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FEDERAL WAGE AND HOUR POLICIES IN THE TWENTY-FIRST CENTURY ECONOMY

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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FEDERAL WAGE AND HOUR POLICIES IN THE TWENTY–FIRST CENTURY ECONOMY

Thursday, February 16, 2017
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, D.C.

The subcommittee met, pursuant to call, at 10:01 a.m., in room 2175, Rayburn House Office Building, Hon. Bradley Byrne [Chairman of the subcommittee] presiding.

Present: Representatives Byrne, Grothman, Stefanik, Rooney, Takano, Adams, DeSaulnier, Norcross, Krishnamoorthi, and Shea-Porter.

Also present: Chairwoman Foxx and Ranking Member Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Courtney Butcher, Director of Member Services and Coalitions; Ed Gilroy, Director of Workforce Policy, Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Brandon Renz, Staff Director; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Press Assistant; Michael DeMale, Minority Labor Detailee; Nicole Fries, Minority Labor Policy Associate; Christine Godinez, Minority Staff Assistant; Eunice Ikene, Labor Policy Advisor; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Udochi Onwubiko, Minority Labor Policy Counsel; Veronique Pluviose, Minority Civil Rights Counsel; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman BYRNE. The subcommittee will come to order.

Everybody will take their seats. A quorum is present. The subcommittee is in order.

Good morning. Welcome to the first hearing of the Workforce Protections Subcommittee in the 115th Congress.

Now, it says "workforce protections." Let's make sure we know exactly what we're talking about. We are talking about the good, hardworking people of the United States of America. And so all of us on this Committee, that's our focus. And we appreciate everyone

who's come to be with us today, and we appreciate the fine members of the subcommittee.

I'd like to begin by introducing my Republican colleagues on the subcommittee for this Congress. Not all of them are here yet, but let me go ahead and introduce them.

Representative Joe Wilson from South Carolina's Second District. Joe has served on the Committee for 16 years. He's also served in the Army Reserves and the South Carolina Army National Guard. I'm pleased to also serve with him on the House Armed Services Committee.

Representative Duncan Hunter represents East and Northern County San Diego. Duncan, who I also serve with on Armed Services, served our country in the United States Marine Corps and has since been an advocate for national security here in the United States Congress.

Representative Dave Brat from Virginia's Seventh District. Dave served as chairman of the economics department at Randolph-Macon College before joining us here in Congress.

Representative Mike Bishop from Michigan's Eighth District. Mike previously served as Michigan's Senate majority leader and as a practicing lawyer.

Representative Glenn Grothman from Wisconsin's Sixth District. Glenn previously served in the Wisconsin State Senate and has been an advocate for effective government oversight in Congress.

Representative Elise Stefanik represents the North Country of New York. Elise and I work together on many priorities, given the fact that we share service on Armed Services together. She has been a very effective member of that body and of this body.

One of our new members, Representative Francis Rooney, who I know is here, from Florida's 19th District. Francis served as U.S. Ambassador to the Holy See under President George W. Bush, and has worked in the construction industry, creating jobs, since 1984, including creating a few jobs in my district, which I appreciate.

Representative Drew Ferguson from Georgia's Third District. Drew established a family dental practice before coming to Congress and is the former mayor of West Point, Georgia.

Now, not on anybody's list but perhaps very importantly to all of us, we have with us the chair of our full Committee, Dr. Virginia Foxx. Dr. Foxx has been in Congress for a number of years. She and I served together on the Rules Committee. If you want to really get to know somebody, serve on the Rules Committee, because we spend a lot of time together. And she's been a very effective member of this Committee and has done a great job for us as Chairwoman of the Committee.

I would also like to congratulate the Ranking Member, Mark Takano, on his selection to serve as the subcommittee senior Democrat. He and I have traveled before on CODELs. We've worked together on a number of things. And we had a little meeting the other day, but I want to reiterate that I am looking forward to working with you.

There are important issues under this subcommittee's jurisdiction, and I know that we won't always agree on how to tackle those issues, but as I said after our meeting the other day with Mr. Takano, I want to emphasize my commitment to working together,

finding common ground, and advancing the positive solutions that the American people deserve.

In recent years, working families and small businesses have faced significant challenges as they struggle through the slowest economic recovery since the Great Depression. Since 2009, the economy grew at an average annual pace of just 1-1/2 percent. The net result is limited opportunity for hardworking men and women.

In fact, the labor force participation rate has dropped to 62.9 percent, nearly the lowest level in decades. Wage growth remains largely stagnant, as the average hourly earnings for today's worker is roughly the same as in 2009. Meanwhile, 7.6 million Americans are searching for work, and nearly six million individuals are working part-time hours when what they really need are full-time jobs. We cannot accept this as the new normal.

The American people have clearly spoken, and they expect their leaders in Washington to put the country on a better path and finally get our economy moving again, which means more and better paying jobs. That's why Republicans are committed to advancing a bold agenda that will remove barriers to job creation and empower more Americans to reach their full potential.

As part of that effort, this subcommittee will examine the policies impacting the American workforce so we can assure that those policies support rather than hinder the ability of workers to succeed and employers to grow and hire. A key part of this effort will be robust oversight of the policies under our jurisdiction, and as Chairwoman Foxx has made clear, a commitment to holding the administration accountable for how it enforces the law.

There is too much at stake for families and small businesses to leave any stone unturned, whether it's examining policies that are intended to promote safety and health in the workplace, holding Federal contractors accountable, or assuring wage determinations under the *Davis-Bacon Act* are done accurately and fairly.

We have a lot of ground to cover in the coming months and, of course, an important part of our agenda, and the reason for today's hearing, will be taking a close look at a law that affects practically every workplace and every worker in this country: The *Fair Labor Standards Act*. The law was signed over 80 years ago to address the challenges that existed during the Great Depression. It established important protections for workers, and it has served as the foundation of our Nation's wage and hour policies ever since.

A lot has changed over those 80 years. For starters, things that are part of our daily life didn't even exist back then, smartphones, iPads, and the internet, just to name a few. Advancements in technology have led to virtual workplaces, entire new industries, and flexible, innovative work arrangements. Most recently, we've seen the rapid rise in the so-called "sharing" economy.

The point is the American workforce has transformed dramatically, and the challenges facing workers and employers today are different than they were in the 1930s. However, our labor policies have failed to adapt. The rules and regulations surrounding the *Fair Labor Standards Act* are simply outdated. At the same time, small business owners are getting tied up in a complex regulatory maze that forces them to confront costly litigation and limits their ability to expand. It's clear our Nation's wage and hour rules were

designed for another era and no longer reflect the realities of the twenty-first century workforce.

That's why it is so disappointing that the previous administration missed an opportunity to streamline and modernize these important worker protections. Instead, the Obama administration spent its time and resources advancing an extreme and partisan overtime rule that would stifle workplace flexibility and limit opportunities for career advancement.

I can tell you that small businesses in my district are breathing a sigh of relief that this fundamentally flawed rule was blocked by a Federal judge. Countless small business owners were worried that they would have to cut their employees' hours or even lay people off. Colleges, universities, and nonprofits were bracing for an especially devastating impact. As an example for my home State, the rule would have cost the University of Alabama System $17 million in just the first year, costs that would have likely been passed on to students in the form of higher tuition and fees, a topic that is very important to our full Committee.

Fortunately, we have a new administration that understands how misguided regulations often hurt the very individuals they're intended to help. We also have a new Congress that's working to advance an agenda that will foster economic growth and deliver results for the American people. Bringing our Nation's wage and hour rules into the twenty-first century will be an important part of that conversation.

I look forward to hearing from our witnesses, who can speak more to the challenges resulting from an outdated law and the need for positive reforms that will improve the lives of hardworking Americans.

With that, I will now yield to the Ranking Member for his opening remarks.

[The statement of Chairman Byrne follows:]

Prepared Statement of Hon. Bradley Byrne, Chairman, Subcommittee on Workforce Protections

In recent years, working families and small businesses have faced significant challenges as they've struggled through the slowest economic recovery since the Great Depression. Since 2009, the economy grew at an average annual pace of just 1.5 percent. The net result is limited opportunity for hardworking men and women.

In fact, the labor force participation rate has dropped to 62.9 percent—nearly the lowest level in decades. Wage growth remains largely stagnant, as the average hourly earnings for today's worker is roughly the same as in 2009. Meanwhile, 7.6 million Americans are searching for work, and nearly six million individuals are working part-time hours when what they really need are full-time jobs.

We cannot accept this as the new normal. The American people have clearly spoken, and they expect their leaders in Washington to put the country on a better path and finally get the economy moving again, which means more and better paying jobs.

That's why Republicans are committed to advancing a bold agenda that will remove barriers to job creation and empower more Americans to reach their full potential. As part of that effort, this subcommittee will examine the policies impacting America's workforce, and ensure those policies support, rather than hinder, the ability of workers to succeed and employers to grow and hire.

A key part of this effort will be robust oversight of the policies under our jurisdiction, and as Chairwoman Foxx has made clear, a commitment to holding the administration accountable for how it enforces the law. There is too much at stake for families and small businesses to leave any stone unturned, whether it's examining policies that are intended to promote safe and healthy workplaces, holding federal

contractors accountable, or ensuring wage determinations under the Davis-Bacon Act are done accurately and fairly.

We have a lot of ground to cover in the coming months. And of course, an important part of our agenda—and the reason for today's hearing—will be taking a close look at a law that affects practically every workplace in the country: the Fair Labor Standards Act. The law was signed over eighty years ago to address the challenges that existed during the Great Depression. It established important protections for workers, and has served as the foundation of our nation's wage and hour policies ever since.

A lot has changed in those eighty years. For starters, things that are part of our daily life didn't even exist back then—smartphones, iPads, and the internet, just to name a few. Advancements in technology have led to virtual workplaces, entire new industries, and

flexible, innovative work arrangements. Most recently, we've seen the rapid rise in the so-called "sharing" economy.

The point is the American workforce has transformed dramatically, and the challenges facing workers and employers today are different than they were in the 1930s. However, our labor policies have failed to adapt. The rules and regulations surrounding the Fair Labor Standards Act are simply outdated. At the same time, small business owners are getting tied up in a complex regulatory maze that forces them to confront costly litigation and limits their ability to expand.

It is clear our nation's wage and hour rules were designed for another era and no longer reflect the realities of the 21st century workforce. That's why it's so disappointing that the previous administration missed an opportunity to streamline and modernize these important worker protections. Instead, the Obama administration spent its time and resources advancing an extreme and partisan overtime rule that would stifle workplace flexibility and limit opportunities for career advancement.

I can tell you that small businesses in my district are breathing a sigh of relief that this fundamentally flawed rule was blocked by a federal judge. Countless small business owners were worried that they would have to cut their employees' hours or even lay people off. Colleges, universities, and non-profits were bracing for an especially devastating impact. As an example for my home state, the rule would have cost the University of Alabama System 17 million dollars in just the first year, costs that would have likely been passed on to students in the form of higher tuition and fees.

Fortunately, we have a new administration that understands how misguided regulations often hurt the very individuals they're intended to help. We also have a new Congress that is working to advance an agenda that will foster economic growth and deliver results for the American people.

Bringing our nation's wage and hour rules into the 21st century will be an important part of the conversation. I look forward to hearing from our witnesses who can speak more to the challenges resulting from an outdated law and the need for positive reforms that will improve the lives of hardworking Americans.

Mr. TAKANO. Thank you, Chairman Byrne, and congratulations to you on your new position as chairman of this subcommittee. And I too want to express my full intention to work with you on areas where we can agree. Where there's common ground, we certainly should work together. But on areas where we disagree, we'll have to stand our ground. But let it be known that there is a spirit of comity between us, and look forward to—you are definitely indeed a gentleman of the south and a gentleman at that. So thank you.

I would like to introduce the members of the—the Democratic members of the subcommittee, not all of whom are here.

Raul Grijalva represents the Third District of Arizona. From 1974 to 1986, Mr. Grijalva served on the Tucson Unified School District Board—Tucson Unified School District Governing Board, including six years as chairman. In 1988, he was elected to the Pima County Board of Supervisors, where he served for the next 15 years.

Alma Adams represents North Carolina's 12th District. She got her start serving on the Greensboro City Council as well as—ex-

cuse me. She started on the Greensboro City School Board as well as the Greensboro City Council. Before coming to Congress, she served a decade in the North Carolina House of Representatives, State House of Representatives.

Mark DeSaulnier represents California's 11th District and is a veteran of California politics. He served on the Concord City Council from 1991 to 2006 and as mayor of Concord in 1993. He also served in the California State Assembly and State Senate.

Donald Norcross, who is present with us, represents New Jersey's First District. His background as a member of the International Brotherhood of Electrical Workers, former president of the Southern New Jersey Building Trades Council, and president of the Southern New Jersey AFL-CIO Central Labor Council accords him a wealth of experience and knowledge that he can bring to the subcommittee. He served in both the New Jersey State Senate and Assembly before becoming a member of Congress.

Raja Krishnamoorthi represents Illinois' Eighth District. He has previously held the positions both of Deputy State Treasurer and Special Assistant Attorney General for the State of Illinois.

Carol Shea-Porter represents New Hampshire's First District and is returning to our Committee for her second tour of duty. During college, she worked in a factory. She also worked previously both as a social worker and community college professor.

We look forward to working with our majority members on this subcommittee to find areas of common ground that allow us to move our Nation forward.

And now, Mr. Chairman, I'll move on with my opening statement.

I want to thank you again, Mr. Chairman. I do look forward to working with you to address the challenges facing America's workers. It is my hope that the work we do together in this subcommittee will ensure that the rules of our economy help American workers and businesses prosper together.

Today's hearing is on wage and hour policy in the twenty-first century workplace. In the past three Congresses, the majority has called eight hearings on wage and hour policies, but in those hearings we have not considered a single policy to raise the pay for millions of hardworking Americans who are struggling to make ends meet.

If past is prologue, I expect we are going to hear from our friends in the majority today about the *Fair Labor Standards Act* and how it is stifling America's job creators. But before we launch into that discussion, I'd like to take a moment to step back and look at the facts.

Over the past four decades, worker productivity has grown by more than 70 percent. You might think a rising tide would lift all boats, but it hasn't happened. Since 1979, wages for the top one percent have grown by 138 percent, while wages for the bottom 90 percent have grown by only 15 percent. Now, workers are more productive than ever, but it's been a long time since most Americans have gotten a raise. So tell me, who is being stifled?

I wholeheartedly agree with the title of this hearing. We do need to update wage and hour policy for the twenty-first century. That should mean strengthening our wage and hour policies to ensure

that hardworking Americans get a fair day's pay for a fair day's work.

Too many Americans today can't afford to buy a home, send their children to college, or save for retirement. It should not be this way. American workers' productivity has led to tremendous economic growth; but, unfortunately, the rules are written so that the economy delivers only for those at the very top. Here in Congress, we have the power and the responsibility to fix that. However, despite our requests, last Congress, the majority did not hold a single hearing on what we can do to ensure that Americans in the middle and the bottom rungs of the economic ladder get a fair shake.

They refused to raise the minimum wage and fought against the update to the overtime threshold, which would have put more pay in the pockets of millions of hardworking Americans. And the majority refused to bring the twenty-first century workplace in line with the needs of the twenty-first century workforce by adopting sensible solutions to prevent predictable—not prevent, to provide—to provide predictable schedules, paid sick days, and paid family leave, and finally guarantee equal pay for equal work, which are long overdue.

These are the updates to our wage and hour policy that would make a real difference to hardworking Americans. There is simply no need to make the false choice between employer innovation and rules that make our economy fair for everyone. We can have both.

There are plenty of examples of businesses that do very well while playing by the rules. In fact, treating workers fairly has been shown again and again to promote employee retention and productivity. I hope our witnesses today will help us explore the future of work that is both innovative and fairly rewards all hardworking Americans.

Thank you, Mr. Chairman. I yield back the remainder of my time.

[The statement of Mr. Takano follows:]

Prepared Statement of Hon. Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Thank you, Chairman Byrne. I look forward to working with you to address the challenges facing American workers. It is my hope that the work we do together in this subcommittee will ensure that the rules of our economy help American workers and businesses prosper together.

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I hope our witnesses today will help us explore a future of work that is both innovative and fairly rewards all hardworking Americans.

Thank you, Mr. Chairman. I yield back the remainder of my time.

Chairman BYRNE. Thank you, Mr. Takano.

And we welcome all of the Democratic members to the subcommittee. Many of them I've worked with in the past.

Mr. Krishnamoorthi, I know you're new to Congress, but you've already made quite an impact and we appreciate having you here.

Mr. KRISHNAMOORTHI. Thank you.

Chairman BYRNE. Pursuant to committee rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record.

And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

And now, it's my pleasure to introduce today's witnesses.

Ms. Rhea Lana Riner is president of Rhea Lana's Franchise Systems, Inc. She will testify on behalf of the International Franchise Association. Mr. Andrew Stettner is a senior fellow with The Century Foundation. Mr. Andy Brantley is president and chief executive officer of the College and University Professional Association for Human Resources. Ms. Christine Walters is an independent human resources and employment law consultant and sole proprietor of the FiveL Company. She will testify on behalf of the Society for Human Resource Management that years ago I used to be a member of. So welcome.

I will now ask our witnesses to raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Let the record reflect the witnesses answered in the affirmative.

Okay. Before I recognize you, I need to go through the lighting system so you understand how it works. And I apologize for having to do this, but it helps things go if we do this.

You each will have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one

minute is left, the light will turn yellow. When your time has expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best you are able. After you have testified, members will each have five minutes to ask questions.

Now, I don't intend to be heavy with the gavel, by the way. If you're getting close, I'm going to try to let you finish up, and try to do the best you can, because we really want to hear your testimony. And I certainly want to let the members have their full five minutes. And if we go over a little bit, that's okay, but let's try to stay within that.

Okay. We're going to start with Ms. Riner. You're recognized for five minutes. Welcome.

TESTIMONY OF RHEA LANA RINER, PRESIDENT, RHEA LANA'S FRANCHISE SYSTEMS, INC., CONWAY, AR, TESTIFYING ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION

Ms. RINER. Good morning, Chairman Byrne—and happy birthday, by the way—Ranking Member Takano. Congratulations to both of you on your first subcommittee hearings.

And distinguished members of the subcommittee, my name is Rhea Lana Riner and I'm the CEO and founder of Rhea Lana, Inc., and Rhea Lana's Franchise Systems. Thank you for taking an interest in my story and my struggle to protect the rights of small business owners and moms like myself across the Nation. It is my privilege to testify on behalf of the International Franchise Association today.

In 1997, I began my small business as a young mom after my husband changed careers. Like many people, I had a passion for fashion, but on a limited budget. We simply could not afford to dress our children as I hoped. I also knew many other moms who experienced the same challenge, so I came up with an idea that would help all of us.

I invited a few friends to a small event in my living room to buy and sell our children's used clothing. From that humble beginning of moms working together, Rhea Lana's was born and grew. From the positive feedback, we quickly realized that there was an eager market among families of all kinds for gently used children's clothing. My heart went out to families with budget struggles, trying to provide high-quality items for their kids.

The moms, grandmoms, and husbands who join together to host Rhea Lana's consignment events create a marketplace in which their families can participate, with Rhea Lana's acting as the facilitator. In so doing, we play a small role in helping these families succeed. Today, we have 80 franchises operating in 23 States, and we look forward to continued growth.

Unfortunately, after many years of running our consignment events, our business model is in peril because we have been drawn into an extended legal battle that is now in its sixth year. In the spring of 2011, Arkansas Department of Labor officials began investigating Rhea Lana's to determine if we were violating any laws by inviting moms to volunteer at our events. We cooperated fully and spent a ton of money in legal fees, but we received a favorable response from the State of Arkansas and thought the story was over.

But then in January of 2013, we were contacted by the U.S. Department of Labor informing us that it was opening its own investigation into whether our volunteers were, in fact, employees. Our initial meeting with the DOL was held in Little Rock on February 28, 2013. Once again, we fully cooperated and we provided the DOL with contact information for ten moms who had participated as consigner volunteers. We assumed that once DOL spoke with these women and recognized that they were participating on a very limited basis for their own benefit, DOL would naturally determine that they should not be considered employees.

Unfortunately, the question was not so easily settled. Instead, DOL officials requested all of our payroll records going back two years, submitted formal questions that required more legal assistance to respond, and they showed up at one of our events to conduct interviews. Every consigner volunteer interviewed assured them they voluntarily chose to participate in order to help their families and they expected no compensation for doing so.

In spite of this, DOL determined that the moms should be considered employees. Incredibly, DOL even sent letters to our consigner volunteers suggesting they had the right to sue Rhea Lana's for backpay. None of our volunteers took such action against us, despite DOL's encouragement to sue us. But DOL officials would not be deterred. Without a formal hearing or other procedural safeguards, the DOL arbitrarily determined that Rhea Lana's had violated the *Fair Labor Standards Act*.

In August 2013, the DOL sent us a determination letter citing legal provisions that our attorney estimated penalties could reach $3.6 million. Receiving this letter was terrifying. It was then I decided I had to fight back and we challenged the DOL in court. The DOL initially won in district court, arguing that we could not challenge the agency's determination because it was not a final agency action. However, in a ruling last June, the D.C. Circuit Court reversed and held that DOL's action could be challenged in court. The D.C. Circuit's ruling was the first positive step in 4-1/2 years of fighting to protect the future of my small business.

So we're continuing to fight for a mother's right to use her personal time as she sees fit to help her family. And if we lose, Rhea Lana's will no longer be able to provide its valuable service to families in need.

Meanwhile, the Department of Labor has also aggressively been trying to apply broader joint employment liability to all small businesses. Some have minimized the joint employment concerns of franchise business owners, but expanded joint employment liability means more operating costs, more legal costs, decreased value of business, less compliance assistance, and less growth for locally owned franchise businesses.

Mr. Chairman, no one can assure any franchise business owner that their business may not unintentionally violate a broad liability standard that is based on indirect and even unexercised control. We need the new DOL to rescind the January 2016 interpretation and return to the preexisting joint employment test. But we also need Congress to clarify a definition of employer that thinks better of the motivations of franchise business owners.

Mr. Chairman, I never intended to be a businessperson, but I have been sincerely thankful for the opportunity to build and grow a business that helps so many families have what they otherwise could not afford, but we need Congress' help to achieve fairness in our ever-evolving economy.

Thank you for your leadership on behalf of all small businesses, and I would be happy to answer any questions.

[The statement of Ms. Riner follows:]

RHEA LANA RINER

CEO AND FOUNDER

RHEA LANA'S CHILDREN'S CONSIGNMENT EVENTS
CONWAY, AR

TESTIMONY BEFORE THE U.S. HOUSE EDUCATION AND THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION

HEARING ENTITLED "FEDERAL WAGE AND HOUR POLICIES IN THE TWENTY-FIRST CENTURY ECONOMY"

FEBRUARY 16, 2017

Good morning Chairman Byrne, Ranking Member Takano, and distinguished members of the Subcommittee. My name is Rhea Lana Riner, and I am the CEO and Founder of Rhea Lana, Inc. and Rhea Lana's Franchise Systems. I am so honored to be with you today and want to first thank you for your invitation. I am grateful to you for taking an interest in my struggle to protect the rights of small business owners and moms, like myself, across the nation.

It is my privilege to testify on behalf of the International Franchise Association (IFA), the world's largest organization representing franchising. IFA works to protect, enhance and promote franchising and the more than 733,000 franchise establishments that support nearly 7.6 million direct jobs, $674.3 billion of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product. The membership includes franchise companies that operate in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, technology and business development.

Franchising enables ambitious, hard-working people like me and my franchise owners, to go into business for themselves, but not by themselves. Franchising represents the American Dream come to life – that regardless of who you are and where you come from, initiative and hard work can pay off. Consequently, franchise business output, establishments and employment have each grown faster than the broader U.S. economy in recent years. Moreover, there have been consistently higher rates of franchise business ownership for both women and minorities as compared to non-franchised businesses. There are hundreds of franchise businesses in every congressional district. Everything about franchising should be celebrated by all members of Congress, regardless of political party.

I appreciate the opportunity to tell you my story, and explain how the issues before us today have impacted small businesses like mine.

MY SMALL BUSINESS STORY

In 1997, I began my small business as a young mom after my husband changed careers, taking our family from a corporate salary to a ministry salary. Like so many people, I had a passion for fashion, but on our limited budget, we simply could not afford to dress our children as I hoped. I also knew many other moms who experienced the same challenge, so I came up with an idea that would help all of us: I invited a few friends to a small event in my living room to buy and sell our children's used clothing. From that humble beginning of moms working together, Rhea Lana's was born and grew.

The positive feedback from our first event was overwhelming, and we quickly realized that there was an eager market among families of all kinds for gently used children's clothing. My heart went out to families with budget struggles trying to provide high quality items for their kids. I wanted to offer them the opportunity to save money while meeting their families' needs. The moms, grandmoms, and husbands who join together to host Rhea Lana's consignment events create a marketplace in which their families can participate,

with Rhea Lana's acting as the facilitator. In so doing, we play a small role in helping these families succeed, and those who participate in our events truly appreciate the value we provide. Today, we have 80 franchises operating in 23 states, and we look forward to continued growth.

THE DEPARTMENT OF LABOR'S HARASSMENT OF MY BUSINESS

Unfortunately, after many years of running our consignment events, our business model is in peril because we have been drawn into an extended legal battle that is now in its sixth year.

In the Spring of 2011, I sent an email to central Arkansas families announcing an upcoming Rhea Lana's event. The email mentioned that moms could volunteer at the event if they were interested in helping out and having early access to the items being sold. One of these emails went to the wife of an Arkansas Department of Labor employee who had signed onto our mailing list. Arkansas Labor officials soon began investigating Rhea Lana's to determine if we were violating any laws by allowing volunteers to help at events. We cooperated fully, and in the end, we received a favorable response from the State of Arkansas. We tweaked our business model slightly and signed a Consent Agreement with the State of Arkansas which allowed us to continue using consignor-volunteers as long as they sold items at our events.

Despite the sizable legal fees our small business incurred to resolve this matter, it seemed that both parties were satisfied with the result. But then, in January of 2013, we were contacted by the U.S. Department of Labor (DOL) informing us that it was opening its own investigation into whether our volunteers were, in fact, employees.

Our initial meeting with the U.S. DOL was held in Little Rock on February 28, 2013. We once again fully cooperated, and we provided the DOL with contact information for ten moms who had participated as consignor-volunteers. Two were teachers, and two were nurses. One was a physician – a radiologist. We assumed that once DOL spoke with these moms and recognized that they were participating on a very limited basis for their own benefit, DOL would naturally determine that they should not be considered employees.

Unfortunately, the question was not so easily settled. Instead, DOL officials requested all of our payroll records going back two years, submitted formal questions that required more legal assistance to respond, and they showed up at one of our events to conduct interviews. Every consignor-volunteer interviewed assured them they voluntarily chose to participate in order to help their families, and they expected no compensation for doing so.

In spite of this, DOL determined that the moms should be considered employees. They used a seven-factor independent contractor test, rather than looking at the economic reality of our business model, as required by the Supreme Court. Incredibly, DOL even sent letters to our consignor-volunteers suggesting that they had the right to sue Rhea Lana's for back pay. **None** of our volunteers took such action against us – even with DOL's prompting. But

DOL officials would not be deterred. Without a formal hearing or other procedural safeguards, the DOL arbitrarily determined that Rhea Lana's had violated the Fair Labor Standards Act (FLSA). This was regulatory overreach at its worst, violating many concepts of basic fairness.

In August 2013, the DOL sent us a determination letter citing legal provisions that, and I quote, "provide for the assessment of a civil money penalty for any repeated or willful violations...in an amount not to exceed $1,100 for each such violation." Our attorney with Cause of Action Institute estimated these penalties could reach $3.6 million. Receiving this letter was terrifying. It was difficult to accept that our small effort to help families had become the focus of our government's disdain. It was then that I decided to fight back and use the true intent of the FLSA to defend my life's work.

The DOL initially won in district court arguing that we could not challenge the agency's determination because it was not a final agency action, leaving me in regulatory purgatory. However, in a ruling last June, the D.C. Circuit Court reversed, and held that DOL's action was indeed final and therefore could be challenged in court. The D.C. Circuit's ruling to send the case back to the district court for a decision on the merits was the first positive step in four-and-a-half years of fighting to protect the future of my small business.

So, we are continuing to fight for a mother's right to use her personal time as she sees fit to help her family. The legal brief we filed just last week is included with my written statement. Fighting an unfair regulatory order is a time-consuming and costly process for a small business. If we lose, Rhea Lana's will no longer be able to provide its valuable service to families in need. DOL fines would put us out of business.

Members of the Committee, I understand and support our government's duty to enforce our laws; it's part of living in a civilized world. However, the treatment Rhea Lana's has endured at the hands of the DOL is bullying by an institution I expect to support small businesses and even advocate for us. Instead, I'm doing all I can to protect the future of Rhea Lana's and the many moms who have come to rely on it for the benefit of their own families. The Department of Labor has cost me precious dollars I could have used to grow my business. I have sacrificed my time, energy and emotional strength fighting my own government for no good reason. And what a waste of taxpayer dollars!

My story is just one example of how the Federal Wage and Hour policies are either being misapplied to new, inventive businesses or being applied unfairly and unequally. Many other types of for-profit businesses use volunteers and collaborative efforts to provide value to our society. Consider the open source software industry which allows programmers to collaborate and create new software programs – what would happen to those innovations if DOL asserted those volunteer programmers had to be paid? Or what about the wine making industry that allows volunteers the opportunity to participate for a day in an exciting experience in exchange for their work making wine? How is Rhea Lana's legally different from the volunteer labor happening every day when Americans sell their treasures on eBay, serve their own frozen yogurt, bus their own table at a quick service restaurant, pump their gas, or tag their own bag at the airport? If the Federal Wage and

Hour policies prevent these innovative businesses, then they will hamper the economy and job growth.

EXPANDED JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT

Making matters worse for franchise businesses, multiple federal agencies, including the Wage and Hour Division (WHD), are also applying broader joint employment liability under their particular statutes.

In January 2016, the WHD released an administrative interpretation (AI) on joint employment that described an extremely expansive view of who is an employer for purposes of federal wage and hour liability. The AI provided at least as broad of an interpretation of joint employment under the FLSA than even the National Labor Relations Board's definition in its *Browning-Ferris* (BFI) decision in August 2015. In its *BFI* ruling, the NLRB overturned its longstanding joint employer standard to allow regulators to potentially find joint employer liability in almost any business contractual relationship.

Franchise business owners have been very concerned about the WHD AI, because it introduced the doctrines of "horizontal" and "vertical" joint employment. The AI describes vertical joint employment as occurring when an employee of one employer (an "intermediary employer") is economically dependent on another employer (referred to in the AI as a "potential joint employer"). Indeed, the WHD was surprisingly candid in revealing that the purpose of the AI was to expand the statutory coverage of the FLSA to small businesses (franchisees) and collect back wages from larger companies (franchisors).

Everyone can see that the vertical joint employment policy is squarely focused on the franchisor-franchisee relationship. It is remarkable that the 16-page AI doesn't mention "franchising" once, despite naming several other industries and business formats in which WHD finds joint employment liability. Then again, former WHD Administrator David Weil's views of my business and franchising are clear, as he has described franchising as a business model designed simply to skirt labor laws. What an overly cynical and incorrect view of an economic engine that has helped tens of thousands of entrepreneurs achieve the American Dream of business ownership.

Some have minimized the joint employment concerns of franchise business owners. But expanded joint employment liability across multiple federal statutes is already harming franchise businesses, long before a lawsuit arrives at the door. In June 2016, the IFA and the U.S. Chamber of Commerce collaborated on a report entitled "*Main Street in Jeopardy: The Expanding Joint Employer Threat to Small Businesses*," that revealed how the Federal government's joint employer policy is already affecting locally owned franchise businesses, and none of it is positive:

- **More operational costs –** Expanded joint employer liability means that small business owners have to pay for products and services they used to receive from their franchise brand companies, undermining the franchise relationship.

- **More legal costs** – Joint employer claims against both franchisors and franchisees are increasing as trial lawyers and aggressive politicians recognize the potential opportunity to exploit this new liability risk.
- **Decreased value of business** – Small business owners' are seeing the devaluation of their retirement savings and nest eggs as the NLRB is perceived to have taken away control of their operations.
- **Less compliance assistance** – Franchisors used to help franchisees navigate complex employment laws. Some compliance assistance has been curbed, due to understandable fear by franchisors of joint employment lawsuits over involvement in franchisee employment practices. This may lead to an increase in companies who are unaware of their legal obligations – a perverse result of the new standard.
- **Less growth** – Franchise business owners are choosing not to grow and create jobs, and may stop operating their business altogether.

These negative effects are consequences of franchise businesses being justifiably concerned that their operations may never be safe from overzealous regulators who seek to apply an inexplicably broad "indirect" and "unexercised" liability standard.

The expansion of joint employer under the AI, and the application of it by plaintiffs' attorneys in multiple cases against franchisees and franchisors, flies in the face of some of the claims made some, as recently as a hearing in this Committee earlier this week, that franchisors and franchisees are not the target of this unlimited joint employer standard. In fact, nothing could be further from the truth. Furthermore, the NLRB's advice memorandum in the Freshii case, which has been held up by those same members of this Committee as evidence of the type of franchise that would be safe from joint employment finding, does not carry the force of law and is obsolete, since it was released prior to the issuance of the NLRB's BFI decision and the WHD AI.

We need the new DOL to rescind the January 2016 AI and return to the pre-existing joint employment test that focused more on actual interdependence of two or more entities. But we also need Congress to clarify a definition of employer that reflects less cynicism about the motivations of franchisees who risk their capital to provide products and services, create jobs and serve people in communities across the country.

CONCLUSION

Mr. Chairman, I never intended to be a "business person." Twenty years ago, I had never sold a product in my life – never wanted to, but I have been sincerely thankful for the opportunity to build and grow a business that helps so many families have what they otherwise could not afford. As with any pursuit, there have been highs and lows, victories and challenges. Our challenges have certainly been many, but I am hopeful that by hearing my story today, you will be inspired to help small businesses like mine in seeking government actions ruled by fairness in our ever-evolving labor economy.

Mr. Chairman, thank you for your leadership on behalf of all small businesses, and thank you again for allowing me the honor of addressing you today. I would be happy to answer any questions you have.

Chairman BYRNE. Thank you, Ms. Riner.

The chair now recognizes Mr. Stettner for five minutes.

TESTIMONY OF ANDREW STETTNER, SENIOR FELLOW, THE CENTURY FOUNDATION, WASHINGTON, D.C.

Mr. STETTNER. Good morning, Chairman Byrne, Ranking Member Takano, and other members of the committee.

I'm a senior fellow at The Century Foundation, an independent nonpartisan think tank with offices here in Washington and in New York City. Thank you for the opportunity to speak today to the Committee about the changing nature of the economy and the need to modernize our wage and hour laws.

For decades, Americans have been afflicted by stagnating wages and a rise in low-wage work. Since 1976, as Mr. Takano said, workers have increased their productivity by 73.4 percent, but hourly paychecks have only gone up by 11 percent.

Next slide, please.

The manufacturing sector has shrunk dramatically. In its place, working Americans have turned to what I call fast-growing RASHH sectors of the economy. These RASHH jobs—retail, administrative, social assistance, hospitality, and health care—pay less than $15 per hour and offer less than 30 hours per week. The *Fair Labor Standards Act* could be a powerful lever against this crisis of wage stagnation.

In the 1960s, the minimum wage was equivalent to half of the average weekly wage. Today, it is just a third. An increase in the minimum wage to $12 an hour, phased in by 2020, would provide raises of $2,300 per worker to 35 million working Americans. This increase too can eliminate the discriminatory subminimum wage for tip workers.

Meanwhile, the number of workers guaranteed overtime rights with a salary threshold plummeted from 12.6 million protected in 1979 to 3.5 million by 2014. The rule promulgated by the Labor Department to restore the salary threshold would deliver raises of $1.2 billion and cement overtime protections for 13.1 million workers. The rules would have had the added benefit of providing a bright-line test that distinguishes those salary workers eligible for overtime.

Now, the Department of Labor only has 1,000 investigators to enforce the law at 7.3 million establishments. Targeted enforcement focuses on industries where research has surfaced high levels of violations where the changing economy makes certain groups more vulnerable. This is the only way for the Department of Labor to use its resources to recover significant amounts of unpaid wages while moving industry practices. Using these targeted methods, the Department of Labor increased the amount recovered per investigation from $785 per worker in 2009 to $1,000 in 2016. But more must be done.

The twentieth century economy was dominated by large firms who used traditional employment relationships to control every aspect of production. Now, the twenty-first century management model increasingly entails the main firm retaining only the most essential aspect of its identity and outsourcing all other functions. These fissured arrangements have allowed firms to absolve them-

selves of their employment law responsibilities. The rise in subcontracting, use of third-party administrators, franchising, and staffing firms leaves workers' heads spinning when they try to find out who is ultimately responsible for their pay.

The Department of Labor's Administrator's Interpretation on joint employment went a long way to clarifying what courts have said repeatedly. Those joint employers who have economic control over employees must ensure that wage and hour laws are followed. This is already causing welcome change. For example, the Department of Labor and Subway agreed to a voluntary program of compliance education and software-based flagging of possible violations at their locations.

Now, as many as 30 percent of all workers are misclassified as independent contractors, forfeiting their wage and hour rights. The reality is that employers have moved millions of Americans into 1099 status who should not, by law, be paid that way. Too often, workers are misclassified as independent contractors based on one element, such as owning their own tools, even though they are not in business for themselves. The Department of Labor's recent AI on worker misclassification was put in place to give employers numerous examples of such cases to avoid.

Now, there is much talk about the need for workplace flexibility. I assert that the *Fair Labor Standards Act* is a very flexible piece of law already that can be adapted to innovations in business, including telecommuting and, yes, the gig economy, without sacrificing workers' rights.

Now, in this context of the need for strengthened wage and hour enforcement, the nomination of Mr. Andrew Puzder for Secretary of Labor raised deep concerns about the future ability of the Department of Labor to implement much-needed wage and hour reform. Every past Republican nominee for Secretary of Labor pledged to Congress that they would uphold the unique mission of the Department of Labor to enforce the *Fair Labor Standards Act*, as well as 180 other laws entrusted to the Department. Whoever Mr. Trump picks to replace Mr. Puzder should share that same commitment to fundamental employment laws and the rights of all workers, regardless of race, gender, or immigration status.

In conclusion, in order for tens of millions of additional workers across the country to share in our Nation's economic prosperity, Federal wage and hour laws need to be strengthened and vigorously enforced.

Thank you for your attention.

[The statement of Mr. Stettner follows:]

Testimony of Andrew Stettner
Senior Fellow, The Century Foundation
House Education and Workforce Committee
Subcommittee on Workforce Protections
February 16, 2017

Federal Wage and Hour Policies in the Twenty-First Century Economy

Good morning, Chairman Byrne, Ranking Member Takano, and other members of the Committee. Thank you for the opportunity to speak to the Committee today about the changing nature of the economy and the need to modernize the protections under the Fair Labor Standards Act. I am a Senior Fellow at the Century Foundation, an independent nonpartisan think tank with offices in Washington and New York City.

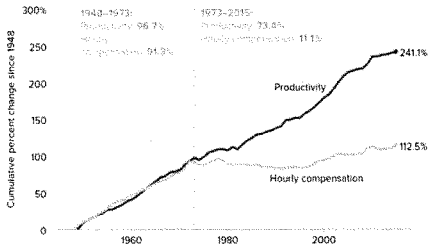
The Fair Labor Standards Act (FLSA) of 1938 provides a basic floor on fair treatment for workers in the U.S. economy. It has led to, among other things, a federal minimum wage of $7.25 per hour, and the right to time-and-a-half pay for work beyond forty hours per week, as well as improvements in child labor law. I am pleased to have this opportunity to discuss the changing nature of the economy and some key policy changes that could increase the effectiveness of the Act.

- For decades, Americans have been afflicted by stagnating wages and a rise in low-wage work—and corporations not workers have enjoyed the fruits of the current economic recovery. The Fair Labor Standards Act could be a powerful lever against wage stagnation—if Congress were to significantly increase the minimum wage, eliminate the sub-minimum wage for tipped workers, and strengthen overtime protections for the middle class.
- The twenty-first century has accelerated changes to the structure of work that have left workers' wages more vulnerable to theft than ever before, and the Department of Labor needs to pair aggressive targeted enforcement with thoughtful policy guidance on issues like misclassification and joint employment.
- The Fair Labor Standards Act is already able to respond to a variety of flexible arrangements, like telework and the gig economy. Fair scheduling laws are one example of a concrete policy that would allow workers to more effectively balance work and family.

1. America Needs—and Deserves—a Raise

The topic of today's hearing could not be more timely. Americans need—and deserve—a raise. Over the past four decades, workers have increased their productivity by 73.4 percent.[1] During that same time, hourly compensation of working families has only increased by 11.1 percent.[2] The average worker makes only $17.86 per hour, which, controlling for inflation, is only modestly better than his counterpart's pay four decades ago, despite decades of economic growth and tremendous advances in the use of technology in the workplace.[3] Furthermore, it is corporations, not working families, who have enjoyed the fruits of the recent economic recovery. For example, from 2000 to 2015, the share of corporate income going to wages sharply declined, from 82.3 percent to 75.5 percent.[4] The result has been tremendous gains for the top 1 percent of Americans at the expense of middle and low-wage earners. This is a continuation of a long-term trend: from 1980 to 2014, the pre-tax income of the bottom 50 percent of working-age adults actually declined, while the top 1 percent alone captured 36 percent of all income growth.[5]

Disconnect between productivity and a typical worker's compensation, 1948–2015



Note: Data are for average hourly compensation of production/nonsupervisory workers in the private sector and net productivity of the total economy. "Net productivity" is the growth of output of goods and services minus depreciation per hour worked.

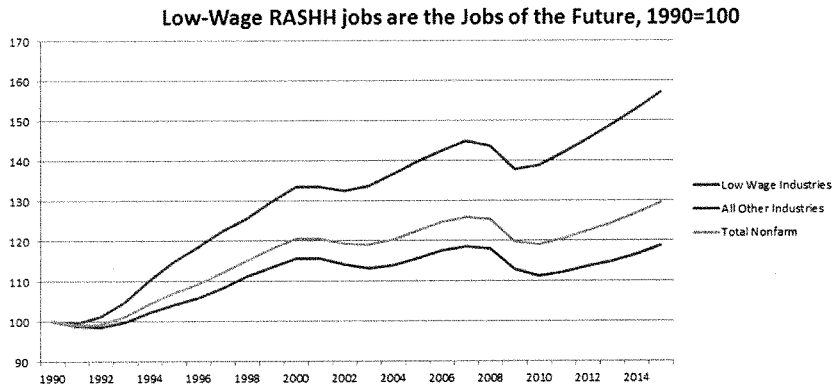
Source: EPI analysis of data from the BEA and BLS (see technical appendix of *Understanding the Historic Divergence Between Productivity and a Typical Worker's Pay* for more detailed information)

Economic Policy Institute [6]

[1] Economic Policy Institute, "The Productivity-Pay Gap," August 2016, http://www.epi.org/productivity-pay-gap/.
[2] Ibid.
[3] Heidi Shierholz, "Remaining Challenges: Why So Many People Feel Forgotten in This Recovery," Economic Policy Institute, February 9, 2017, go.epi.org/perkinspreview.
[4] Josh Bivens, "The Decline In Labor's Share of Corporate Income Since 2000 Means $535 Billion Less for Workers," Economic Policy Institute, September 10, 2015, http://www.epi.org/publication/the-decline-in-labors-share-of-corporate-income-since-2000-means-535-billion-less-for-workers/.
[5] Thomas Piketty, Emmanuel Saez, and Gabriel Zucman, "Economic Growth in the United States: A Tale of Two Countries," Washington Center for Equitable Growth, December 6, 2016, http://equitablegrowth.org/research-analysis/economic-growth-in-the-united-states-a-tale-of-two-countries/.
[6] Economic Policy Institute, the Productivity-Pay Gap, August 2016, http://www.epi.org/productivity-pay-gap/ .

The Changing Economy is Pressing Down Wages

There are numerous factors to blame for America's stagnating wages. For example, the share of Americans employed in well-paid manufacturing jobs has declined from 22 percent of all jobs in 1976 to 8.5 percent in 2016.[7] In manufacturing's place, the American economy has been characterized by fast growing RASHH (Retail, Administrative and Waste Services, Social Assistance, Hospitality, and Low-wage Health Care) industries that pay under $15 per hour and offer less than thirty hours per week. At the same time, the sharp decline in unionization of the private-sector workforce has contributed to the hollowing-out of middle class jobs.[8] Technological change has curtailed the employment prospects of the majority of American workers who have less than a college degree, and the growth of artificial intelligence technologies is bringing new threats to mainstays of the middle-class, such as trucking.[9]



Source: BLS Current Employment Statistics (CES). Low Wage industries include Administrative and Waste Services, Retail, Leisure and Hospitality, Nursing and Residential Care Facilities, Social Assistance, and Home Healthcare Services.

Inflation and Lack of Congressional Action Have Suppressed Wages

The erosion of the core standards of the Fair Labor Standards Act has facilitated the growth of low-wage jobs and the erosion of the middle class. Congress last voted to increase the minimum wage a decade ago, with the full increase from $5.15 to $7.25 going into effect in

[7] J. Bradford DeLong, "NAFTA and Other Trade Deals Have Not Gutted American Manufacturing—Period," *Vox*, January 24, 2017, http://www.vox.com/the-big-idea/2017/1/24/14363148/trade-deals-nafta-wto-china-job-loss-trump;
[8] Richard Freeman, Eunice Han, Brendan Duke, and David Madland, "What Do Unions Do for the Middle Class?" Center for American Progress, January 13, 2016, https://www.americanprogress.org/issues/economy/reports/2016/01/13/128366/what-do-unions-do-for-the-middle-class/.
[9] Council on Economic Advisers, "Artificial Intelligence, Automation, And The Economy," Whitehouse.gov, December 20, 2016, https://www.whitehouse.gov/sites/whitehouse.gov/files/images/EMBARGOED%20AI%20Economy%20Report.pdf.

2009.[10] At its peak in 1968, the minimum wage represented 54 percent of the average wage of non-supervisory workers, while today it is just a third.[11] If the minimum wage had kept up with the rise in prices that wage earners face, it would stand at $10.53—meaning that the minimum wage has lost nearly 45 percent of its purchasing power since its peak level.[12] More seriously, the minimum wage for tipped workers is just $2.13 per hour, and has not been raised since 1991.[13]

A similar pattern of neglect has weakened the Fair Labor Standards Act guarantee of time-and-a-half pay for work beyond forty hours per week. The salary threshold determines which workers are guaranteed overtime pay, and cannot be exempted as executive, administrative, or professional employees. The threshold was set at $250 per week from 1975, until it was raised by the Bush Administration in 2004 to $455 per week. Still, the number of workers protected by the salary threshold has declined from 12.6 million workers in 1979 to 3.5 million in 2014—impacting middle-class workers who have been particularly hard hit by paycheck stagnation.[14]

The Fissured Economy

These wage trends have been worsened by economic trends that have led to more insecure work, including the fissuring of the workplace, employee misclassification, the growth of the gig economy, and erratic scheduling. The twentieth-century economy was dominated by large firms who used a traditional employment relationship to control every aspect of production. The twenty-first-century management model only entails the firm retaining only the most central aspect of its identity, and outsourcing all other functions. Mechanisms for firms to contract out their workforce needs are becoming increasingly complex, to the point that an average hotel now consists of employees of different contractors responsible for seemingly core functions, such as front desk staff and maid service.[15]

These fissured arrangements have allowed firms to absolve themselves of their employment law responsibilities, leaving workers vulnerable to exploitation, whether they are classified as independent contractors or as employees of contracting agencies. And these arrangements are on the rise. Business spending on outsourced services (defined as all services purchased by businesses except for telecommunications and finances) has risen from 7 percent of GDP in 1982 to 12 percent in 2006.[16]

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[10] U.S. Department of Labor, History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 - 2009, https://www.dol.gov/whd/minwage/chart.htm.
[11] Craig Ewell, "Inflation and the Real Minimum Wage: A Fact Sheet," Congressional Research Services, January 8, 2014, https://fas.org/sgp/crs/misc/R42973.pdf.
[12] Author's calculation using the CPI-W series, available at https://data.bls.gov/cgi-bin/surveymost?cw
[13] Sylvia Allegretto and David Cooper, "Twenty-Three Years and Still Waiting for Change," Economic Policy Institute, July 2014, http://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/.
[14] Ross Eisenbrey, "Testimony Before the U.S. Senate Committee on Small Business and Entrepreneurship" May 11, 2016 http://www.epi.org/publication/testimony-raising-the-overtime-threshold-is-an-important-improvement-in-working-families-labor-standards/.
[15] David Weil, *The Fissured Workplace,* (Cambridge, MA: Harvard University Press, 2014).
[16] Yuskavage, Robert E., Erich H. Strassner, and Gabriel W. Medeiros, "Outsourcing and Imported Services in BEA's Industry Accounts," *International Flows of Invisibles: Trade in Services and Intangibles in the Era of Globalization*, eds. Marshall Reinsdorf and Matthew Slaughter (Chicago: University of Chicago Press, 2008), 247–288.

Part of this surge in contracting out is the rise of a "1099 economy" of workers paid as independent contractors—often when they should be paid as and afforded the rights of employees. The Department of Labor (DOL) has found that between 10 percent and 30 percent of employers (depending on the state) misclassify part of their workforce as independent contractors, depriving them of basic employment rights. State studies have found as much as 60 percent of audited employees are misclassified.[17] Misclassification impacts workers at every wage level in many different sectors, including construction, real estate, home care, trucking, and janitorial workers. Low-wage workers frequently accept pay as independent contractors (or get paid in cash) because that is the only way they can get work, not because they are genuinely in business for themselves.

The rise of the on-demand—or "gig"—economy has generated tremendous attention, (which today accounts for only 0.5 percent of the workforce), most popularly represented by services such as Uber and Lyft.[18] While some of these firms effectively use new technology to dispatch drivers, there is nothing new about the concept of labor intermediaries that dispatch workers—and nothing that says those in the gig economy must get 1099s. Gig economy start-ups such as Managed by Q and Shyp actually classify their workforce as employees, rather than independent contractors, so they can provide "additional supervision, coaching, branded assets and training" to "ensure that each time a customer uses Shyp they have an incredible experience."[19] The innovation of the gig economy should be to streamline the delivery of services, but all too often it has been used to facilitate the expansion of platforms whose profits depend on avoiding playing by the rules facing more traditional employers.

The Changing Economy Has Led to Rampant Violations of Wage and Hour Law

The fissuring of employment, the rise of misclassification, and scheduling abuses are just some of the factors that have led to a dramatic rise in wage and hour violations. A scientific sample conducted by researchers in three major cities found that 26 percent of all low-wage workers had minimum wage rights violated, and 76 percent of those who worked more than forty hours had their rights violated.[20] Surveys of fast food enterprises have found that 90 percent of workers report at least one violation.[21] Not surprisingly as violations have increased, so has FLSA litigation, with the Government Accountability Office reporting a 514 percent increase in the number of federal wage and hour cases filed from 1991 to 2012.[22]

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[17] National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, July 2015.
[18] Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, Harvard University http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf?m=1459369766.
[19] Kevin Gibbon, "A Note from Shyp's CEO," July 1 2015, http://blog.shyp.com/shyp-ceo-note/.
[20] Annette Bernhardt et al. "Broken Laws, Unprotected Workers," Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009 http://web.archive.org/web/20141102153212/http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.
[21] Tiffany Hsu, "Nearly 90% of fast-food workers allege wage theft, survey finds," April 1, 2014 http://articles.latimes.com/2014/apr/01/business/la-fi-mo-wage-theft-survey-fast-food-20140331.
[22] Government Accountability Office, The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance, "http://gao.gov/products/GAO-14-69.

2. The Need to Modernize Fair Labor Standards Act Regulations

The economic headwinds facing workers and their families require reforms that both strengthen core elements of the law, bolster enforcement, and modernize the Department of Labor to new challenges caused by the fissuring of employment.

In this context, the nomination of Mr. Andrew Puzder for Secretary of Labor raises concerns about the future ability of the Department of Labor to implement much-needed wage and hour policies, and to pursue the types of strategic enforcement necessary to ensure that American workers will share in the prosperity that their labor generates. President Trump has chosen as chief enforcer of our nation's employment laws someone from the ranks of an industry with one of highest rates of wage and hour violations, and someone who has pursued a business model often predicated on strict control of labor costs and cutting corners on employment laws. The Century Foundation's research uncovered 1,082 substantiated violations of wage and hour laws since Mr. Puzder took control of Hardee's and Carl's Jr. restaurants (owned, operated and franchised by CKE Restaurants) in 2000, with workers refunded nearly $150,000 of back wages in those cases.[23] From the start of the Obama administration, 60 percent of the CKE restaurants investigated had at least one violation—and the documented violations likely represent only a small share of the wage and hour infractions at CKE restaurants that Mr. Puzder would now be charged with rooting out. Indeed, there have been additional complaints by CKE Restaurants' workers about working off the clock, debit card fees that cheated workers out of a minimum wage, and failing to pay overtime for on-call hours worked by general managers.

Beyond his record, Mr. Puzder is a prolific public speaker and writer who has decried the overall impact of regulations on the economy as negative, and who spoke out against recent efforts to strengthen labor and employment laws. Every past Republican nominee for Secretary of Labor has pledged to Congress that they would uphold the unique mission of the Department of Labor to enforce the Fair Labor Standards Act, as well as the 180 other laws entrusted to the department's staff. Past nominees include Ray Donovan, a construction executive and President Reagan's first Labor Secretary, who said "Any good manager, regardless of the law, has to concern himself with safety." For his part, Mr. Puzder has openly questioned the need for a federal minimum wage and the need to update overtime standards, and said specifically that he prefered robots over workers because "they're always polite, they always upsell, they never take a vacation, they never show up late, there's never a slip-and-fall, or an age, sex, or race discrimination case." His overall view is that "more government is not the solution to every problem, it's the problem to every solution."[24] It is unclear whether Puzder can bring the kind of balanced view required to lead an agency of committed civil servants dedicated to upholding employment laws.

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[23] Michael McCormick and Simon Glenn-Gregg, "Mapping Andy Puzder's Labor Violations," The Century Foundation, January 12, 2017, https://tcf.org/content/facts/mapping-andy-puzders-labor-violations/.
[24] Andrew Stettner, "GOP Secretaries of Labor: Puzder Is a Break from the Past," The Century Foundation, January 23, 2017, https://tcf.org/content/report/gop-secretaries-labor-puzder-break-past/.

The First Priority Is to Advance a Substantial Increase to the Minimum Wage

Changes in the economy, along with the decline in unionization and lagging bargaining power of low-wage workers, have made minimum wages a more important policy lever than ever before. A national wage of $12 per hour, phased in by 2020, would provide raises (averaging $2,300 per year) for 35 million workers. This type of minimum wage increase, or proposals to phase in a $15 wage several years later, would account for the gains in worker productivity, restore the power of the minimum wage to reduce inequality, and reinvigorate the economy at the lower-end of the wage scale.[25] As part of these proposals the subminimum tipped wage should be eliminated (as done in 8 states), which will have the added benefit of eliminating costly litigation over the tip credit.

Despite stereotypes of minimum wage workers as young people starting in the labor force, two-thirds of those who would benefit from the increase are over the age of 25 and, on average, are the primary breadwinners in their families.[26] Thirty-five percent of African-American workers would benefit, as would 38 percent of Hispanic workers, and 21 percent of white workers.[27]

Economic research has increasingly found that minimum-wage increases have little negative impact on employment, even among teenagers identified as most vulnerable in previous research and critics of increases.[28] Minimum-wage increases save companies money through reductions in labor turnover and improvements in organizational efficiency, as shown by successful retailers who pay high wages and enjoy high productivity and high profits like Costco, QuikTrip, and Trader Joe's.[29] Detailed economic analysis of $15 minimum wages (already enacted in New York, California, and in cities in four other states) found that they could actually lead to a net gain in jobs as a result of increased productivity and greater spending power by low-wage workers.[30]

Sustain the Recent Modernization of Overtime Rules

The recent regulation promulgated to modernize overtime rules is both prudent and highly impactful. The new level of $921 per week was conservatively set, so that the bottom 40 percent of workers in the poorest parts of the nation would be guaranteed overtime pay. The increase would expand overtime rights for 4.2 million workers, and clarify them for an additional 8.9 million.[31] Before the federal court in the Eastern District of Texas enjoined the rule, a diverse

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[25] David Cooper, "Raising the Minimum Wage to $12 by 2020 Would Lift Wages for 35 Million American Workers," Economic Policy Institute, July 2015, http://www.epi.org/publication/raising-the-minimum-wage-to-12-by-2020-would-lift-wages-for-35-million-american-workers/.
[26] Ibid.
[27] Ibid.
[28] John Schmitt, "Why Does the Minimum Wage Have No Discernible Effect on Employment," Center for Economic Policy Research, February 2013, http://cepr.net/documents/publications/min-wage-2013-02.pdf.
[29] Zeynep Ton, *The Good Jobs Strategy,* (New York: New Harvest Books, 2014).
[30] Michael Reich, Sylvia Allegretto, Ken Jacobs, and Claire Montialoux, "The Effects of a $15 Minimum Wage in New York State," Center on Wage and Employment Dynamics, March 2016, http://irle.berkeley.edu/files/2016/The-Effects-of-a-15-Minimum-Wage-in-New-York-State.pdf.
[31] U.S. Department of Labor, Wage and Hour Division, Overtime Final Rule, Summary of the Economic Impact Study, 2017, https://www.dol.gov/whd/overtime/final2016/overtimeFinalRule.pdf.

set of companies, including Walmart, had already begun to raise salaries to conform with the new rules—part of the $1.2 billion raise estimated to be triggered. It is hard to imagine another policy that could have as much of an impact for middle wage workers (earning $10 to $23 per hour). While there were grave concerns about the impact of the rule on certain sectors, like higher education, these have been overblown. In the case of higher education, many academic and administrative staff qualify for special exemptions, and only a small portion would be impacted.[32] Increases in tuition won't be necessary. For example, the National Institutes of Health agreed to raise its grant levels so postdoctoral fellows could be paid above the new threshold without additional cost to the institution.

The overtime rule has the added benefit of simplifying compliance. The increase in the salary test tells employers clearly which modest and low-pay salaried workers are guaranteed overtime—and would substantially reduce the number of workers who would need to be subjected to the more complicated duties test. The Bush Administration defended a proportionally larger increase in the salary test from $155 to week to $455 in 2004, with similar logic.

Support Strategic Enforcement

The Department of Labor has limited resources, as the number of investigators actually declined by 14 percent from 1975 to 2004, even as the number of covered workplaces increased by 112 percent.[33] The Department of Labor now has about 1,000 investigators to handle 7.3 million establishments. Targeted enforcement policies, focusing on industries where research has surfaced high levels of violations, is the only way for Department of Labor to utilize its resources to recover significant amounts of unpaid wages and to move industry practices. For example, a directed investigation of a fast food restaurant was found to decrease violations at other fast food restaurants in the same zip code by 33 percent.[34]

With the probability of a Department of Labor investigator engaging an individual employer so low, it is critical for the Department to be able to us a wide range of tools (such as liquidated damages, court action, hot goods, civil penalties) to deter other employers from stealing worker's pay. Partnerships with community based organizations can help to identify violations and raise standards within industries with chronically high violations. The model of the Susan Harwood Grants to community groups around OSHA could be applied to expand the reach of Wage and Hour as well.

The Department of Labor has moved to a targeted enforcement strategy while maintaining the effectiveness of its investigations—remarkably achieving nearly the same percentage of investigations that find violations in its directed investigations (79 percent) than in

[32] U.S. Department of Labor, Overtime Final Rule and Higher Education, 2016 https://www.dol.gov/sites/default/files/overtime-highereducation.pdf.
[33] Annette Bernhardt and Siobhán McGrath, "Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004," Brennan Center for Justice at NYU School of Law, September 2005, http://www.nelp.org/content/uploads/2015/03/Trends-in-Wage-and-Hour-Enforcement.pdf.
[34] David Weil, "Improving Workplace Conditions through Strategic Enforcement," U.S. Department of Labor Wage and Hour Division, May 2010, https://www.dol.gov/whd/resources/strategicEnforcement.pdf.

ones where a worker actively lodges a complaint (82 percent).[35] And because these investigations are in targeted sectors, they are more effective—the average amount recovered per investigation increased from $785 per worker in FY 2009 to $1,000 per worker in FY 2015.[36] These efforts have led to $1.6 billion in back wages for more than 1.7 million workers in over 209,000 investigations.

Recent Guidance Has Clarified Rules for Employers and Employees

Strategic enforcement can be greatly assisted by guidance from the Department of Labor that becomes visible to employers, worker advocates, and employers. The rise in subcontracting, use of third-party administrators, franchising, and staffing firms have made it confusing about who is ultimately responsible for meeting wage and hour responsibilities. The Administrative Interpretation issued in 2016 clarifies existing policies and case law in which firms would be found to have a joint employment responsibility. The goal of such guidance is to ensure that entities that exert control over the working conditions of their subcontractors will be held liable for wage violations. There is much that franchisers can do to protect themselves and their subcontractors from wage violations. For example, the Department of Labor and Subway agreed to a voluntary program of compliance education and software-based flagging of possible violations.[37]

The Administrator's Interpretation issued by the Department of Labor in 2015 on independent contractor misclassification has a similar educational goal in mind. It reiterated that FLSA uses a broad standard of whether an employer "suffers or permits" an individual to work for them, and that the courts have used a multi-factor economic realities test to determine whether an individual is in fact economically dependent on the employer. The goal of this Administrator's Interpretation is to encourage employers to only treat individuals as independent contractors if they are truly in business for themselves. Too often, workers are misclassified as independent contractors based on one element (such as owning their own tools) when they are in fact in an employment relationship. The Administrator's Interpretation was put in place to give employers numerous examples of such cases to avoid.

Responding to the Desire of Workers for Flexibility

A common point of debate is whether the Fair Labor Standards Act inhibits the flexibility of workers and employers. Nothing in the FLSA prevents any of the common examples of flexible work (working from home, working split shifts, doing piece work, or other forms of intermittent work) as long as these arrangements ensure that the worker is paid for their work, at least at the minimum wage, and with overtime pay for any hours over forty hours per week.[38] Technology should make it easier than ever to track work hours using a myriad of available

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[35] Ibid.
[36] U.S. Department of Labor Wage and Hour Division, "Transition Documents," November 2016, https://www.dol.gov/dol/foia/presidential-transition-docs/whd.pdf.
[37] Ben Penn, "Subway, DOL Compliance Deal a New Template for Franchises?" Daily Labor Report, August 2, 2016, https://www.bna.com/subway-dol-compliance-n73014445701/.
[38] David Weil, "Flexibility and Fair Pay: You Can Have Them Both," U.S. Department of Labor, February 18, 2016, https://web.archive.org/web/20160425095705/http://blog.dol.gov/2016/02/18/flexibility-and-fair-pay-you-can-have-both/.

smart phone applications. The Department of Labor should clarify how the Fair Labor Standards Act applies to the use of smartphones and other forms of flexible work, and offer compliance assistance to employers.

In fact, workers today actually are craving stability in their schedule. A unique study found that hourly workers would actually take a 20 percent pay cut if they were guaranteed a set, 9-to-5 schedule; furthermore it found that a set schedule was worth more economically to hourly workers than added flexibility to work from home.[39] Modifications to wage and hour policies would make life easier on hourly workers by providing, say, two weeks of advance notice of a worker's schedule, and offering a modest economic disincentive to changes in worker's schedules: one hour of premium pay to workers whose schedule is changed writhing twenty-four-hours notice, and one hour of reporting pay to workers who are sent home early for a shift.

Additionally, workers need the ability to take paid time for the birth or adoption of a child, or when they or a family member are seriously ill. Compensatory time proposals such as the Workplace Flexibility Act fail that test. Under that proposal, employers would have the right to refuse a request for time off if it conflicts with business interests. Nothing in current law prevents employers from paying workers time-and-a-half for overtime and then giving them time off the next week as a reward for working extra hours, and thus comp time proposals represent a needless intervention by Congress.

Conclusion

In summary, in order for tens of millions of additional workers across the country to share in the nation's economic prosperity, they need a boost in the minimum wage and overtime laws, a long-term commitment to strong enforcement of the wage and hour laws, new resources to root out misclassification that regularly cheats them out of wages, and a strong effort to apply the Fair Labor Standards Act to workers in the gig economy and other forms of twenty-first century work.

[39] Alexandre Mas and Amanda Pallais, "Valuing Alternative Work Arrangements," National Bureau of Economic Research Working Paper #22708, September 2016, http://www.nber.org/papers/w22708.

Chairman BYRNE. Thank you, Mr. Stettner.

Mr. Brantley, you are recognized for five minutes.

TESTIMONY OF ANDY BRANTLEY, PRESIDENT AND CEO, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, KNOXVILLE, TN

Mr. BRANTLEY. Good morning, Chairman Byrne, Ranking Member Takano, and distinguished members of the subcommittee. Thank you for holding the hearing today and for the opportunity to testify.

CUPA-HR serves as the voice of higher education human resources, representing more than 22,000 human resources and other professionals on campus and almost 2,000 colleges and universities across the country. Higher ed employs over 3.9 million employees with colleges and universities in all 50 States.

My testimony today will focus on higher ed's concerns with the Department of Labor's recent revisions to the FLSA, the overtime pay requirements, and our suggestions for moving forward. To say that these changes have been top of mind for higher education and higher education institutions would be an understatement. Before I explain why the overtime changes have garnered so much attention from higher ed, let me say that CUPA-HR and other higher education associations that advocated on this issue believe that an increase in the minimum salary threshold is due and that the DOL must update salary levels and regulations from time to time to ensure compliance and that the exemptions are not abused.

The current salary threshold of $23,660 is overdue for a much-needed increase, but more than doubling the threshold to $47,476, as was proposed by President Obama's Department of Labor, would have had a tremendous negative impact for employers and employees across the country.

As we outlined for the DOL, professionals in thousands of higher education positions that clearly met the duties test for exemption are paid less than $47,476. Positions that require bachelor's degrees and master's degrees, such as residence hall managers, academic advisors, mental health counselors, admissions counselors, financial aid counselors, student life professionals, alumni development professionals, and many athletics positions typically pay early and mid-career and sometimes even later career professionals annual salaries of less than $47,000 per year, particularly at smaller institutions in more rural parts of the country.

Increasing the threshold by over 100 percent will increase annual expenses and lead to the reduction in services and positions. A quick sample from just 35 CUPA-HR member institutions estimated a cost of nearly $115 million to implement the rule in the first year alone. These institutions also shared with us that such an increase in expenses would trigger tuition hikes and reductions in services.

When DOL issued the final rule, employers were just given six months to comply. Participation in our webinars that we held on this issue regarding the new regulations far surpassed any participation in CUPA-HR history. Also remarkable were the number of comments. For example, in just one webinar, over 400 content questions on things that you would think most human resource

professionals would know, but to add to the complexity of things like tracking time, salary calculations, comp time, part-time employees, and more.

Although proponents of the rule argue that these changes could be made with the flip of a switch, the increased interest in our webinars, the extraordinary use of our resources that we created and the feedback that we received from across the country is evidence to the contrary.

So what is a reasonable salary threshold? In a July 2015 survey we conducted, the majority response shows a salary survey level of either $29,172, which, by the way, is the current level, adjusted for inflation, or $30,004, the salary level if the DOL applied the same formula used to update the salary threshold in 2004. Eighty-eight percent of the respondents indicated that a threshold over $40,352, which is the median of all wage and salary workers combined, would be too high. These salary levels were not picked randomly, but according to the notice of proposed rulemaking, the DOL actually considered these as part of their proposed update.

Finally, while we are pleased with the court's injunction, the temporary injunction, it was issued just a few days before the December 1 implementation date. In an early December survey of our members, 28 percent had already implemented changes, while 71 percent either implemented some changes or delayed others or delayed all changes.

As an example, one large public institution spent over a million dollars changing services, holding positions vacant, just to adjust their payroll cycle to move formerly exempt employees to nonexempt status. This institution is now facing significant challenges on working hours and services performed for those employees impacted.

We need your help to create and implement a more reasonable salary threshold as quickly as possible.

Mr. Chairman, thank you again for the opportunity to testify and offer CUPA-HR support for the Committee's focus on modernizing Federal wage and hour policies. I'll be happy to answer any questions from you or other members of the Committee. Thank you.

[The statement of Mr. Brantley follows:]

College and University Professional
Association for Human Resources

Testimony of Andy Brantley

Before the
United States House of Representatives
House Education and Workforce Subcommittee on Workforce Protections

Hearing on
"Federal Wage and Hour Policies in the Twenty-First Century Economy"

February 16, 2017

Good morning, Chairman Byrne, Ranking Member Takano and distinguished members of the Subcommittee. Thank you for holding this hearing today on "Federal Wage and Hour Policies in the Twenty-First Century Economy" and for the opportunity to testify. I am Andy Brantley, president and chief executive officer of the College and University Professional Association for Human Resources, known as CUPA-HR. Prior to joining CUPA-HR, I was associate vice president and chief human resources officer for the University of Georgia (UGA) in Athens, Georgia. Before my arrival at UGA in January 2001, I served as the assistant vice president for business administration and director of human resources at Davidson College, a private college in Davidson, North Carolina.

CUPA-HR serves as the voice of human resources in higher education, representing more than 22,000 human resources professionals and other campus leaders at almost 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 56 percent of all bachelor's institutions, and nearly 700 community colleges and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

My testimony today will focus on higher education's concerns with the U.S. Department of Labor (DOL)'s recent revisions to the "white collar" exemptions to the Fair Labor Standards Act (FLSA)'s overtime pay requirements and our suggestions for moving forward. To say that these changes have been top of mind to higher education HR professionals and higher education institutions is an understatement.

Before I explain why the overtime changes have garnered so much attention from higher education let me say that CUPA-HR and the other higher education associations that engaged on this issue believe 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.

1811 Commons Point Drive, Knoxville TN 37932 | Tel: 865.637.7673 | Fax: 865.637.7674 | www.cupahr.org

I will talk more about our thoughts on how best to accomplish these goals a bit later. First, I will discuss DOL's proposal and our response and higher education's experiences with the initial stages of complying with the final rule before it was stayed by a federal court.

DOL's Proposal

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, DOL published the Notice of Proposed Rulemaking (NPRM), which proposed several changes to the white collar exemptions and invited public comment on those proposals.

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 (currently $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 all 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 workweek (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.

In the July rulemaking, DOL proposed several changes to the white collar exemptions, including increasing the current salary threshold of $455 per week ($23,660 annually) by 113 percent to $970 per week (or $50,440 per year), which the agency estimated to be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposed automatic annual increases to the salary threshold by tying it to one of two indexes.

Higher Education's Response

The proposal generated widespread concern in the higher education community. The FLSA covers all or nearly all of the 3.9 million workers employed by our colleges and universities nationwide. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the white collar regulations but earn less than the threshold DOL had proposed.

CUPA-HR and 18 other higher education associations representing approximately 4,300 two- and four-year public and private nonprofit colleges and universities filed detailed comments outlining our concerns with DOL's proposal. In short, we argued that while an adjustment to the minimum salary threshold was due, DOL's proposed increase was simply too high. It would require colleges and universities to reclassify large numbers of salaried 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. 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.

As we detailed in our comments, in our view, this mass reclassification would be to the detriment of employees, institutions and students. With respect to employees, there are advantages and disadvantages to exempt and nonexempt status and some jobs are better suited to exempt work, which is why the exemptions exist. As I mentioned previously, employers must carefully track hours for all nonexempt employees and provide them with premium pay for overtime hours. As a result, employers will necessarily avoid situations where tracking nonexempt employees' hours is difficult or impossible. This means employers often restrict hourly employees' access to smart devices and other technology that can be used remotely. Flexible work arrangements and work travel also become extremely cumbersome if not impossible to manage, and jobs that have innate fluctuations in workload must be managed by counting hours instead of just letting a professional get his or her work done.

Thus, while the FLSA protects hourly employees against excessive work hours, nonexempt employees often face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement. That is why it's so important that regulations strike the appropriate balance between protecting employees from abuse and allowing white-collar employees autonomy and flexibility. To us it was clear that DOL's proposed threshold was too high, as it would have required mass reclassification of jobs that are clearly performing exempt, professional-level work.

We also detailed in the comments our significant concerns about the burden and costs of this mass reclassification on institutions; not only are colleges and universities often the largest employers in their communities, but in many cases they are the largest employer in the state. Institutions can be extremely complex organizations comprised of teaching hospitals, research facilities, agricultural operations and more, all of which compliment extensive academic program offerings. As a result, colleges and universities employ a very skilled, very diverse workforce of faculty and staff. Adjusting this workforce to the dramatic changes proposed by DOL is complex, not some simple payroll change accomplished with the stroke of a key. Colleges and universities must undergo detailed analysis of how to staff any given department so it can best achieve its mission under new rules that have fundamentally changed when and where employees may work.

As we provided in great detail in our comments, the complexities of this change would be burdensome and costly. As nonprofits and public entities, institutions would have difficulty absorbing these costs as well as costs associated with increased salaries for exempt employees, expanded overtime payments and administrative costs related to tracking hours. In the face of these costs and challenges, many 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.

Finally, we expressed in the comments our concern about DOL's proposed automatic annual updates to the threshold. We do not believe the FLSA grants the authority to DOL to impose automatic updates, and even if it did, the agency should not automatically update the salary level. Not only would annual increases negatively impact institutions' budgets and budget planning,

their ability to provide merit-based pay increases and employee morale, but such increases ignore economic circumstances and changes in our workforce.

Rather than automatically updating the salary level, we argued in the comments that 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. 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 cost analysis — which is an important part of assessing the impact of any increase to the salary level.

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 addition to filing comments, our community also raised our concerns with the Office of Management and Budget (OMB)'s, Office of Information and Regulatory Affairs (OIRA) during its pre-publication review of the final rule. In fact, 25 percent of all stakeholder meetings conducted and nearly 50 percent of letters submitted to the OMB docket were on behalf of either individual institutions or a higher education association. In addition, numerous Members of Congress from both sides of the aisle urged DOL and OMB to carefully consider the impact the proposal would have on higher education before proceeding with the rule.

DOL's Final Rule

Unfortunately, on May 18, 2016, DOL issued its final rule setting the new threshold at $47,476, which was a modest decrease from the proposed amount of $50,440, but still a 100 percent increase over the current level of $23,660. The new rule also requires automatic updates to the threshold every three years, rather than the proposed annual updates. Like the proposal, the final rule would require mass reclassification of many white-collar workers in jobs that have traditionally been and are well suited to exempt status. Thus, the final rule would still have adverse consequences for colleges and universities and their employees and students that we detailed in our comments.

We were deeply disappointed that DOL did not do more to address the concerns of colleges and universities across the country that submitted comments, wrote letters to Congress and met with administration officials.

Professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemption are paid less than $47,476. Positions that require bachelor's or master's degrees such as residence hall managers, academic advisors, mental health counselors, admissions counselors, financial aid counselors, student life professionals, alumni development

professionals and many athletics positions typically pay early and mid-career professionals annual salaries of less than $47,000, particularly in smaller institutions and in rural parts of the country.

CUPA-HR annually collects and analyzes comprehensive salary and benefits data for higher education administrators, professionals, faculty and other staff. Following the release of the final rule, we looked to our *2016 Professionals in Higher Education Salary Survey Report* and found that a threshold of $47,000, which is slightly below the final rule's $47,476, would impose significant costs on higher education. Twenty-four position classifications in that survey have median national salaries below the final rule's threshold.[1] If an institution moved just one employee in each of these 24 classifications to $47,476, the average annual cost increase for that institution would be approximately $209,000. Institutions will typically have many professionals below $47,476, particularly institutions in lower-cost areas of the country, which will be those hardest hit by the rule.

In addition to reviewing our salary survey report, we reached out to our membership for data. The 35 institutions that were able to provide data in that short window of time estimated a combined cost of nearly $115 million to implement the rule in the first year alone and indicated such an expense could trigger tuition hikes and reductions in force and services.

We are also concerned that these initial costs and the subsequent decisions institutions would have to make regarding their employees and students would be continuously repeated as the rule provides for automatic increases to the salary threshold every three years. Each update would raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region and DOL would post the new salary levels just 150 days in advance of their effective date. While increasing the intervals for automatic updates from one year to three years is an improvement, we believe that DOL lacks the authority to impose *any* automatic updates and, for the reasons I mentioned previously, the public is better served when DOL makes any adjustment to the regulations through notice and comment.

In addition, we have significant concerns with DOL's methodology of indexing future increases to the 40th percentile of salaried workers when intervals for threshold adjustments are stacked closely together. Changes brought on by implementation of the rule will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could lead to exponential and unpredictable increases to the threshold, which would be destabilizing.

Although we were mostly disappointed by the final rule, we were pleased DOL issued specific guidance on the applicability of the final rule to higher education. Although the guidance restates current law, it did increase awareness of certain unique provisions within the regulations that would help higher education comply.

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[1] CUPA-HR members report that employees that would face reclassification include those in departments such as academic affairs (librarian, adviser, counselor), student affairs (residence hall manager, admissions counselor, financial aid counselor, student activities officer), institutional affairs (human resources professionals), fiscal affairs (accountant, head cashier, ticket manager), external affairs (alumni development professionals), facilities, information technology, research professionals (including many with advanced degrees), athletics (some assistant coaches, physical therapist, trainer), and managers in food service, security and building and grounds.

Compliance Efforts and Complications

I want to now turn the attention of my testimony to focus on the compliance efforts we undertook at CUPA-HR and the many complications institutions of higher education encountered while racing to transform their complex organizations and unique workforce in the relatively short amount of time DOL provided. When we were reviewing the department's original proposal our members provided ample feedback on the length of time that institutions should be given to bring their workforce into compliance. The vast majority of the feedback we received suggested at least one year was needed in order to adequately implement the changes, yet DOL provided, just over six months with December 1 as the effective date. Given the short time DOL provided we knew this would be a great challenge and is why we as an association devoted our resources towards helping our member institutions prepare for the December 1st effective date.

To do so, we produced webinars and other resources dedicated to the overtime changes throughout the rulemaking process. Although we knew viewership would be high none of us imagined that our February 2016 webinar entitled "FLSA Overtime: How, When and Why to Prepare" would set the record for total viewership only to be upended later in 2016 when a conservatively estimated 5,825 individuals logged in to view our webinar on the final rule. The participation in the event was record-breaking for CUPA-HR, but also remarkable were the 408 content questions submitted during the webinar regarding the new rule's impact on comp time, part-time employees, tracking time, salary calculations and more. Remember, many of these questions came from seasoned human resources professionals who have significant expertise with the Fair Labor Standards Act and the white collar overtime exemptions — although proponents of the rule argued these changes could be made with a "flip of the switch," the interest in our webinars is evidence to the contrary.

Furthermore, after the rule was released, it became clear that lingering problems surrounding the application of the rule to higher education persisted, along with questions surrounding compliance with respect to certain occupational areas. For instance, extension agents for our public land grant institutions are crucial to bringing educational programs, modern technologies and modern agricultural science to citizens across the United States and are often stationed in rural areas of the country where the cost of living is substantially less than urban areas. However, as a result of DOL setting such a high salary threshold, a significant number of extension agents who are currently exempt based on their duties and salaries under current law would either have needed to be reclassified or have their salaries increased. Given the importance of professional autonomy to the success of an extension agent's mission and the impracticality associated with reclassification to hourly status, we began exploring the applicability of the teaching exemption to this profession.

Although most exemptions must meet the salary level test, teachers are not subject to the salary level requirement for the professional exemption if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Higher education has applied this exemption historically to college and university professors and adjunct instructors but application to extension agents is much more complicated, as there is no existing guidance from DOL—presumably because previous updates to the salary level have not excluded a similarly large number of exempt professionals. More specifically, we needed guidance on what activities performed by the extension agent (whether it be instruction not for credit; as a visiting

teacher at K-12 class; instructing farmers on the latest soil, seeds, etc.) might be considered teaching and at what point these activities, combined or separately, constitute a primary duty of teaching. Additionally, it is unclear whether those who may have a primary duty of teaching but do not instruct people enrolled in degree-seeking programs may meet the teaching exemption.

Another area where we sought additional guidance was related to academic administrative personnel and their special exemption, with a potentially reduced salary level, provided to this group of employees within the regulations. Academic administrative personnel are those who help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities. To qualify as an academic administrator, the employee must satisfy the "normal" salary requirements or the minimum salary for teachers at their institution and their "primary" duty must consist of "administrative functions directly related to academic instruction or training."

For example, if the minimum teacher salary at an institution is $42,000, an exempt academic administrator would only need to be paid $42,000 to qualify for exemption (assuming the duties performed met the standard). However, the complications with applying this exemption to academic administrators is that the DOL has not provided specific guidance on the term "minimum salary for teachers" and as professors and faculty are oftentimes paid quite differently than staff, applying this exemption is, at best, problematic and, at worst, a lawsuit waiting to happen.

One of the last occupational areas I will discuss is a position that is almost exclusively found in higher education. Resident directors often are responsible for the supervision of graduate coordinators and several resident assistants. They also are responsible for the creation and execution of programming and connecting the "student life work" to the academic work of the institution. Although dependent on their specific role within an institution, resident directors have traditionally been exempt based on their duties and salary. However, had the final rule taken effect in December, a significant number of resident directors would either have needed to be reclassified or have their salaries increased. Reclassification and tracking hours is impractical if not impossible for resident directors, as their workweek can fluctuate dramatically depending on the time of year (orientation, finals, summer break, etc.), and as many live on campus they are often in contact with students or others outside normal working hours. Unfortunately, even though these professional staff may be furnished with room and board, oftentimes a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold.

Of course these were just three of the many issues on which CUPA-HR was working to obtain guidance when the department's rule was preliminarily enjoined in November.

We have received some feedback from member institutions that implemented changes in anticipation of the rule and prior to the injunction. These members report incurring significant costs, experiencing employee morale issues and finding that several job categories are very difficult to manage as nonexempt. For one large Midwestern university, costs included nearly $1 million for a "one-time 10-day payment made to everyone switching from exempt to nonexempt in order to address cash flow due to nonexempt payroll being two weeks in arrears." This was in addition to administrative costs, payroll increases as a result of bumping up some salaries to meet

the new threshold and any overtime pay for those who are reclassified. Members have also reported morale issues as "people who have been 'professional' for years now have to track hours."

Finally, we are hearing from members that "several job categories are very difficult to manage as nonexempt because of the unusual nature of their schedules." One member provided the following specifics:

> [The job categories that have caused the most difficulty] include residential housing staff, who are struggling with how to track time when they run into a student in the dining hall or a student pops in for advice at 11:00 p.m. This has led to some issues of coverage. Complicating the residential housing issue is that we provide room and board for many of them as compensation but this is not factored into their salaries for FLSA purposes. Another job type relates to athletics. We have been able to cover some of the coaches under the teaching exemption, but many athletic trainers are not included. They work unusual hours and travel with teams, which adds a lot of complication to tracking hours.

The Court's Ruling and Our Suggested Path Forward

The November decision issued by Judge Mazzant in response to a legal challenge brought by a coalition of more than 50 business groups and 21 state attorneys general found that DOL exceeded its delegated authority and ignored Congress's intent by raising the salary level such that it supplants the duties test. The court's ruling, subsequent appeal by President Obama's DOL, and the recent 30-day extension granted to the Trump administration's Department of Justice provides a great level of uncertainty for employers moving forward. Given this uncertainty, we would like to see DOL withdraw the rule and issue a new one that sets a more reasonable salary level.

As I have stated elsewhere in my testimony, CUPA-HR agrees an increase to the minimum salary threshold is due. As most colleges and universities strive to be progressive employers and are often considered to be an employer of choice in a community, CUPA-HR believes DOL should work towards updating the threshold under the new administration but should not consider a similar threshold that is so high that it forces employers to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status.

While we are not settled on an exact salary level, in a July 2015 survey we conducted of 819 CUPA-HR members, a majority chose a salary level of either $29,172 (23 percent increase) or $30,004 (27 percent increase) and 88 percent of respondents indicated any threshold over $40,352 (71 percent increase) would be too high. These salary levels were not picked randomly; in fact according to the NPRM preamble, DOL considered these salary levels as part of the 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; the final number represents the median of all wage and salaried workers combined.

Additionally, we would like to see DOL issue specific guidance with respect to the many complications that arose while institutions were preparing to comply. In a survey we administered after the injunction just 28 percent of respondents reported implementing their planned changes, while 71 percent either implemented some changes and delayed others or delayed all changes. Although many of our member institutions spent night and day preparing to be compliant with the regulations, it is clear that there would have been many unanswered issues had the rule taken effect on December 1.

Conclusion

Mr. Chairman, thank you again for the opportunity to testify and offer CUPA-HR's support for the committee's focus on modernizing federal wage and hour policies. I am happy to answer any questions from you or other members of the Committee.

Chairman BYRNE. Thank you, Mr. Brantley.

Ms. Walters, you are recognized for five minutes.

TESTIMONY OF CHRISTINE WALTERS, SOLE PROPRIETOR, FIVEL COMPANY, WESTMINSTER, MD, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. WALTERS. Thank you.

Good morning, Mr. Chairman, Ranking Member Takano, and Committee members. I am Christine Walters, sole proprietor of FiveL Company in Westminster, Maryland, where I serve as an independent human resources and employment law consultant. I'm appearing before you today on behalf of the Society for Human Resource Management, or SHRM, where I've been a member for 18 years.

I thank you for holding this hearing to examine Federal wage and hour policies under the FLSA. While this statute is a cornerstone of employment law, it is out of step with our modern technology-based economy, creating unnecessary regulatory burdens and hindering the ability of employers to be flexible and address contemporary employee needs. And let me explain just some of those challenges.

Employers of all sizes work to classify employees correctly and remain in compliance with the FLSA. However, classification decisions for positions can be particularly challenging, because the statute includes both objective and subjective criteria. Therefore, an employer acting in good faith could mistakenly misclassify employees as exempt who, in reality, could be nonexempt or vice versa. Moreover, administrator's interpretations, or AIs, on both joint employment and employee versus independent contractor classification under the FLSA have contributed to this complexity.

The AIs rely on a broad economic realities test, which is open to various interpretations and gives employers no objective criteria on which to rely. In order to provide more clarity, SHRM believes these AIs should be withdrawn and the Department of Labor should reinstate Department opinion letters as well as provide examples in regulatory text. Opinion letters and examples enable employers to understand the Department's view on how regulations might apply to their own actual and practical workplace situations.

The stakes in improperly classifying employees are high. If an employer is determined to have misclassified employees, then the organization is required to award up to three years' backpay for overtime to those employees, plus attorneys' fees. That's why employers do work hard to ensure that employee classifications are in compliance with the FLSA. Many of the small businesses and nonprofits with whom I work have limited budgets and very tight margins, and so it's imperative that these organizations avoid lawsuits.

Simply put, the FLSA has not kept pace with the realities of the twenty-first century workplace or its workforce. Today's modern technology allows many employers to perform job duties when and where they choose. And frankly, Mr. Chairman and Committee members, a growing number of employees have come to expect and enjoy that flexibility. For example, it's not uncommon for nonexempt employees to want to access online work platforms re-

motely after work hours. But because nonexempt employees must be paid for all hours worked, those hours must be closely tracked in order to remain in compliance with the FLSA. As a result, employers may implement policies to restrict the employees' ability to work from home because of the challenges associated with tracking.

Additionally, the FLSA makes it very difficult for employers to offer nonexempt employees the flexibility of a biweekly workweek. Because employers are required to pay overtime for hours worked over 40 in a workweek, an employer's ability to offer employees the flexibility of, say, working 45 hours in the first week of a pay period and then 35 hours in the second week, for a total of 80 hours in that pay period, is not an option without incurring overtime liability.

Private sector employers are also prohibited under current law from offering nonexempt employees the option of paid time off or comp time in lieu of overtime pay for hours worked over 40 in a workweek, even though public sector employees have enjoyed that flexibility for more than the last 30 years.

Finally, let me turn to FLSA overtime regulations that were finalized in May of last year. SHRM continues to have serious concerns with the final overtime rule that, as we heard, more than doubled the salary threshold to over $47,000 and included automatic increases every three years. Throughout the rulemaking process, SHRM noted that a salary update was warranted, but a more than 100 percent increase was simply too much too fast and would curtail the workplace flexibility to which many employees have grown accustomed.

Thankfully, the November 22 preliminary injunction brought relief to many employers who were inundated with questions and complaints from exempt employees about how the conversion would impact them. Going forward, SHRM believes the Trump administration should reexamine the overtime rule and utilize previous methodologies in a new rulemaking to determine a more reasonable salary threshold.

In conclusion, Mr. Chairman and Committee members, because the FLSA was crafted for a different time, it must be reevaluated to ensure it still encourages employers to hire, grow, and better meet the needs of employees in this twenty-first century workplace.

So I thank you again for allowing me to participate in this important discussion, and I also welcome any questions. Thank you.

[The statement of Ms. Walters follows:]

STATEMENT OF
CHRISTINE V. WALTERS, JD, MAS, SHRM-SCP, SPHR

SOLE PROPRIETOR,
FIVEL COMPANY

SOCIETY FOR HUMAN RESOURCE MANAGEMENT
(SHRM)

SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON
"FEDERAL WAGE AND HOUR POLICIES IN THE TWENTY-FIRST CENTURY ECONOMY"

FEBRUARY 16, 2017

Introduction

Chairman Byrne, Ranking Member Takano, my name is Christine Walters, and I am the sole-proprietor of the FiveL Company. I have more than 30 years of combined experience in human resources administration, management, employment law practice and teaching. Previously, I worked as an in-house HR practitioner in the nonprofit sector for nearly 10 years and subsequently served as an adjunct faculty member at the Johns Hopkins University, teaching a variety of courses in graduate, undergraduate and certification-level programs from 1999 to 2006 in human resource management topics.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I have been a member for 18 years. On behalf of our 285,000 members in more than 165 countries, I thank you for this opportunity to participate in today's hearing on "Federal Wage and Hour Policies in the Twenty-First Century Economy."

SHRM is the world's largest HR professional society and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the 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.

Since 2002, I have served as an independent HR and employment law consultant. Many of my clients are small businesses, including small government contractors and small nonprofits. Given their limited resources, many of my clients face challenges imposed by antiquated wage and hour rules prescribed by the Fair Labor Standards Act (FLSA), which have not kept pace with the modern, 21st century workplace and workforce.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees, demonstrate some of the practical challenges faced by employers when complying with the FLSA, and explain how the FLSA hinders an employer's ability to provide workplace flexibility.

The Fair Labor Standards Act

Certainly, the FLSA has been a cornerstone of employment and labor law since 1938. This important statute establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's (DOL's) Wage and Hour Division administers and enforces the FLSA with respect to private employers and state and local government employers, and virtually all organizations are subject to the FLSA. Additionally, many states and local jurisdictions have their own laws pertaining to overtime pay. If a state or local law is more inclusive or more generous to the employee than federal law, the state or local law will apply. If, however, the state

or local law is less inclusive, then employers are required to follow federal law. The myriad of federal, state and municipal laws add additional complexity to employers' compliance efforts.

As noted above, the FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself has remained relatively unchanged in the nearly 80 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done. Therefore, today's examination of federal wage and hour policies is an important discussion.

Mr. Chairman, employers encounter challenges as they navigate the complexities of FLSA compliance. As such, I know my clients and employers generally would welcome additional guidance from the DOL to inform their compliance efforts. Complying with the statute can create significant legal costs for employers, especially for many small businesses and nonprofits. Improved guidance from the Department would also be helpful in order to prevent baseless lawsuits. Defending against litigation is just one of the practical challenges employers encounter with the FLSA. These practical challenges are outlined below.

Employee Classification Determinations

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Taking into consideration the regulations under 29 CFR Part 541, employers and HR professionals regularly use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime and the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or nonexempt is made on whether the employee is paid on a salary basis, at a defined, minimum salary level, currently $23,660 annually, and an individual's specific duties and responsibilities. It is assumed by the DOL that all employees covered under the FLSA are nonexempt employees, and each element of the three-part FLSA test must be met in order to consider an employee exempt under the statute.

These classification determinations must be made looking at each individual employee. Classification decisions for each employee are particularly challenging because the statute specifically includes both objective (salary basis level, salary basis test) and subjective (duties test) criteria. As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt who, in reality, should be nonexempt, or vice versa. How these tests are defined and the application of them in the workplace has been refined through years of litigation. We certainly do not want to take a step backward redefining these tests. Instead, employers would welcome additional examples that illustrate how the tests can be applied in various situations.

In addition, Administrators Interpretations (AIs) on both joint employment[1] and employee versus independent contractor classification[2] under the FLSA have contributed to the complexity of

[1] https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm
[2] https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf

employee classifications. In both instances, these AIs established new standards creating greater exposure for employers. The joint employment guidance defined both "horizontal joint employment" and "vertical joint employment" for which the agency listed seven economic reality factors that should be considered when analyzing vertical joint employment and nine factors when analyzing horizontal joint employment. This is an expansion from the three circumstances identified in the existing DOL regulations[3] defining joint employment.

Similarly, DOL guidance issued in 2015 narrowed who could be considered an independent contractor. The agency again focused on a broad "economic realities" test asking whether the worker is economically dependent on the employer or in business for him or herself, rather than focusing on the extent to which the employer has the right to control how the worker does the job.

The economic realities test used in each of these AIs is open to various interpretations which means that employers have no practical, objective criteria on which to rely. At the same time, a misclassification or an unexpected finding of joint employment could have serious repercussions and risk of liability with respect to wage and hour law. SHRM believes that these AIs, which were issued without notice and comment, should be withdrawn.

Given the challenges HR professionals encounter, a significant portion of SHRM's programs and educational resources focus on compliance with the FLSA. SHRM's HR Knowledge Center responds to thousands of FLSA inquiries each year from our members as employers diligently work to stay in compliance with the law. In fact, the volume of questions SHRM receives regarding the FLSA is second only to one other federal statute—the Family and Medical Leave Act.

In order to assist employers, the department should provide examples within their regulatory text and reinstate department opinion letters. Unlike the Administrator Interpretations mentioned earlier, opinion letters enabled employers to understand the Department's view on how the regulations apply to specific fact patterns and were widely used by employers to better understand the application to their own workplaces.

Defending Against Litigation

Despite the ambiguity of many employment situations, the stakes in "improperly" classifying employees as exempt or nonexempt are high. The DOL frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorneys' fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position's proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

For example, today at least 14 states have their own "white collar" or "Executive, Administrative and Professional (EAP)" regulations that use a three-factor test different from the one described above for properly classifying an employee as exempt. In these states, employers must conduct a dual analysis under the state and then the federal regulations to ensure proper classification.

[3] 29 CFR 791.2

Changes in state level thresholds may also be on the horizon as many state legislatures pursue proposals similar to the pending Obama Administration overtime final rule that I discuss later in my statement.

In addition, the definition of an independent contractor is also murky. The Internal Revenue Service (IRS) uses factors different from (1) those described above that are used by the DOL; (2) state workers compensation statutes; (3) state unemployment insurance codes; (4) and more. On several occasions, I have witnessed employers do their due diligence, follow the IRS guidance, and properly classify a worker as an independent contractor. Then, when the job is complete the worker files for unemployment insurance (UI) benefits and the state grants those benefits, despite the employer's appeal that the worker was not, in fact, an employee. This occurs because the state uses a different definition of employee or independent contractor and is under no obligation to follow the IRS guidance. The employer is then subject to back taxes, back wages, future increases to the UI tax premium and more.

Employers work hard to ensure that employee classification decisions are in compliance with the FLSA. Many of the small businesses and nonprofits I work with have limited budgets and time as well as tight margins, so it is imperative that these organizations avoid expensive lawsuits.

Technology Challenges

Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Smartphones, tablets, the use of social media and other technology allow many employees to perform job duties when and where they choose.

Many employees enjoy the flexibility of regularly working from home. The enjoyment is recognized, in part through the *When Work Works* awards program,[4] which is a research-based initiative that highlights how effective and flexible workplaces can yield positive business results and help employees succeed at work and at home. A unique aspect of this award program is that employees are surveyed about their individual use of and experiences with flexibility, and the final scoring heavily weights the experience of employees. Therefore, the flexible workplace arrangements offered by winning organizations are validated by their own employees.

While the benefits of telework for both employers and employees are well documented, potential pitfalls exist. For example, research shows that employee engagement has a positive correlation to productivity. Research also shows that teleworkers are more engaged if they participate in-person with their colleagues on a regular basis. Now consider this situation an employer client of mine recently faced.

To encourage inclusion and team engagement the employer asked all teleworkers to begin attending weekly staff meetings in person. The teleworkers then suggested that they should be

[4] http://www.whenworkworks.org/meet-our-winners

paid for the travel time from their home to the office meeting. But the employees who regularly reported to the office each day were not paid for that time. Yet under the FLSA regulations, there is a reasonable interpretation that the teleworkers should be paid and the other employees need not be for the very same travel time. The antiquated regulations simply do not address the realities of today's work practices and create not just legal challenges but employee relations concerns as well.

As noted, the FLSA was written before the proliferation of smartphones. Phones and other "smart" devices are nearly universal in today's workforce, yet continue to present challenges in regards to nonexempt employees. It is not uncommon for nonexempt employees to want to access online work platforms remotely after work hours. Because nonexempt employees are only paid for the hours they work, all hours must be closely tracked in order to remain in compliance with the FLSA. Often, employers will error on the side of caution and implement policies to restrict employees' access to work platforms from home because of the challenges associated with tracking those hours. This is yet another example of how the FLSA has not kept pace with the 21st century economy.

Diminished Workplace Flexibility

The 21st century workforce and workplace are increasingly demanding workplace flexibility, defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

The FLSA makes it difficult, if not impossible in many instances, for employers to provide workplace flexibility to millions of nonexempt employees. First, the FLSA limits choices for employees interested in modifying the biweekly workweek. Under the FLSA, employers are permitted to allow a nonexempt employee to work four 10-hour days Monday through Thursday, for a total of 40 hours in a week and to take every Friday off without the employer incurring any overtime obligations.

However, if an employee wanted greater flexibility to work a nine-hour day Monday through Friday of the first week for a total of 45 hours and then to work three nine-hour days and one eight-hour day in the second week and take Friday off, the employer would have to pay overtime for the additional hours over 40 hours in the first week or the employer would have to create and administer a separate workweek for payroll purposes for those employees working the flex schedule. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement, often referred to as an alternative work schedule.

Second, the statute also prohibits private-sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public-sector employees are offered this type of flexibility, commonly referred to as "compensatory" or "comp" time. SHRM has long supported the Working Families Flexibility Act, a bill that would amend the FLSA to give private-sector employers the option of offering

nonexempt employees the voluntary choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work. SHRM strongly supports the idea of compensatory time because it meets our core workplace flexibility principle—that in order for flexibility to be effective, it must work for both employers and employees.

During my time as an HR practitioner, I encountered a challenge involving the use of comp time at a private employer. I received a call from the Baltimore office of the DOL. In short, one of our directors was allowing the nursing technicians, who were nonexempt, to "bank" time for use at a later date instead of receiving overtime pay. The employees loved it; the director loved it – everyone was happy until I had to break the bad news that it was not permissible under current law. We then had to go back two years, including tracking down employees who had left our employment in that time, in order to calculate the overtime that was provided in the form of comp time for each person and compensate these individuals appropriately. Thankfully we avoided three years' liability for back wages because we demonstrated that we had conducted in-house management training on the FLSA and – although it was clear that the director had not retained the information – we were able to show good faith and due diligence in our efforts to comply with the FLSA.

While the ability to offer nonexempt, private-sector employees comp time is one way public policy can encourage greater access to workplace flexibility, SHRM believes more can be done to incentivize employers to implement effective and flexible workplaces. It is our strong belief that public policy must not hinder an employer's ability to provide flexible work options. Rather, public policy should encourage and enhance the voluntary employer adoption of workplace flexibility programs. As such, SHRM continues to work with Congress on developing legislation to expand workplace flexibility options for employees.

FLSA Overtime Regulations

As outlined earlier in my statement, an employee must satisfy each element of the three-part test to be considered exempt from overtime requirements as prescribed in section 541 of the FLSA overtime regulations. These regulations governing the FLSA have been revised by the Executive Branch numerous times.

In fact, last year the DOL released final regulations making changes to the overtime rules that raised serious concerns for SHRM and HR professionals. Specifically, the salary threshold would have been increased by more than 100 percent to $913 per week, or $47,476 per year. In addition, the final rule also provided for automatic salary threshold increases every three years. Throughout the rulemaking process, SHRM supported an update to the salary threshold, but the final rule's salary threshold increase went too far, too fast. Fortunately, on November 22, 2016, the United States District Court, Eastern District of Texas issued a preliminary injunction delaying the final rule's implementation date of December 1.

Chairman BYRNE. Thank you, Ms. Walters. And I thank all of you. Those were great statements.

We're now going to go to the question part of this proceeding, and we will start with a question from our distinguished Chairwoman, Ms. Foxx.

Ms. FOXX. Thank you, Mr. Chairman.

And I want to thank all of our witnesses here today. You've made some wonderful comments and shared very useful information with us, and I want you to know I appreciate your being here.

Mr. Brantley, I'd like to know a little bit more about the kinds of employees at institutions of higher education who would be affected by implementation of the overtime rule. Actually, I think I know something about it, having worked in an institution of higher—several institutions of higher education, but some others may not.

You mentioned resident directors in your written testimony as particularly unsuited to classification as hourly workers. Would you elaborate a little bit on that, and how would the services they provide to the students be negatively affected?

Mr. BRANTLEY. Thank you, Chairwoman Foxx. So most of us in this room have spent some time on a college campus, and as all of us know, the students don't exactly work on an 8 to 5 schedule. So as we think about the services that are provided to these students 24/7/365, no position is more impacted than a position like a resident director, who typically has a master's degree, may supervise a number of graduate assistants, a number of resident assistants, maintenance staff, office staff, et cetera. This person typically has an apartment or some other residence that's with the students, the idea being that this person has that integral connection to the students outside of the classroom.

If we implement the new regulations with a salary threshold of $47,476, the majority of our resident directors are paid a salary below that. One of the challenges with the current regulation is it doesn't include room and board, so all of that cannot be included as part of the compensation for our resident directors.

Also, as we encourage these individuals to have to track hours, is a casual conversation in the hallway with a student working hours? Is having a meal with students in the residence hall or in the dining room, is that working hours? The complexity is there. Asking these individuals to track their hours is all but impossible.

Ms. FOXX. Thank you very much.

Ms. Riner, as you've testified, entrepreneurs like yourself are being impacted by costly regulatory requirements. Time and resources have gone into ensuring compliance with regulatory requirements instead of growing businesses and creating jobs. Would you reflect on that a little bit more for us and for the folks listening?

Ms. RINER. Yes, Chairwoman Foxx. My own personal journey has been very discouraging, quite honestly. I have been trying to protect my business from the Department of Labor's regulations that they have applied to me. We believe it's been—they used the wrong standards in the *Fair Labor Standards Act*. And they actually used the independent contractor test, which, actually, they should have used the precedent set forth in the Supreme Court, which says that

you look at the economic reality of the situation and we use our common sense to look at the whole work activity.

So it has been very discouraging for me personally. It has hurt our ability to create business opportunities for our franchise owners. It's been a big distraction. It's cost us a lot of time and money. I'm a small business owner. I have three full-time employees in my office, also some part time. And so it's been quite a burden to bear to continue to operate our business and continue to grow.

Ms. FOXX. We understand that your attorney has estimated the penalties for repeated or willful violations could reach $3.6 million for your small business. Is that correct?

Ms. RINER. Yes, ma'am, that is correct. And it was a terrifying number to receive, quite actually. It would put us out of business. And so it has been worth fighting for, though, not only for my business, but for moms who I represent. I represent thousands of families, not only in Arkansas but across the country, who love our consignment events. It saves families a lot of money. And also, just small business owners. Honestly, I hear a lot of stories of small business owners that are experiencing this overregulation to the point of being put out of business, because a lot of them can't fight back.

Ms. FOXX. Well, bless you for exercising your civic responsibility in doing what you have done. And let's hope we can see some changes so that small business people like you will not be harassed by bureaucrats with too much time on their hands. Thank you very much.

I yield back.

Chairman BYRNE. Thank you, Chairwoman Foxx. She yields back.

Mr. Takano, you're recognized for five minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

It's curious to me that several witnesses and some of my Republican colleagues have said that the *Fair Labor Standards Act* is an outdated law from the 1930s that needs to be updated to reflect the modern workforce.

To me, it's no surprise, Mr. Stettner, that—well, I strongly supported the administration's updated overtime rule, but I want to make sure the Committee has an understanding of why an update to the salary threshold was long overdue.

What was the original purpose of the maximum hour provision in the *Fair Labor Standards Act*? Can you just review that for us?

Mr. STETTNER. First, to create more jobs. When you limit to 40 hours, rather than having so much overtime, you can create more jobs. Second, to allow for the balance between work and family. And third, to protect the workers' health.

Mr. TAKANO. So basically, when someone has to be paid overtime at time and a half or whatever, the employer has a choice: Do I pay this person overtime or do I hire another person to do that job?

Mr. STETTNER. That's correct.

Mr. TAKANO. That was the intent behind the law, was that, you know, you legally mandate that they get paid more for overtime, and then the employer has to decide whether that employee is—you know, it's worth it to that employer to keep that employee on

the job longer or hire someone else. Obviously, it will create more jobs if we have a standard.

Mr. STETTNER. That's correct. And I think it was during the Great Depression when there was a need for more employment. So let's put this into place. And I think that was the same hoped effect of the overtime—the new overtime rule was to, you know, inspire more employment.

Mr. TAKANO. So, you know, it's fair to say that, you know—so it's my understanding that the threshold used to be updated quite frequently, once every two to nine years between 1938 and 1975. But it's only been updated twice since 1975. Do you think that Congress envisioned only two updates to that threshold in 40 years?

Mr. STETTNER. No. The idea was for it to keep pace with only those employees to be exempted that are truly bona fide executive, administrative, and professional employees. To date, having a salary threshold of just $23,000, by any means and common sense, does not include individuals that are bona fide administratives and executives.

Mr. TAKANO. So administrators and executives, we have kind of tests to figure out and determine who those folks are, truly people who are managers, not people who are called managers who are actually doing, you know, work, so that we can tell the difference between somebody who's a manager and someone who's a line worker.

What effect, in your opinion, has that long delay had on the threshold's ability to accomplish the purpose of the FLSA?

Mr. STETTNER. I think the effect has been that many workers, particularly our young workers, aren't even familiar with the concept that they have a right to be paid time and a half. It's been so eroded that the overtime protections really have lost their value in the economy.

Mr. TAKANO. You mean to tell me, Mr. Stettner, that there's a whole generation of Americans out there, millennials, who don't know that they have a right to overtime pay?

Mr. STETTNER. Often they're told in their very first job, you're on a salary, you're being paid $28,000 per year, and you're not eligible for overtime. So it's just not a reality. The salary designation is used to avoid people's right to overtime, and it's created a generation of overworked Americans.

Mr. TAKANO. My God, if I were a millennial or part of this whole group of people that wasn't aware of this, because the law was not updated and I never felt the benefit of this updated threshold, I would begin to think that the economy was rigged against me. That the rules not being enforced meant that I as a little worker, that the rules somehow not being enforced, I mean, now that I'm awakened and know that, hey, this law has not—the threshold hasn't been updated, that the Obama administration was really trying to unrig this rigged economy that's rigged against the wage earner or, actually, in this case a salaried worker who, you know, doesn't meet that threshold anymore.

So, to me, enforcing the FLSA and regularly updating the law would have meant that many, many people, workers would have felt the benefit of being protected by these overtime protections.

The last update to the salary came in 2004. Do you believe, Mr. Stettner, that the 2004 update brought the salary threshold back to its intended level?

Mr. STETTNER. It was far below what had been in 1979, the last time it had been significantly updated. So that the update that was promulgated and is now enjoined really is getting towards the previous purchasing power of that update. It's by no means the maximum. The level has actually been much higher in the past. And really importantly, one of the policies that we really can do to help those middle income earners who are having the hardest struggle.

Mr. TAKANO. Well, thank you, Mr. Stettner. My time has run out, and I appreciate your responses. Thank you.

Chairman BYRNE. Thank you, Mr. Takano.

I now recognize myself for five minutes.

I'm going to give you a test like you had in college. It's going to be a one-word response and it's one of two words, agree or disagree. Okay. Listen to the statement and tell me if you agree or disagree with this.

Many of us have argued over the years that the rules and regulations implementing Federal wage and hour protections are outdated and overly complex and, as a result, undermine the strength and competitiveness of the American workforce.

Ms. Riner, agree or disagree?

Ms. RINER. Agree.

Chairman BYRNE. Mr. Stettner, agree or disagree?

Mr. STETTNER. Disagree.

Chairman BYRNE. Okay. Mr. Brantley, agree or disagree?

Mr. BRANTLEY. Agree.

Chairman BYRNE. Ms. Walters?

Ms. WALTERS. Agree.

Chairman BYRNE. Okay. See, you all did well. You did well in college.

Ms. Riner, I understand legislation was introduced last week in the House and Senate to amend the *Fair Labor Standards Act* to clarify that volunteers of certain children's consignment events are not employees under the law. Do you believe legislation is necessary to provide your business with the certainty it needs to operate without the threat of litigation going forward?

Ms. RINER. I do, Chairman. We're very thankful to Senator Boozman, Senator Cotton, and Congressman Hill for reintroducing the *Children's Consignment Event Recognition Act* for us. And we're very grateful for it.

We do have a case going on in court right now that we're battling, but we feel that for long term, we really do need the protection for the industry. It's been growing. This industry has been around, actually, for 30 years, and it's serving thousands of families. And we feel that in order to protect what we do and what families love, that we do need this legislation in place.

Chairman BYRNE. When you had your meetings with the people with the Wage and Hour Division, did you tell them, this is going to put me out of business?

Ms. RINER. Well, no. Well, I did say that I felt like it was unfair.

Chairman BYRNE. What did they say when you said it's unfair?

Ms. RINER. That I needed a lobbying group.

Chairman BYRNE. A lobbying group?

Ms. RINER. They asked me if I had one, actually.

Chairman BYRNE. So let me get this straight. A Federal agency recommended that you get a lobbyist?

Ms. RINER. Well, they just asked if I had support. And at the time, it was myself. And so I realized that if I wanted to protect my business and protect the industry, that I really had no choice but to fight.

Chairman BYRNE. Ms. Walters, can you talk more about the burdens that small businesses face in trying to ensure that they have properly classified their workers?

Ms. WALTERS. I think I can, Mr. Chairman. How many minutes do I have?

Chairman BYRNE. A minute and a half.

Ms. WALTERS. Gosh, burdens come from a variety of perspectives. First is, as some folks have mentioned here today, just getting the initial classification of whether someone is an independent contractor versus an employee is tantamount and preliminary. We have IRS guidance, Department of Labor's Administrative Interpretation. And many States—I hale from Maryland. Our Department of Labor, Licensing, and Regulation doesn't follow either of those. They use their own test.

Then next, trying to, again, properly classify as exempt or nonexempt. We have at least 14 States today, I believe, that have their own white-collar or EAP regulations. So you have to do that analysis under Federal as well as State analyses. And hopefully, if you get that right, then there are myriad, under the FLSA, challenges of compliance with regard to travel time, idle time, training time. Then we have State laws of sick pay and just a whole lot of compliance issues when it comes to properly classifying in the first place and paying in the second place.

Chairman BYRNE. And most of these small businesses don't have a designated single person that just does human resources for them. They can't afford to have that. Is that your experience?

Ms. WALTERS. That's what I find, yes, sir. It's sort of the office manager, payroll clerk, HR administrator, and perhaps several other hats.

Chairman BYRNE. So that person has to pull away from their other duties—first of all, understand this ever-changing law that gets more complex by the day, and then figure out, all right, how do I apply that in my workplace setting? That's got to detract from productivity at that company and their ability to grow.

Ms. WALTERS. It likely does not enhance it, yes, sir.

Chairman BYRNE. Mr. Brantley, very quickly, the Department's overtime rule has a provision that indexes the salary threshold for exempt employers, which will likely increase the threshold every three years. In your judgment, does the Department of Labor have the statutory authority to index the threshold, and what practical problems would automatic updates cause for colleges and universities?

Mr. BRANTLEY. Our opinion is that they do not have the authority to index and make changes every three years. As we think about the changes that are going on in not just the economy but for employers overall, we really strongly believe that any change to

the threshold should be vetted and that we should be given the opportunity to provide comment and feedback as to what that impact might be for not just colleges and universities but employers overall.

Chairman BYRNE. Very quickly, because we're actually out of time, but give me just real quick, what would be the effect on colleges and universities if we continue to do that?

Mr. BRANTLEY. The effect on colleges and universities with tight budgets and decreasing funding from public institutions, et cetera, could mean additional funds that are just not available to dedicate to a salary threshold that really is not applicable in most circumstances.

Chairman BYRNE. Thank you.

I now would turn over for five minutes to the distinguished lady from North Carolina and my cochair of the HBCU Caucus, Ms. Adams.

Ms. ADAMS. Thank you, Chairman Byrne and Ranking Member Takano.

And thanks to our witnesses for—thank you for your testimony today.

Women make up half of the country's workforce, yet the Census Bureau reported that the gender wage gap between full-time year-round working men and women, women make only 80 percent of the median wage men earn. While working women may have had great strides since 1967, when they earned only 58 percent of what men earned for full-time year-round work, there's still a long way to go before true pay equity is achieved.

Mr. Chair, I'd like to enter into the record a letter from the nonpartisan National Women's Law Council, which details the challenges that women face in the workplace.

Chairman BYRNE. Without objection, so ordered.

[The information follows:]

February 16, 2017

The Honorable Virginia Foxx
Chairwoman
House Committee on Education and the Workforce

The Honorable Robert "Bobby" C. Scott
Ranking Member
House Committee on Education and the Workforce

The Honorable Bradley Byrne
Chairman
House Committee on Education and the Workforce, Subcommittee on Workforce Protections
Washington, DC 20515

The Honorable Mark Takano
Ranking Member
House Committee on Education and the Workforce, Subcommittee on Workforce Protections
Washington, DC 20515

Dear Representatives Foxx, Scott, Byrne and Takano:

The National Women's Law Center is pleased to submit this letter in relation to the Subcommittee on Workforce Protections' hearing, "Federal Wage and Hour Policies in the Twenty-First Century Economy." The National Women's Law Center has worked for 45 years to advance and protect women's equality and opportunity, and has long worked to remove barriers to equal treatment of women in the workplace, including by ending pay discrimination against women.

Effective wage and hour polices must address the reality of the twenty-first century economy and of those who work. Today women are half the country's workforce, and they are breadwinners or co-breadwinners in two-thirds of American families. The previous administration took significant steps to remove barriers to women's opportunity in the workplace and strengthen enforcement of current of current wage and hour and anti-discrimination protections. Instead of undoing this important work and moving backward, Congress and this administration should further improve current policies to ensure that women receive equal pay, which is critical to their economic security and that of the families who depend on their income.

Women working full time, year round continue to confront a stark wage gap, typically making only 80 percent of the median annual wages made by men working full time, year round.[1] The wage gap is even worse when we look specifically at women of color: African American women typically are paid only 63 percent, Native American women only 58 percent, and Latinas only 54 percent of the wages typically paid to white, non-Hispanic men for full-time,

[1] NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE (Sept. 2016), *available at*

year-round work.[2] This wage gap has remained stagnant for nearly a decade.[3] The result is that a woman working full time, year round stands to lose $418,800 over a 40-year period due to the wage gap.[4] To make up this lifetime wage gap, a woman would have to work ten years longer than her male counterpart.[5]

A range of factors contributes to the pay gap, including pay discrimination between employees of different genders who are doing the same job.[6] Women are still paid less than men in nearly every occupation;[7] workers in low-wage and higher-paying occupations face a gender wage gap.[8] Studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.[9] Conscious and unconscious stereotypes about working women remain a factor in this unexplained gap. Another key driver of the wage gap is the overrepresentation of women in low-wage jobs, including minimum wage and sub-minimum wage positions, and underrepresentation in high-wage ones. Nearly two-thirds of minimum wage workers and tipped workers in the United States are women — and the minimum wage falls far short of what it takes to live above the poverty line.[10] Women also are concentrated in occupations

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http://nwlc.org/resources/wage-gap-stagnant-nearly-decade/ [THE WAGE GAP IS STAGNANT].

[2] *Id.*

[3] *Id.*

[4] *Id.* Lifetime wage gaps for women of color are significantly larger: African American women lose $840,040, Native American women $934,240; and Latinas $1,043,800. Jasmine Tucker, "The Wage Gap Isn't Just Sexist – It's Racist Too," NAT'L WOMEN'S LAW CTR., Oct. 6, 2016, *available at* https://nwlc.org/blog/the-wage-gap-isnt-just-sexist-its-racist-too/.

[5] *Id.*

[6] Blau, F. D. & Kahn, L.M, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), *available at* http://www.nber.org/papers/w21913.pdf; *see* NAT'L WOMEN'S LAW CTR., FIFTY YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY (2015), *available at* http://nwlc.org/resources/50-years-counting-unfinished-business-achieving-fair-pay/.

[7] Hegewisch, A. & Ellis, E., *The Gender Wage Gap by Occupation 2014 and by Race and Ethnicity*, INST. FOR WOMEN'S POLICY RESEARCH (Apr. 2015), *available at* http://iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2014-and-by-race-and-ethnicity; Schieder, S. & Gould, E., *"Women's work" and the gender pay gap* 3, ECONOMIC POLICY INST. (July 2016), *available at* http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/.

[8] NAT'L WOMEN'S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Sept. 2016), *available at* http://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/; Jena, A.B., et al., *Sex Differences in Physician Salary at U.S. Public Medical Schools*, 176 JAMA INTERN. MED. 1294 (2016), http://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2532788.

[9] Blau & Kahn, *supra* note 6.

[10] NAT'L WOMEN'S LAW CTR., RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (Oct. 2016), *available at* http://nwlc.org/resources/raise-the-wage-women-fare-better-in-states-with-equal-treatment-for-tipped-workers/. Full-time earnings of $14,500 at the federal minimum wage of $7.25 leave a family of three thousands of dollars below the poverty line. NAT'L WOMEN'S LAW CTR., WOMEN AND THE MINIMUM WAGE: STATE BY STATE (Aug. 2016), *available at* http://nwlc.org/resources/women-and-minimum-wage-state-state/.

that are female-dominated, such as child care workers, family caregivers, or servers, which pay low wages *simply because* women are the majority of workers in the occupation.[11]

Congress could take a few immediate and effective steps to ensure equal pay. Congress should introduce and pass the Paycheck Fairness Act, a commonsense solution that would help employees to uncover and challenge pay discrimination, prohibit retaliation against employees who discuss their salaries, improve remedies for employees who have been discriminated against, and ensure employers are provided with effective incentives to comply with the law. Efforts to close the wage gap would be strengthened further by providing that women should receive equal pay for "similar" work, which recognizes that women's work is devalued just because women do it. Congress should introduce and pass a related bill, the Pay Equity for All Act, which would prevent prospective employers from asking applicants to disclose their prior salary; relying on a job applicant's prior salary in hiring or setting pay perpetuates prior discrimination and compounds gender and racial wage gaps. Congress also should raise the federal minimum wage and ensure that tipped workers are entitled to the same minimum wage as everyone else, which would help close the wage gap and lift women and the families they support out of poverty.

Congressional action to increase wages, strengthen legal protections and improve enforcement to secure real progress on equal pay is more important than ever, given the nomination of Andrew Puzder, a millionaire fast-food CEO, to be the Secretary of Labor. Mr. Puzder would be responsible for directing the Department of Labor's interpretation and enforcement of a number of laws vital to women's economic security and right to be free from workplace discrimination. Yet he has consistently and publicly expressed hostility to these protections, including wage and hour provisions[12] in the Fair Labor Standards Act, the Family and Medical Leave Act, and executive orders prohibiting employment discrimination by federal contractors and setting labor standards for federal contractors' employees, including protection of the right to earn paid sick days.[13] These policies are essential to closing the gender wage gap: they remove barriers to women's employment opportunity, including sex discrimination; raise women's wages; allow women to meet caregiving responsibilities without sacrificing their employment; and ensure women's health and safety so they can

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[11]Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (April 3, 2010), *available at* http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html. A study of more than 50 years of data revealed that when women moved into a field in large numbers, wages declined, even when controlling for experience, skills, education, race and region. Levanon, A., et al., *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data*, SOCIAL FORCES (Dec. 2009), *available at* http://sf.oxfordjournals.org/content/88/2/865.short.

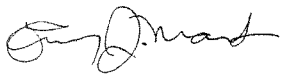
[12]Mr. Puzder has consistently opposed raising the minimum wage, and opposes the current Department of Labor's rule expanding eligibility for overtime pay, which would benefit an estimated 12.5 million modestly paid U.S. workers. *See* NAT'L WOMEN'S LAW CTR., ANDREW PUZDER'S RECORD: WHAT'S AT STAKE FOR WOMEN (Jan. 2017), *available at* http://nwlc.org/resources/andrew-puzders-record-whats-at-stake-for-women/.

[13]*Id.*

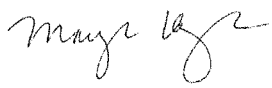
continue to support their families. Given his record, Mr. Puzder cannot be trusted to pursue the best interests of working women.

We urge the Subcommittee to resist any efforts to undo the important progress on this issue. We call on the Subcommittee to take timely and effective action to close gender and racial wage gaps and ensure federal wage and hour laws address the reality and needs of our current workforce. Women can't afford to be shortchanged any longer, and neither can the millions of families who rely on women's income.

Sincerely,



Emily Martin
General Counsel & Vice President for Workplace Justice



Maya Raghu
Senior Counsel & Director of Workplace Equality

Ms. ADAMS. Thank you.

According to a study by the National Women's Law Center, African-American women typically are paid only 63 percent, Native American women only 58 percent, and Latinas only 54 percent of the wages typically paid to white non-Hispanic men for full-time year-round work. Researchers cite conscious and unconscious stereotypes about working women and the overrepresentation of women in low-wage jobs, including minimum wage and subminimum wage positions, and underrepresentation in high-wage ones. Nearly two-thirds of minimum wage workers and tipped workers in the United States are women.

Congress should introduce and pass the *Paycheck Fairness Act*, a commonsense solution that would help employees to uncover and challenge pay discrimination, prohibit retaliation against employees who discuss their salaries, improve remedies for employees who have been discriminated against, ensure employees are provided with effective incentives to comply with the law, and to ensure equal pay.

Ms. ADAMS. In addition to an increase in minimum wage, legislators should prevent prospective employers from asking applicants to disclose their prior salary on a job application, as it often perpetuates prior discrimination and it compounds gender and racial wage gaps.

Mr. Stettner, as more and more women participate in the workforce as either primary breadwinners or supplements to their family's income, what are the income impacts of systematically low wages for women? And what are some initiatives that Congress should support to reduce or eliminate pay disparities among women and individuals of color?

Mr. STETTNER. Women and people of color are disproportionately impacted by the growth in the low-wage service sector and would be more likely—are the predominant beneficiaries of an increase in the minimum wage.

As the Congresswoman mentioned, strengthening the ability of women to be able to assert the right to equal pay, having the same rights around discrimination that there are in race-based cases, and the nondisclosure of salaries—these are all steps that can be taken to decrease the gender and racial pay gap.

Ms. ADAMS. Thank you.

So do you support protections for workers who choose to disclose and discuss their salaries with coworkers? And if so, can you explain why?

Mr. STETTNER. In order to defend your right to equal pay, you need to know what your colleagues are working. And many firms have kept that data away from other employees, and this makes it impossible for women workers to assert their rights.

Ms. ADAMS. Thank you very much for your responses.

And, Mr. Chairman, I yield my time back. Thank you.

Chairman BYRNE. Thank you.

And the chair now recognizes for five minutes Ambassador Rooney.

Mr. ROONEY. Thank you, Mr. Chairman.

Ms. Riner, your heart-moving story of bureaucratic abuse reminds me of something President Ford said years ago, where he

said a government that's big enough to give you everything you want is big enough to take away everything you have. And it sounds like the Department of Labor has tried assiduously to do that to you.

I'm moved by that, and I wonder if you could just give a quick comment on what that out-of-control, abusive bureaucracy says about America right now and whether the word "opportunity" still exists for us average Americans trying to build up a great country.

Ms. RINER. Well, you know, I grew up the daughter of an infantry Army officer. I love our government, I love our country. And so I was very surprised as this process rolled out with me. We were very cooperative with the Department of Labor. And so I will tell you that it has been very disheartening and discouraging, personally, to me and to my family, to my franchise owners. A franchising system is really like a family, and so, as they have watched me walk through this and try to protect our company, it has been very disappointing and discouraging.

And, you know, also, as we have the issue of joint employer, that's a whole other battle that we're fighting that we're discouraged about. It really creates confusion and, again, discouragement, because it creates this confusing liability for a franchisor, as we potentially could be responsible for all of the employees of our franchisees—in my case, even my consignor volunteers.

So it has been discouraging, but it also, in some ways, has been encouraging. As I have fought, so many people have come along beside us and encouraged us and supported us. Still no one has ever complained against our company. Thousands and thousands of families love our business model. Many moms and grandmoms and dads love what we do.

Mr. ROONEY. Thank you very much.

Ms. Walters, we have 20,000 unfilled computer programming jobs in the State of Florida right now. This law, the FLSA, was passed in 1938 in an era of surplus labor, manufacturing and farm economy where people didn't move. And now we have, in 2016, scarcity of labor, rapidly mobile employment base, and a service economy.

So I'd like you to elaborate just a tad bit on that last comment you made about how obsolete and backward-looking the FLSA is relative to the conditions that we face now and that our young people are going to face in the future.

Ms. WALTERS. Well, thank you for the question.

I think an example that comes to mind is we have a lot of employees that, again, enjoy the flexibility that they have today to work from home, telecommuters—great example—and how do we track the time that they are or are not working. We need to track it. They need to be paid. I think we all agree with that. If you provide work for us, we need to pay you for that time. The question is how do we capture that information.

In real life, an employer has a large percentage of their employee population work from home. Other employees coming into work every day is a more traditional model. And research shows employee engagement increases productivity. We've talked about increased productivity. Face-to-face interaction with our employees is very important.

So the employer asked the telecommuters, "Would you come into the office once a week so we can have a team meeting and stay in touch?" Those employees said they want to be paid for the time that they traveled from their home office to the regular office. The other employees said, "Well, that's not fair. We don't get paid for that time. *Portal-to-Portal Pay Act*. We get paid only after we arrive at the first office." And so the regulations currently are not clear whether that time should be paid or should not be paid.

So there's a lot of dialogue I think we can have, should have, and need to have to figure out how to strike a really, really good balance on this.

Mr. ROONEY. Thank you.

I yield back my time.

Chairman BYRNE. Thank you, Ambassador.

Ms. Shea-Porter, welcome to the subcommittee. And you are recognized for five minutes.

Ms. Shea-Porter. Thank you very much. It's an honor to be back.

And I thank all the witnesses today.

Enforcement in industries with high rates of violations is an efficient use of the Department's resources and ensures that workers who do not have the resources to bring a claim are protected.

Mr. Chair, I'd like to enter into the record a letter from the nonpartisan National Employment Law Project.

Chairman BYRNE. Without objection, so ordered.

Ms. Shea-Porter. Thank you.

[The information follows:]

Christine L. Owens
Executive Director

www.nelp.org

NELP National Office
75 Maiden Lane
Suite 601
New York, NY 10038
212-285-3025 tel
212-285-3044 fax

Washington DC Office
2040 S Street NW
Washington, DC 20009
202-683-4873 tel
202-234-8584 fax

California Office
405 14th Street
Suite 401
Oakland, CA 94612
510-663-5700 tel
510-663-2028 fax

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000 tel

February 16, 2017

The Honorable Virginia Foxx
The Honorable Robert Scott
The Honorable Bradley Byrne
The Honorable Mark Takano
U.S. House of Representatives
Committee on Education and the Workforce

Dear Representatives Foxx, Scott, Byrne and Takano:

On behalf of the National Employment Law Project (NELP), a non-profit and non-partisan 501(c)(3) organization that advocates on behalf of low-wage and unemployed workers, I ask that this letter be made part of the official record of the February 16, 2017 hearing of the Subcommittee on Workforce Protections entitled "Federal Wage and Hour Policies in the Twenty-First Century Economy."

NELP has extensive expertise on the enforcement of our nation's wage and hour laws, and particular expertise in the widespread and ever-growing practice of employers misclassifying workers as independent contractors. These are areas of significant concern which require a vigilant and strategic Wage and Hour Division at the US Department of Labor in order to ensure that workers are paid the wages to which they are entitled.

Enforcement of the Fair Labor Standards Act

Approximately 42 percent of workers in America earn under $15 per hour.[1] They are nursing assistants, home care workers, janitors, waiters and waitresses, cashiers, truck drivers, auto workers, and many others who keep our families and businesses going.[2] They are also disproportionately women, people of color, and immigrants.[3] As the real value of wages generally continues to decline[1] and income inequality worsens, ensuring that low-wage workers are paid the minimum wage and overtime required by law must be a priority.

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[1] Irene Tung et al, The Growing Movement for $15 (Nov. 2015) at 1, http://nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf.
[2] *Id.* at 6–8.
[3] Annette Bernhardt et al, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009) at 9, http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1; see also supra note 1.

A seminal 2009 study by the National Employment Law Project and other academic partners surveyed over 4,000 low-wage workers and found that 26 percent were paid less than the required minimum wage in the previous work week, and nearly two thirds experienced at least one pay-related violation in the previous week, such as failure to pay overtime, not being paid for all hours worked, and stolen tips.[4] That study also found that apparel and textile manufacturing, personal and repair services, and private households yielded the highest minimum wage violations —all exceeding 40 percent. Child care workers experienced the highest violations of any job, with 66 percent reporting not being paid the minimum wage in a given week and 90 percent facing overtime violations. The report estimates that workers surveyed lost an average of 15 percent, or $2,634, of their annual wages due to workplace violations.

A more recent NELP study of business outsourcing found that the restructuring of employment arrangements through multi-layered contracting, the use of staffing or temp firms, franchising, and other means can result in poor working conditions and a lack of corporate responsibility.[5] The report focused on non-compliance in some of our largest and fastest-growing sectors. In the fast food industry, for example, nearly 90 percent of fast food workers suffered some sort of wage theft on the job. In the warehouse and logistics industry, 23.1 percent suffered minimum wage violations and 67.8 percent suffered overtime violations. About 80 percent of port truck drivers who transport goods from ports to railheads or logistics firms are misclassified as independent contractors.

Given these realities, we need a strong US Department of Labor that will engage in strategic and aggressive enforcement of the nation's wage and hour laws. An effective enforcement scheme must protect workers who come forward to raise complaints, and must also include strong public and private enforcement tools to better guarantee compliance; and help ensure collection of owed wages.

Strategic enforcement means not just relying on complaints that walk through the proverbial doors of DOL, but instead, using all available data to determine enforcement priorities that will have impact beyond just one employer. In recent years, the Wage and Hour Division has focused on particular industries that employ large numbers of vulnerable workers – people who earn low wages, who probably lack good knowledge of their rights, and are too scared of retaliation to file a formal complaint about unpaid wages. Industries that meet these criteria hotel and motel, agriculture, janitorial services, fast food and full service restaurants, home care and other healthcare segments, retail and logistics, and some segments of manufacturing like garment production.

The benefits of strategic enforcement is that it is focused on changing the employer practices that lead to violations. These kinds of investigations require carefully mapping business relationships, figuring out how to use enforcement resources to have the greatest impact on an industry as a whole, so that the deterrence value goes beyond the one employer being investigated.

In addition to making extensive use of strategic enforcement, in order for DOL to adequately address wage theft in all its forms, it must dedicate sufficient resources and staff to enforce the law. Due to insufficient resources, public enforcement of wage and hour laws have significant difficulty keeping up

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[4] Id.

[5] Catherine Ruckelshaus, et al, "Who's The Boss: Restoring Accountability for Labor Standards in Outsourced Work," May, 2014, http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

with violations. On the federal level, the U.S. Department of Labor, which is responsible for enforcing federal wage, child labor and other laws has just over 1,000 investigators nationwide who are tasked with enforcing these laws in more than 7 million workplaces.[6] Because of these scarce resources, the average employer has just a .001% chance of being investigated by U.S, DOL Wage and Hour Division or Occupational Safety and Health Administration in any given year.[7] And on the state level, according to a nationwide survey, states have the equivalent of one inspector for every 146,000 workers. Most states have fewer than ten investigators.[8]

An enforcement team must, at a minimum, be able to issue rules and regulations; conduct thorough investigations; perform outreach and education geared to both workers and employers; resolve complaints in a timely manner from start to finish; and recover the wages owed to workers. A well-resourced investigation and enforcement team should develop programs seeking to ensure that employers comply with the law; it should also collect and analyze data to identify gaps and strategically target enforcement. Too many workers are afraid to report violations, worrying that they will lose their jobs, or worse, if they do so. Absent a strategic enforcement agenda, geared toward high-violation industries with high concentrations of vulnerable workers, DOL and the Wage and Hour Division cannot succeed in performing their missions.

And given DOL's very limited resources, it is clear that community-based organizations, who have ties to workers in specific industries and sectors, as well as their roots in certain racial or ethnic communities, can assist enforcement through outreach and education; detection and reporting of violations; filing complaints; and identifying high-violation industries and employers for proactive investigations.[9] As NELP outlines in a 2011 report, some specific ways to engage community groups include:[10]

- Conferring regularly with community advocates, state enforcement agencies, and other stakeholders to discover community needs and to work out partnerships.
- Convening task forces on specific problem areas or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways.
- Designating staff to act as liaisons to immigrant worker groups, attend events, and act as a resource.

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[6] See FY 2011 Congressional Budget Justification from U.S. DOL Wage and Hour Div., http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf (stating that for 2011, WHD expect to have 1,006 full time investigators, a number that has not changed significantly).

[7] U.S. DOL Comprehensive FLSA Powerpoint, available at www.dol.gov/whd/flsa/comprehensive.ppt (stating that more than 130 million workers in more than 7 million workplaces are covered by the Fair Labor Standards Act).

[8] Policy Matters Ohio, Investigating Wage Theft: A Survey of the States, 2010, http://www.policymattersohio.org/WageTheft2010.htm.

[9] For a more detailed discussion of the importance of community-based partners, see Diego Rondón Ichikawa and Rebecca Smith, Delivering $15: Community-Centered Wage and Hour Enforcement in Seattle (Oct. 2014) at 12–15, http://www.nelp.org/content/uploads/2015/03/Delivering-15-Community-Centered-Wage-and-Hour-Enforcement-Seattle.pdf.

[10] National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (2011) at 39, http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf.

- Implementing community-safeguarding models that designate certain stakeholders to educate the community about the agencies' priorities and policies, especially in underserved areas.

Next, when workers report violations, they should recover all the wages they are owed in addition to damages that compensate the worker for the time, effort, risk, and costs associated with reporting unpaid wages as well as costs resulting from not receiving those wages in the first place (i.e. late fees on monthly bills). The Fair Labor Standards Act allows workers to recover double the amount of wages owed (and some allow for triple the amount of wages owed or a fixed amount for each day a violation took place). Without such compensation, there would be little to deter an employer from violating the law—violating employers would only have to pay the wages they were required to pay in the first place.

Anti-retaliation protection is also essential for effective wage enforcement. Workers need strong protection so they will not be vulnerable to employer harassment and retaliation when they report a violation. This is especially important because enforcement relies heavily on workers coming forward and filing complaints. Retaliation is common—a national survey found that 43 percent of workers who complained to their employer about their wages or working conditions experienced retaliation.[11] A national survey found that 20 percent of workers never made a complaint because they feared retaliation or thought it would not make a difference.[12] DOL must pursue the fullest extent of penalties on employers when they engage in retaliation.

Misclassification of Employees as Independent Contractors

With increasing frequency, employers misclassify employees as "independent contractors," either by giving their employees an IRS Form 1099 instead of a Form W-2, or by paying the employee off-the-books and providing no tax forms or tax reporting and withholding. The "advantages" of this approach are many including: (1) evading responsibility for compliance with virtually all employment laws; (2) saving upwards of 30% on personnel costs including taxes, FICA, workers compensation and unemployment insurance; and (3) gaining unfair competitive advantages in bidding processes.

Misclassification is one of the trends that is most damaging to the goal of fostering a good-jobs economy. At NELP, we see janitors, home care workers, construction laborers and drywallers, cable installers, delivery persons, and even restaurant servers – these are the workers we see who are called non-employees by their employers. They are not running their own businesses by any definition. They want to work and they too often accept whatever arrangement gets them a job. And not coincidentally, the same occupations with high rates of independent contractor misclassification are among the jobs with the highest numbers of workplace violations.[13]

Workers lose out on labor and employment protections including workers' compensation, unemployment insurance, fair pay, and health and safety safeguards. They also bear a tax burden that

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[11] Id. at 55.
[12] Id.
[13] *See,* National Employment Law Project, *Holding the Wage Floor,* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf

their employers are supposed to incur. It hurts law-abiding employers who treat their workers as employees but who cannot compete with those who perpetrate fraud. This has resulted in a race to the bottom and rewards cheaters. This affects the quality of what should be middle class jobs that could stimulate our economy.

This is no small problem. A 2000 study commissioned by the US Department of Labor found that up to 30% of firms misclassify their employees as independent contractors.[14] Many states have studied the problem and find high rates of misclassification, especially in construction, where as many as 4 in 10 construction workers were found to be misclassified.[15]

But as shocking as these numbers are, most of these studies do not capture the so-called "underground economy," where workers are paid off-the-books, sometimes in cash.[16] These workers are *de facto* misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules. Many of these jobs are filled by immigrant and lower-wage workers.[17] This type of payroll fraud is common in the following industries: construction,[18] day labor,[19]

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[14] Lalith de Silva *et al.*, "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs" i-iv, *prepared for* U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[15] *See* Fiscal Policy Institute, "New York State Workers Compensation: How Big is the Shortfall?" (January 2007); Michael Kelsay, James Sturgeon, Kelly Pinkham, "The Economic Costs of Employee Misclassification in the State of Illinois" (Dept of Economics: University of Missouri-Kansas City: December 2006); Peter Fisher *et al*, "Nonstandard Jobs, Substandard Benefits", Iowa Policy Project (July 2005); Francois Carre, J.W. McCormack, "The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004); State of New Jersey, Commission of Investigation, "Contract Labor: The Making of an Underground Economy" (September 1997).

[16] Bear Stearns in 2005 estimated that the U.S. is losing $35 billion annually due to off-the-books employment. Justich and Ng, "The Underground Labor Force is Rising to the Surface," at p. 3, Bearns Stearns Asset Management (2005).

[17] Francois Carre, J.W. McCormack, "The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004), at p. 8.

[18] Workers Defense Project, "Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry" (2009); Francois Carre, J.W. McCormack, *et al.*, "The Social and Economic Cost of Employee Misclassification in Construction" 2, Labor & Worklife Program, Harvard Law School and Harvard School of Public Health, Dec. 2004, http://www.faircontracting.org/NAFCnewsite/prevailingwage/pdf/Work_Misclass_Stud_1.pdf

[19] Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States* (January 2006).

janitorial and building services,[20] home health care,[21] agriculture[22], poultry and meat processing,[23] high-tech,[24] delivery,[25] trucking,[26] home-based work,[27] and the public[28] sectors.
This isn't a faceless problem. Here are but a few stories of how misclassification plays out in the real world for low-wage workers:

- Faty Ansoumana, an immigrant from Senegal, worked as a delivery worker at a Gristede's grocery store in midtown Manhattan. He worked as many as seven days a week, 10-12 hours a day and his weekly salary averaged only $90. He and his fellow delivery workers, who had similar pay and hours, were all hired through two middlemen labor agents, who in turn stationed the workers at grocery and pharmacy chain stores throughout the City. The workers all reported directly to the stores and provided deliveries pursuant to the stores' set delivery hours and under the stores' supervision. Many delivery workers were required to bag groceries and to do other non-delivery work, including stocking shelves. When NELP challenged the abysmally low pay, the stores said the workers were not their employees, and the labor brokers said the deliverymen were independent contractors.[29] We were able to recover $6 million for the over 1,000 workers in the lawsuit, but only after overcoming the stores' claims that they were not responsible.

- Janitors from Central and South America and Korea were recruited by a large building services cleaning company, Coverall, Inc., to clean office buildings in MA and other states. The janitors were "sold" franchise agreements for tens of thousands of dollars, permitting them to clean certain offices assigned by Coverall. The janitors were told where to clean, what materials to use, and were not permitted to set their own prices for the cleaning services. When one janitor quit when she couldn't make ends meet, she applied for unemployment benefits in MA and was told she was an "independent contractor" and not eligible. She challenged that decision and

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[20] *See Bulaj v. Wilmette Real Estate and Management Co., LLC*, 2010 WL 4237851 (N.D.Ill.2010); *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006); *Vega v. Contract Cleaning Maintenance*, 10 Wage & Hour Cases 2d (BNA) 274 (N.D. IL 2004).
[21] *See Crouch v. Guardian Angel Nursing, Inc.*, 2009 WL 3737887 (M.D.Tenn.2009); *Bonnette v. Cal. Health & Welfare Agcy.*, 704 F.2d 1465 (9th Cir. 1983).
[22] *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1988).
[23] *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 30.
[24] *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996).
[25] *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).
[26] *See* Smith, Bensman, Marvy, "The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports," (2010), http://nelp.3cdn.net/000beaf922628dfea1_cum6b0fab.pdf; Steven Greenhouse, The New York Times, *Clearing the Air at American Ports*, http://www.nytimes.com/2010/02/26/business/26ports.html.
[27] *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 31.
[28] Phillip Mattera, "Your Tax Dollars at Work... Offshore," Good Jobs First (July 2004) http://www.goodjobsfirst.org/publications/Offshoring_release.cfm.
[29] *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).

Massachusetts' Supreme Judicial Court ruled in her favor. NELP wrote an *amicus* brief in Coverall and provided assistance.[30]

- Home health care workers in Pennsylvania were hired as employees by a home health care agency to place them in individual homes, where they cared for elderly and disabled people. The employees were not paid overtime or for their time spent traveling from household to household during their workdays, and they brought a lawsuit with NELP's help to claim their unpaid wages. Several months after the lawsuit was filed, the home care agency told each of these employees that they had to sign an agreement calling them "independent contractors" if they wanted to keep their jobs. Nearly all of the workers did so to keep their jobs, even though none of the other aspects of their job conditions, pay, or assignment and direction changed, and none was running an independent business.[31]

Workers and high-road businesses aren't the only victims. Federal and state governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Several government studies document the extent to which misclassification drains federal revenues:

- A 2000 study commissioned by the U.S. Department of Labor (DOL) – the "Planmatics" study – found that misclassification exacts an enormous toll: misclassifying just one percent of workers as independent contractors would cost unemployment insurance (UI) trust funds $198 million annually.[32]
- A 2009 report by the Government Accountability Office (GAO) estimated independent contractor misclassification cost federal revenues $2.72 billion in 2006.[33]
- In 2012 California's Employment Development Department's (EDD) Tax Branch conducted 4,290 audits and investigations, resulting in assessments totaling $230.6 million, and identifying 89,063 unreported employees. EDD's Compliance Development Operations which concentrates on the underground economy, conducted 2,600 joint inspections,

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[30] *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006).

[31] *Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown*, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10.

[32] Lalith De Silva, *et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs,* Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[33] U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), http://www.gao.gov/products/GAO-09-717. See also, Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, and Agency-Wide Employment Tax program and Better Data are Needed* (February 4, 2009), http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf (explaining that "Preliminary analysis of Fiscal-Year 2006 operational and program data found that underreporting attributable to misclassified workers is likely to be markedly higher than the $1.6 billion estimate from 1984.")

identified 13,226 previously unreported employees, assessed $36 million in payroll tax assessments and assessed over $9 million on fraud cases in 2012.[34]

- The New York Joint Enforcement Task Force on Employee Misclassification said in February 2013 that since its inception in 2007, it has identified over 88,700 instances of employee misclassification and discovered over $1.4 billion in unreported wages and conducted 142 joint sweeps. In 2012, the JETF identified over 20,200 cases of employee misclassification; discovered over $282.5 million in unreported wages; and assessed over $9.7 million in unemployment insurance taxes. [35]

Conclusion

The challenges facing our nation's workers are significant, and the methods by which they are being denied the wages they have earned are extensive and varied. It is more important than ever before that DOL's Wage and Hour Division has sufficient resources to combat wage theft in all the ways that it happens, and that it uses its resources as strategically as possible

Thank you for the opportunity to submit this letter to the official record.

Sincerely,

Christine L. Owens
Executive Director

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[34] California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities*, report to the California Legislature (June 2013), http://www.edd.ca.gov/about_edd/pdf/Fraud_Deterrence_and_Detection_Report13.pdf.

[35] *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, (February 1, 2013), http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf.

Ms. Shea-Porter. As this letter explains, during the Obama administration, Department of Labor directed its Wage and Hour enforcement investigations towards industries with vulnerable workers. These industries include hotel and motel work, agriculture, janitorial services, garment manufacturing, and the restaurant industry.

And I'd like to stop for a second and say that I worked in many, many restaurants through high school and college, and I can assure you that we did not receive proper wages in so many of those places, and we didn't get our breaks either. So this does happen, and that's why we need to be vigilant. I recognize that sometimes, you know, there's overstepping, but we do have a problem, and there are a large number of people in this country who suffer because of this.

This is especially critical for workers who may be afraid to come forward or may not know. The Department of Labor successfully rescued over $1.5 billion in back wages for 17 million workers between 2009 and 2015. In fiscal year 2015 alone, the Wage and Hour Division investigations resulted in more than $246 million in back wages and helped over 240,000 workers. And we're talking about workers who really must have this income to take care of themselves and their families.

Under the Obama administration, the average back-wage recovery per worker increased from $785 in fiscal year 2009 to $1,000 per worker in fiscal year 2015. And over 51 percent of those rescued wages were returned to 16,902 working families in the retail fast-food industry. Yet these recoveries are only a fraction of the estimated $3 billion lost annually by workers due to wage theft.

Since the New Deal, the Department of Labor has challenged itself to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of United States, improve working conditions, advance opportunities for profitable employment, and ensure work-related benefits and gains.

So, Mr. Stettner, my questions are for you. What does strategic enforcement by the Department of Labor mean to workers?

Mr. STETTNER. Thank you, Ms. Porter.

What it means is that we're focusing not just on the minuscule number of workers that the Department can reach but really trying to change those industry practices. In fact, there's research that documents it works. If there's one investigation against a fast-food restaurant in a ZIP code, compliance increases at all the neighboring restaurants.

So that's the idea, to shift industry practices and make sure that all Americans get the pay that they deserve.

Ms. Shea-Porter. Thank you.

And do you believe that the Department of Labor's enforcement agencies are adequately staffed, given the millions of employers in workplaces around the country?

Mr. STETTNER. No. They're woefully understaffed.

Ms. Shea-Porter. And one last question: Throughout the previous administration, we saw the Wage and Hour Division focus enforcement on low-wage industries. Can you talk about why that practice is important?

Mr. STETTNER. So wage and hour violations are not equally distributed. They're really concentrated in some of the industries you mentioned: fast food, agricultural, janitorial services. Unfortunately, many of the businesses in this sector, part of their business model is keeping labor costs so low that they routinely break the law. We need to change that practice.

And, in fact, if there are minuscule price increases that happened on your burger, that would be worth it to make sure that the working families that work there get a fair pay.

Ms. Shea-Porter. Thank you.

I think a lot of people don't realize, because they didn't work in an industry like that, that there is a lot of difficulty, that they bring workers in and they make the effort, they pay the bus fare or whatever it is to get there, the gasoline, and then they're told they're not needed or come back in three hours. And these are working conditions that a lot of us would not accept. So I want to thank you for highlighting this.

And I yield back.

Chairman BYRNE. Thank you.

The gentlewoman yields back.

The gentleman from Wisconsin, Mr. Grothman, is recognized for five minutes.

Mr. GROTHMAN. Ms. Walters, I wanted to talk to you a little bit more about the overtime rule that caused the workers who were previously exempt from overtime to be included in overtime.

I always like to repeat a story. A buddy of mine back home, his daughter got a job, probably earning in this—you know, under this amount. He told her, always be the first one at work in the morning and the last one to go home at night. You know, be a hard worker and you're going to move up, and she was a hard worker and moved up.

What impact would this have on your business or the businesses that you advise, I guess, if some employee wanted to work extra hard and really, you know, go all out?

Ms. WALTERS. So if the employee—and I think many, many employees want to work extra hard. The question is, what does that get you? So if we're talking about more money, that may not be the result. Even the Department of Labor, when the final regulations came out, the DOL provided examples where an employer could prohibit overtime and might not do that—

Mr. GROTHMAN. As a practical matter, you'd get in trouble with your boss for working hard, wouldn't you?

Ms. WALTERS. I'm sorry. Say again?

Mr. GROTHMAN. If you define working hard as putting in another half-hour at the end of the day or do something extra, you'd get in trouble with your boss because they would have to pay you more, right?

Ms. WALTERS. Well, if you're nonexempt, then, yes, the employer has to pay for that time.

Mr. GROTHMAN. Right, right, right. Okay. So it would be a problem.

I think in some jobs you can be in a position—usually, I think of a salaried job—in which you're supposed to complete something by the end of the day, maybe complete a report or something. Well,

what if at the end of the day you don't feel you've done a good job on the report? Aren't you kind of stuck in a situation where either you have to turn in a not-very-good report or hang around an extra hour if you want and finish things?

What would you do if you were an employee and it's five o'clock and you'd like to spiff this up a little bit more or do a little bit of work? You know, so you could either turn in the report, which you don't think is adequate, at 5:00 or hang around at 5:30 and get in trouble with your boss because they've got to pay for you for a half-hour of overtime. What would you do in that position?

Ms. WALTERS. You know, it's interesting. We often find the stories, I often hear it's the star employee, it's the star performer who says, "No, no, no, I don't mind, I'll do this extra work without pay." And you can't. Obviously, we've said an employer has to pay for that time.

So what would I do? I'd have to talk to my boss and say, do you want my quality or do you want my time? And then we figure it out from there.

Mr. GROTHMAN. I like the rule was put together by somebody who likes to golf all the time. Yeah.

Okay. Next question. Mr. Brantley, can you give us any suggestions—you spoke about the overtime rule—any other suggestions you have for changes in the wage-and-hour policy?

Mr. BRANTLEY. Absolutely. One of the key challenges with the policy as currently constructed relates to how we characterize part-time employment.

So let's take the example of an accountant who's a CPA who has been working full-time for years who we make an accommodation so that person can be at home part-time to spend with a newborn or with an elderly parent. If that salary of that CPA professional staff member goes below $47,000, all of a sudden we are no longer able to consider that person as an exempt employee.

The same could be true for a fundraising development professional who is ready to retire, and we'd like to provide a stipend so that person could actually provide some services to our college or university. If that looks anything like part-time, that person could all of a sudden be characterized as nonexempt and be required to complete a timesheet for the first time in his or her career.

Mr. GROTHMAN. Okay. It makes things a little bit more difficult.

Ms. Riner, a question for you. We'll get you all. You expressed frustration in your testimony, the way the Department treated your company. Has the Department worked with you in any ways to ensure that small businesses which are franchised can succeed?

Ms. RINER. No, sir. Unfortunately, we've really had an adversarial relationship, to the extent that we've had to take them to court to protect our business. So we had hoped in the beginning that we were working together, we hoped that we were educating them as to our model, but, unfortunately, that didn't happen. So we're in court, trying to bring resolution and protect our industry.

Mr. GROTHMAN. Okay.

This is a more sensitive question. Are any of you familiar with the EEO-1 form?

Mr. Brantley, you're familiar with it?

Mr. BRANTLEY. Yes.

Mr. GROTHMAN. Yeah. How long have you been familiar with the form, or how long have you been familiar with organizations that have to fill out that form?

Mr. BRANTLEY. Well, as a human resource professional my entire career, I have a long history of completing that form.

Mr. GROTHMAN. Okay. To make things turn out right in that form, do you or people like you advise people who should be hired, who should be promoted?

Mr. BRANTLEY. Well, most employers that have Federal contracts have to have an affirmative action plan. So, in turn, as part of that, you have goals and expectations in terms of your recruitment efforts.

Mr. GROTHMAN. Does it ever change who's hired or promoted because you want the numbers to work out right on that form?

Mr. BRANTLEY. Well, obviously, the perspective of any employer should be that we're hiring the right person for the job. It's just, as it relates to our recruitment efforts, the types of things that we're doing to attract a more diverse applicant pool.

Mr. GROTHMAN. Does it affect that—you know, if you have two people applying for a job or three people applying for a job, you may pick somebody different than you would otherwise?

Mr. BRANTLEY. The guidance is, if both positions are equal, if both individuals are equal, that you would defer to someone from a minority status.

Mr. GROTHMAN. Okay.

Thank you.

Chairman BYRNE. The gentleman's time has expired.

The Chair does want to recognize the presence of Mr. Scott, the Ranking Member on the full Committee.

I understand you don't have any questions, but you're always welcome here, and we love seeing you.

Mr. SCOTT. Well, thank you, Mr. Chairman. I had three other meetings at the same time. I apologize for being late. But I appreciate your leadership and the Ranking Member. Thank you.

Chairman BYRNE. Thank you, sir. Glad to have you.

Now we call on Mr. DeSaulnier for five minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman. I want to thank you and the Ranking Member and the witnesses.

And these are odd hearings for me, when we went through the rule last session, because, as somebody who managed and owned restaurants for almost 35 years, someone who was once a registered Republican but has a difference of opinion, and just from my life experience and my work experience—and it may be just that northern California is different. Clearly, it's different. But, Mr. Stettner, some of my questions are directed at just the economic benefits.

So, when I owned restaurants, I liked to go by the Ford rule, that I wanted a product but also an income, that my employees could afford the product. Now, recognizing what the business owners have said here and in other hearings, there's a struggle when your costs go up. I always felt like I could make that struggle work and pass it on to my customers, even though they were struggling as well.

But I found that if you paid more—and I always thought it was sort of outrageous that I looked at my leases and I wanted to make sure they were—the landlord wanted to make sure it was indexed for inflation but minimum wage isn't indexed for inflation, although that's about to change in California.

So my question is more directed—it strikes me that, coming from northern California, coming from a business ownership, having looked at schedules—and I can't remember a time where I didn't have to pay an hour if I had split-shifts, I didn't have to pay overtime if we went over—it is less than 40 hours in California. So I had to manage that, and I had to have my managers manage that, and it worked.

Also, in California, we have a flexible work schedule, that if a majority of the employees vote to have a flexible work schedule, they can have it. It's fairly easy to access through the State workforce development website. And it's an important thing.

As Ms. Walters, as you said, there are a lot of good employees, I've had good employees, who have said, "I'll work an extra hour. I don't want to spend an hour and a half in traffic. And you need somebody to do this." But I would always say, "I'm required to pay you overtime, and I will do that." But it worked. And given that all my competitors, who were complying legally, had to do the same thing, it seemed to work out.

So my question, Mr. Stettner, is, in the Bay Area, which is part of California that's the fifth-largest economy in the world, in 2015 our GDP grew by almost 12 percent. We protect consumers, we have very stringent consumer laws, very strict worker enforcement laws, stricter than the ones that we are debating today, strict environmental laws, but the economy works. And we clearly have challenges. Our housing costs are a big challenge for us.

So if you could help me a little bit about why it works in some areas and why businesses flourish, but there's this theory that in other areas in the country, if you do this, businesses will not be able to sustain and have the kind of benefits we have in California, in the urban areas.

Mr. STETTNER. So, when workers have more in their pocket, they're able to spend more, and it goes directly into the hands of businesses. When workers are paid more, they're more likely to stay at a firm, more likely to gain a skill and help that firm become more productive.

It's no coincidence that Walmart, which is all over the country, including the South, recently increased their wages of their associates, explicitly because that's what they needed to compete more on quality, as there was much more competition from other retaliators offline and online. And, in fact, some of the best low-wage retail businesses pay good wages.

Mr. DESAULNIER. So the transition part, so if you're in another part of the country and, say, you want to start to have the economy grow faster than one or two percent, and you believe this research, how do you help businesses transition to that? Or is it just, as in my case, you accepted it and you realized that, through your own business experience, that you could struggle for a while—a matter of months, in my case—but, ultimately, as you said, the research—and my life experience bore out the research that you allude to.

Mr. STETTNER. So most of the costs are businesses, like the overtime rule. Although that $1.2 billion in pay raises is significant, it's less than .1 percent of all wages paid in the country. So, right now, in general, corporations have taken the most of that growth. The first step to making it work better is to have more of it shared. And that's going to help lift all boats.

Mr. DESAULNIER. I'll just conclude, Mr. Chairman, I would like to submit a letter from similar business owners from my experience and my view, from the Businesses for a Fair Minimum Wage for the record, if that's acceptable.

Chairman BYRNE. Without objection, so ordered.

[The information follows:]

BUSINESS for a
FAIR MINIMUM WAGE

February 14, 2017

The Honorable Rep. Virginia Foxx, Chair, Committee on Education and the Workforce
The Honorable Rep. Bradley Byrne, Chair, Subcommittee on Workforce Protections
2176 Rayburn House Office Building
Washington, DC 20515

Cc: The Honorable Rep. Robert C. "Bobby" Scott, Ranking Member, Committee on Education and the Workforce
The Honorable Rep. Mark Takano, Ranking Member, Subcommittee on Workforce Protections

Regarding Hearing on "Federal Wage and Hour Policies in the Twenty-First Century Economy," February 16, 2017

Dear Representatives Foxx and Byrne,

I am the CEO of Business for a Fair Minimum Wage, a national network of business owners and executives who believe that a fair minimum wage makes good business sense. We have thousands of members across the country including small- and medium-sized businesses, large corporations, and business organizations.

We support raising the federal minimum wage because it is good for business, customers and our economy. The minimum wage has been set since 2009 at $7.25 an hour, which amounts to just $15,080 a year for full-time workers. That is far below the inflation-adjusted value of the minimum wage at its peak in 1968 – $11.03 in 2016 dollars, according to the Bureau of Labor Statistics Inflation Calculator.

As Scott Fleming, president of Replacements, Ltd, based in North Carolina, told us, "Our employees drive our success, so it is important that we pay a livable wage. No person should struggle to make ends meet after putting in 40 or more hours a week."

Workers are also customers. We can't build a strong economy on a weak wage floor. When the minimum wage is set too low it not only hurts workers and their families, it undermines the consumer demand at the heart of our economy.

Raising the minimum wage boosts the economy as low-wage workers are the most likely to spend any additional pay. Their increased buying power translates into more purchases at businesses large and small, and helps boost aggregate consumer demand.

Angela O'Byrne, Louisiana's 2016 Small Business Person of the Year and president of Perez, APC, said, "Our country's minimum wage, which applies to Louisiana, has been stagnant for too long. Paying fair wages boosts consumer spending, which drives job creation and forges stronger

businesses and communities. Gradually increasing the federal minimum wage will create an economic ripple effect benefitting businesses large and small."

Bill Phelps, CEO of Wetzel's Pretzels, which has more than 100 locations across California and more than 300 nationwide, said, "We've experienced strong sales growth after minimum wage increases." Same-store sales doubled in the months following California's minimum wage increases in 2014 and 2016, and Phelps is "looking forward to continued growth for our business and the economy with future state and federal raises."

Mike Callicrate, owner of Ranch Foods Direct in Colorado Springs, puts it this way: "A fair minimum wage that not only allows people working full-time to take care of themselves and their families, but goes right back into local business coffers when those same workers spend their paychecks, makes good business sense."

Raising the minimum wage makes good business and economic sense in other ways. Businesses that are more invested in their employees have employees that are more invested in the business.

Low pay typically means high employee turnover. With reduced turnover, businesses see significant savings on recruiting and training costs. They see less product waste and greater customer satisfaction. Employees often make the difference between repeat customers and lost customers.

Radha Patel, owner of Holiday Inn Express & Suites in Pacifica, CA, says, "I rely on my employees to deliver the quality customer service our business depends on. Paying a fair wage helps me retain employees and avoid the increased hiring and training costs and customer dissatisfaction that comes with high turnover."

Michael Lastoria is founder and CEO of &pizza, a fast-growing chain with locations in Washington DC, Virginia, Maryland and Pennsylvania, and opening soon in New York. He says, "It's a simple, but critical, concept: take care of your people and they will take care of your customers."

When workers are paid enough to live on they don't have the continual stress of worrying how they will make rent or afford other basics. They are happier and more productive.

Judy Amabile, co-owner of Polar Bottle, a Colorado-based manufacturer, saw how raising their own entry pay from $8 to $12 "has been great for our bottom line. Our employees are more productive. They can afford repairing their cars and securing reliable child care. Absenteeism and turnover decreased dramatically. Our per-unit labor costs actually went down. As our experience in a highly competitive industry shows: Raising the minimum wage is good for business."

Raising the minimum wage also reduces the strain on our public safety net that arises from inadequate wages. Low-wage workers often need public assistance to get by despite working fulltime.

Edwin Zoe, owner of Zoe Ma Ma restaurants in Denver and Boulder, said, "I've been a fiscally conservative Republican since I was a young man. Raising the minimum wage is good business and good government. It will reward work and strengthen the free market by expecting businesses to compete fairly and not count on taxpayers to subsidize them through public assistance for employees who are paid too little to live on."

Margo Walsh, Maine's 2016 Small Business Person of the Year and owner of MaineWorks LLC in Portland says, "When employees are compensated fairly for their work, they're more productive and our businesses, our customer base, our tax base and our communities are healthier."

Business support for raising the minimum wage is widespread. For example, Manta surveyed 2,409 small business owners in April 2016. The poll showed that 59 percent of small business owners are in favor of a higher minimum wage. A 2016 survey of 1,000 business executives across the country conducted by LuntzGlobal for the Council of State Chambers found that 80 percent of respondents said they supported raising their state's minimum wage.

As the federal minimum wage has stagnated, more states have acted and 29 states now have minimum wages that are above the federal $7.25 level. State action is important, but not sufficient. If the federal minimum wage is not increased, July 24 will mark eight years without a raise. We need federal action to strengthen the floor under our economy nationwide and assure an adequate minimum wage wherever people live and do business.

Gradually phasing in a robust minimum wage increase will enable lower-wage companies to adjust to raises over time, and experience benefits such as lower turnover and increased consumer spending as they do.

I have attached some recent op-eds from Business for a Fair Minimum Wage members that provide further perspective on why raising the minimum wage is smart policy.

Sincerely,

Holly Sklar

Holly Sklar
CEO
Business for a Fair Minimum Wage
holly@businessforafairminimumwage.org

Enclosures: Op-Eds by Bill Phelps, CEO of Wetzel's Pretzels; Angela O'Byrne, president of Perez, APC; Edwin Zoe, owner of Zoe Ma Ma restaurants; Kevin J. Daly, owner of Mountain Sun Pubs and Breweries; Jerome Dodson, president of Parnassus Investments.

Mr. DESAULNIER. And just say it's troubling to me when I see—not to vilify CEOs of publicly traded companies, but, for instance, publicly traded fast-food restaurants have gone up in compensation by almost 1,000 percent since the 1970s, while workers wages have raised about 11 percent but their productivity has gone up 70 percent. It strikes me that we all should really have a reflective period to talk about that and balance it.

And I know both parties share the desire to raise wages and the ability to have a quality life for middle-income and lower-income people. But it seems like there could be a legitimate discussion around these issues since we have different parts of the country that have different problems and address them in a different way with different results.

Thank you, Mr. Chairman.

Chairman BYRNE. Thank you.

The gentleman yields back.

Well, we've come to the end. I would like to again thank our witnesses for taking the time to testify before our subcommittee today. I know you took a lot of time to prepare to be here and you had to travel to be here, and we want to thank you for that time and for the considerable testimony you've given us. Very helpful to the subcommittee's work.

Mr. Takano, do you have any closing remarks?

Mr. TAKANO. I do, Mr. Chairman.

Chairman BYRNE. You are recognized.

Mr. TAKANO. Thank you. Thank you.

Well, I'd like to also thank all the witnesses for coming to the Committee today to share their views.

As we all know, there was supposed to be another hearing this morning across the Capitol. The Senate HELP Committee was scheduled to hold a hearing on Andy Puzder's nomination to be Secretary of Labor. In a victory for working families, Mr. Puzder has now withdrawn his name from consideration.

This administration ran a campaign that promised to defend working people, but the nomination of Andy Puzder, a fast-food CEO with a history of minimum-wage and overtime violations and a declared opposition to efforts to raise wages for working people, was a betrayal of working people across this country. Andy Puzder chose to make a profit by cutting corners and breaking the law. Through his words and actions, Mr. Puzder repeatedly demonstrated his disdain for working people.

We heard today about how workers in low-wage industries like fast food are repeatedly cheated out of their fair pay. These workers deserve a Secretary of Labor who will fight to recover their hard-earned pay.

I urge the President to keep his promise to support working families and nominate a Secretary of Labor who is better suited to meet the mission of the Department of Labor: to foster, promote, and develop the welfare of wage earners, improve their working conditions, and advance their opportunities for profitable employment.

But no matter who heads the Department of Labor in the Trump administration, the members of our Committee must insist that the

Department of Labor does its job by holding employers accountable for misclassifying their workers and stealing their pay.

The American people are counting on us, and we cannot let them down. Mr. Chairman, I hope that we can agree that Federal wage-and-hour policies for the twenty-first century should put America's families first.

But before I yield back, I would like to ask unanimous consent to submit for the record letters from Jobs With Justice, the Economy Policy Institute, and the National Partnership for Women and Families, and the American Sustainable Business Council. As these letters from business representatives—

Chairman BYRNE. Without objection, so ordered.

Mr. TAKANO. Thank you.

[The information follows:]

1616 P Street NW, Suite 150 | Washington, DC 20036
tel: 202.393.1044 | fax: 202.822.2168 | www.jwj.org

The Hon. Virginia Foxx
Chairwoman
The Hon. Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Hon. Bradley Byrne
Chairman
The Hon. Mark Takano
Ranking Member
Workforce Protection Subcommittee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

February 14, 2017

Dear Representatives Foxx, Scott, Byrne, and Takano,

Jobs With Justice is an independent, nonprofit organization dedicated to promoting workers' rights and fighting for an economy that benefits everyone. We bring together labor, community, faith and student voices at the national and local levels through a network of local coalitions across the country. Additionally, we create innovative solutions to the problems working people face today, through research, analysis, organizing, and public advocacy.

This week, the House Education and Workforce Subcommittee on Workforce Protections will hold a hearing: "Federal Wage and Hour Policies in the Twenty-First Century Economy." Serious reforms are needed to adapt our 20th-century employment laws to the 21st century. Among those reforms is predictable scheduling. Working people are increasingly unable to juggle their caregiving duties, second jobs, or educational and training opportunities because their employers fail to give them adequate notice of their work schedules. A recent national survey of early career employees found that 41 percent of those in hourly jobs report getting their schedule less than a week in advance.[1] Kimberly Mitchell, a Macy's employee and scheduling advocate in Washington, DC, epitomizes the struggles of millions of people across the country:

> *"When we should be able to spend time with our families celebrating and preparing for the holidays, [Macy's] overloads us with hours, sometimes at the last minute, while they are cutting our hours everywhere else. This doesn't just happen during the holidays. Macy's can change their schedule to fit a sale or the business of that day, at any time, without notice. That means when Macy's plans a sale at the eleventh hour, they change the schedule to have everyone working that day. If the sale isn't going well, they cancel late-day shifts. If you are lucky, they will call you and tell you not to come in, but in most cases, they don't call at all. You spend the money to come in just to be told that you aren't needed."*

Working people are coming together to demand corporations provide the stability needed in their jobs. In December 2014, working men and women and their advocates spurred the San Francisco Board of

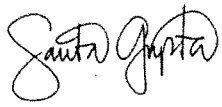
Supervisors to pass first-of-its-kind legislation, providing more reliable and sufficient schedules for more than 40,000 people. The Formula Retail Employee Rights Ordinances, which went into effect in 2015, offer the basic predictability working people need to plan their lives, through schedules they can count on. The laws require that employees receive their schedules 14 days in advance. A forthcoming study by San Francisco State University reveals both a high level of compliance with the predictable scheduling ordinances by employers, as well as positive outcomes for employees who now can better manage their lives outside of work.[ii]

San Francisco's ordinances provide a great model for other communities to imitate and implement. Working people and community and labor advocates helped enact scheduling improvements in Seattle, San Jose, and Emeryville, California in 2016. Additional state and local efforts are underway in 2017. Congress can follow suit and curb employers' abusive scheduling by passing the Schedules That Work Act. Such a law would give all employees a say by enabling them to make scheduling requests and protecting them from related employer retaliation. Unless there is a legitimate business reason for an employer to refuse an employee's request for a schedule change, they must grant the request, and allow employees to fulfill caregiving responsibilities, pursue education and workforce training opportunities, or manage their own serious health conditions.

These protections are particularly important in light of the nomination of fast-food CEO Andrew Puzder to be Secretary of Labor. Mr. Puzder has a record of hostility to working people and their rights. In addition, the restaurants he oversees frequently flout their responsibility to abide by the nation's labor laws. If the Department of Labor won't stand up for working people in the current administration, it is even more important that Congress and state and local governments act as their champions. Passing predictable scheduling laws would be a positive step in that direction.

Jobs With Justice is engaged in better understanding the changing nature of work in our country. We are committed to ensuring that working people continue to have a voice on the job, and a fair shot at a decent standard of living. Thank you for the opportunity to share our perspective on predictable scheduling. Please do not hesitate to contact me or my staff if we can be of further assistance.

Sincerely,



Sarita Gupta
Executive Director, Jobs With Justice

[i] Lambert, Susan, Peter J. Fugiel, and Julia R. Henly. 2016. "*Schedule Unpredictability among Early Career Workers in the US Labor Market: A National Snapshot*," University of Chicago. Accessed at https://ssascholars.uchicago.edu/sites/default/files/einet/files/lambert.fugiel.henly_.executive_summary.b_0.pdf

[ii] Email research@jwj.org for more information on the preliminary findings of the San Francisco State University study, which is based on over 1000 surveys collected between December 2016 and February 2017.

Economic Policy Institute

February 16th, 2017

The Honorable Virginia Foxx
Chairwoman
House Committee on Education and the Workforce

The Honorable Robert "Bobby" C. Scott
Ranking Member
House Committee on Education and the Workforce

The Honorable Bradley Byrne
Chairman
House Committee on Education and the Workforce, Subcommittee on Workforce Protections

The Honorable Mark Takano
Ranking Member
House Committee on Education and the Workforce, Subcommittee on Workforce Protections

Dear Representatives Foxx, Scott, Byrne, and Takano:

The Economic Policy Institute is pleased to submit this letter in regards to the February 16, 2017, Subcommittee on Workforce Protections hearing, "Federal Wage and Hour Policies in the Twenty-First Century Economy." The Economic Policy Institute, a nonprofit, nonpartisan organization, is this country's premier think tank that focuses on the economic condition of low- and middle-income workers and their families. We are deeply interested in any changes to wage and hour policies that protect workers. The components that must be a core part of any reform related to the minimum wage and to overtime protections are described below.

The Minimum Wage

The current federal minimum wage, $7.25, is roughly 25 percent below its historic value in real terms. A full-time worker with one child who earns the federal minimum wage is earning below the federal poverty line. There is an enormous amount of rigorous research on the economic impacts of minimum wage increases, and what the weight of that literature shows is that minimum wage increases have raised wages but have caused little to no negative effect on the employment of low-wage workers. The vast majority of those who would benefit from an increase in the minimum wage are adults in working families, they are disproportionately women, and their households depend on these earnings to make ends meet.

Any reform related to the minimum wage must do the following things:

1. Establish a wage floor that ensures a decent standard of living for all workers. The Raise the Wage Act of 2015 provides a blueprint for what a decent wage floor could be, along with reasonable steps to get there.
2. An increase of the minimum wage must be accompanied by gradual phasing out of a lower subminimum wage for tipped workers. Tipped workers experience dramatically

higher poverty rates in states where they can be paid a separate, lower minimum wage, and this practice must end.

3. To prevent future erosion of the minimum wage and to provide predictability for employers, the minimum wage should be indexed to growth in overall wages on an annual basis.

Overtime Protections

To help ensure the basic, family-friendly right to a limited workweek, the Fair Labor Standards Act (FLSA) requires that most workers—including both hourly and salaried workers—be paid at least 1.5 times their regular rate of pay when they work more than 40 hours a week. One narrow exception to this is for bona-fide executive, managerial, and professional workers. However, the way that exception is defined has become woefully out of date, and in May of 2016, the Department of Labor issued a rule to provide a much needed update. The rule is currently under a nationwide injunction, but that injunction will hopefully be short-lived, since the rule delivers better work-life balance and fairer pay to millions of workers.

The new rule updated the salary threshold below which most salaried workers are entitled to overtime pay if they work more than 40 hours a week. Before this rulemaking, the threshold had been updated only once since 1975, and had thus eroded dramatically—providing overtime protections to less than 10 percent of full-time salaried workers, compared with more than 60 percent in 1975. The current threshold of $455 per week ($23,660 annually for a full year) is well under the poverty threshold for a family of four.

The update includes two crucial components:

1. It increases the salary threshold from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). This updated threshold is well within historical norms; if the 1975 threshold had simply kept up with inflation, it would now be around $57,000 annually.
2. It automatically updates the salary threshold every three years based on weekly wage growth of full-time salaried workers. Thus, as salaries rise over time, the threshold would rise with it, ensuring that the standard laid out in the new rule is preserved, instead of steadily weakening over time. This is good for workers and provides crucial predictability to employers.

These updates to the overtime rule mean that millions of workers, disproportionately women, would likely be asked to work fewer overtime hours, and would get the overtime pay they deserve when they do work more than 40 hours a week. This is good for families; close to 2.5 million children would see at least one parent gain overtime protections. And an increase in the threshold would be a job creator, with Goldman Sachs estimating that it would add around 100,000 jobs to the economy.

Since 1975, the top 5 percent of all households have seen their incomes grow by more than 90 percent, whereas the median (or "typical") household has seen its income grow by less than 20 percent. That means that the last quarter of the 20th century and the first 17 years of the 21st

century have been marked by rising inequality. Reform for the 21st century should focus on reversing that rising inequality and building a fairer economy. Providing a strong minimum wage and overtime salary threshold, and then indexing them going forward so they don't erode over time as prices and wages rise, are common sense steps towards creating an economy that works for everyone and should be at the center of any effort to "update" wage and hour policy for the 21st century.

Sincerely,

Heidi Shierholz
Senior Economist and Director of Policy
The Economic Policy Institute
1225 Eye St. NW, Suite 600
Washington, DC 20005

February 15, 2017

The Honorable Virginia Foxx
Chair, Education and the Workforce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Robert C. Scott
Ranking Member, Education and the Workforce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Bradley Byrne
Chair, Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Mark Takano
Ranking Member, Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Foxx, Ranking Member Scott, Chairman Byrne and Ranking Member Takano:

On behalf of the National Partnership for Women & Families and the activists and supporters we represent, I write to the U.S. House of Representatives Education and the Workforce Subcommittee on Workforce Protections regarding its February 16 hearing on "Federal Wage and Hour Policies in the Twenty-First Century Economy."

The National Partnership for Women & Families is a nonprofit, nonpartisan organization dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality health care, and policies that help women and men meet the dual demands of job and family. For more than 45 years, we have worked to advance policies that create opportunities for women in the workforce and greater economic security for women and their families. The National Partnership has worked tirelessly to secure updated wage and hour protections for millions of America's workers, new equal employment opportunity protections for federal contract employees, and vigorous enforcement of the Fair Labor Standards Act and the Family and Medical Leave Act – all of which are governed by this Committee.

America's working families are not reaping the benefits of their labor. Wages have stagnated relative to the cost of living – and well-paying jobs that offer predictability and stability have become elusive for too many. More families are relying on women as key or sole breadwinners, making updated wage and hour standards particularly critical to the National Partnership and our supporters. As the committee considers the need for federal wage and hour policies in the 21st century, it is imperative that well-established laws that govern America's workplaces – the Fair Labor Standards Act, the Family and Medical Leave Act, and the National Labor Relations Act – are strengthened and not undermined.

The Fair Labor Standards Act (FLSA) overtime protections are especially critical. For salaried, non-exempt workers, the long-overdue increase in the overtime pay threshold finalized last year by the Department of Labor restores overtime eligibility and protections for millions of workers, half of them women. The increase in the salary threshold addresses basic fairness and represents an important step toward fairer pay for women and people of color, who are over-represented in lower-paying jobs and

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539
email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

often required to work overtime hours without compensation. This Committee – and this Congress – would effectively be condoning worker exploitation and injustice by rolling back the overtime rule. We urge you to strengthen, not erode, workers' access to overtime pay.

More generally, updated laws and standards must reflect working families' needs, and especially the need that workers have to manage the dual demands of jobs and family. Too often, work-family conflicts are seen as individual struggles to be managed privately rather than as a common thread that connects virtually every working parent or adult child and that binds the interests of employees, employers and communities. In a survey commissioned by the National Partnership in November 2016, seven in 10 voters (71 percent) say it is likely – and 43 percent say it is "very likely" – that they or their family would face significant financial hardship if they had a serious illness, had a new child or had to care for a parent, spouse or child with a serious illness.[1] Lack of adequate family friendly policies exacerbate these concerns.

However, rather than focus on proactive, tested policies that working families need to manage the dual demands of jobs and family, including paid sick days, paid family and medical leave and fairer, more predictable schedules, we are gravely concerned that this Committee's focus will be misplaced and that the policy changes under consideration will make working families less secure. Eroding well-established wage and hour protections will do irreparable harm. Using the language of "workplace flexibility" to undermine workers' access to fair pay is a disingenuous, misguided disservice to the millions of U.S. workers who are working hard every day to both provide and care for their families. For women, who bear disproportionate responsibility for providing care to children and elders, and who are typically paid less than men, the harms are especially profound.

For more than 75 years, the FLSA has helped to protect the working hours and paychecks of hourly, non-exempt employees. The FLSA already permits employers to offer "flexibility" that allows workers to manage the dual demands of job and family. The FLSA's requirement that hourly, non-exempt employees be paid time-and-a-half for every hour of work in excess of 40 hours per week was intended to spread job opportunities to more workers and create disincentives for overwork.

The FLSA currently allows employers to provide workers with flexibility and time off without compromising their right to be paid fairly for the hours they work. It already provides significant leeway to employers in accommodating the scheduling needs of workers. The types of flexibility allowable under the FLSA include:

- alternative work start and end times (either occasionally or on a more regular basis)
- compressed or variable work hours within a week (e.g., four ten-hour days and one day off, or a combination of variable-length days (either regularly or when needed to address family or personal needs)
- split shifts (e.g., for a working parent who works six hours while their child is at school and then another two hours while their child is asleep at night)
- work at multiple locations (e.g., working remotely for some or all work hours)
- time off, whether paid or unpaid.

Compensatory time in lieu of overtime pay and other "faux flex" proposals would be more than a step in the wrong direction. They set up a false dichotomy that would force workers to choose between flexibility and overtime pay when, in reality, the FLSA does nothing to prevent employers from offering both. They would place substantial power in the hands of employers – giving them the ability to offer comp time in lieu of overtime pay, the ability to determine who is eligible to work overtime hours and the ability to determine whether a worker who has banked comp time is permitted to use it. Workers simply should not

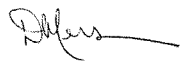
have to put in extra time beyond a 40-hour week *and* forgo pay to earn time to care for themselves or their loved ones.

To address working people's needs to care and provide for themselves and their loved ones, Congress should focus on policy solutions that have been proven effective. Congress should update and index the minimum wage, safeguard updates to the overtime pay threshold and secure collective bargaining rights. Congress should also adopt policies that will provide families with the economic security and the time that they need to care for – and provide for – their families. Sensible solutions include:

- The **Healthy Families Act** which makes earned paid sick days available to millions of workers who are not guaranteed a single paid sick day now;
- The **Schedules that Work Act** which would give workers a say in their schedules and address the instability and inflexibility that can make it next to impossible to manage basic expenses, arrange for child care, continue their education, get a second job, or pursue job training; and
- The **Family and Medical Insurance Leave (FAMILY) Act** which would create a national paid leave insurance program, modeled on the successful state programs in California, New Jersey, Rhode Island and a new program in New York, to allow workers paid time to care for a new child; care for a seriously ill family member; address their own serious health condition; or manage certain military caregiving responsibilities.

Congress must reject proposals that undermine working families' economic security and instead support higher wages, improved fair pay protections, paid sick days, paid family and medical leave insurance, and fairer, more predictable work schedules. These are the advances the nation needs and which evidence shows are effective. These are the initiatives that would help our nation's workers and their families, employers, communities and our economy.

Sincerely,



Debra L. Ness
President

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1 National Partnership for Women & Families. (2016, December). *Election Analysis Suggests Voters Reward Candidates Who Advocate for Family Friendly Workplace Policies.* Retrieved 10 February 2017, from http://www.nationalpartnership.org/research-library/work-family/memo-election-analysis-suggests-voters-reward-candidates-who-advocate-for-family-friendly-workplace-policies.pdf

AMERICAN SUSTAINABLE BUSINESS COUNCIL

February 13, 2017

The Honorable Bradley Byrne
Chairman
Subcommittee on Workforce Protections
Education and the Workforce Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mark Takano
Ranking Member
Subcommittee on Workforce Protections
Education and the Workforce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Byrne and Ranking Member Takano:

On behalf of the businesses represented by the American Sustainable Business Council's (ASBC) network, I write in support of the Department of Labor's overtime rule. ASBC believes that implementation and strategic enforcement of the rule will be good for business, good for workers, and a vital step toward building a sustainable twenty-first century economy.

ASBC advocates for policy change and market solutions for building a vibrant, sustainable economy. Through its national member network, ASBC represents more than 200,000 business owners, executives and investors from a wide range of industries.

The rule creates certainty and predictability for business owners. Since the announcement of the draft rule in July 2015 and the release of the final rule this spring, businesses have been planning for its implementation. In fact, payroll operations companies have been marketing solutions to help employers handle the transition.

Currently the rule is under legal review. Halting the scheduled implementation has caused unnecessary and disruptive uncertainty for business owners. Business owners, by nature, are creative at problem solving. When rules are established, they make the necessary decisions to comply. However, when the rules are in flux, business owners react to the uncertainty by holding back on investments in growth and expansion.

When employers set fairer, clearer wages, they earn dividends with happier, more productive employees. That's good news for a businesses' bottom line, and for growing the nation's middle class. High road businesses understand that compensating their employees for extra time spent on the job builds a better work culture.

The American economy is fundamentally a domestic, consumer-driven economy, unlike some countries where growth is fueled by exports and business-to-business spending. The biggest long term threat to our economy is the hollowing out of the middle class, which is losing its capacity for discretionary spending - responsible for about 70 percent of our gross domestic product.

The new overtime rule closes a loophole which has allowed for hourly workers to be deprived of pay by inappropriately classifying them as exempt. Employees are consumers; if they are not earning sufficient wages, demand will remain stagnant. Closing this loophole will help restore consumer spending and give the economy a needed boost.

Sincerely,

Bryan McGannon
Policy Director

TEL: 202.595.9302
1401 NEW YORK AVE, NW
SUITE 1225
WASHINGTON DC 20005

ASBCOUNCIL.ORG

Chairman BYRNE. Have you concluded?

Mr. TAKANO. Mr. Chairman, I have concluded my statement.

Chairman BYRNE. Thank you, Mr. Takano, and look forward to working with you and the other members of the subcommittee.

We are going to make America great again, but we're not going to make America great again if we don't make the lives of the hardworking people of America great again.

The average person in this country wakes up every morning, hurriedly gets himself ready to go to work, and they go to work and they work hard. A lot of them are doing that while they're raising children, which is its own job, a very hard job.

And as I travel around my district and go to see the places where people work—and I'm from lower Alabama; we don't have very many big businesses—I talk to the people that work there, and I hear what they tell me. And there are so many times when the Federal Government is in the way. In some cases, Ms. Riner, we're worse than in the way; we're actually harming the ability of people to do what they want to do to make their lives better.

I don't think that most of us in the Federal Government intend to be in the way. Sometimes the one law we pass up here the most is the law of unintended consequences. And sometimes we pass these laws to promulgate these regulations thinking they're going to have one effect and they have another.

I know this, that if you go around the workplaces that I've been to over the last three years, they don't look like the workplaces that I started in as a teenager during the 1970s—washing cars and making wooden slats for shutters, sandblasting the oil storage tanks. That's the kind of stuff I had to do, like most young people had to do. The workplace is so different.

I don't think our laws have kept pace with that change, and, worse, I think our laws and the way we're trying to apply them are actually getting in the way. So I hope that what we can do, with the good help of you who came here today to give us this testimony, I hope what we can do is to figure out a way where we can work together to make the lives of these hardworking Americans great again.

I believe the vote last fall was an urgent plea from them: Please help us. Give us the sort of freedom and flexibility in our lives, including our lives where we work every day, so that we can do what we want to do and become who we want to become. That's the American Dream.

So I appreciate so much all of you being here and your testimony. I appreciate so much all the members of the subcommittee who came here today.

There being no further business, the subcommittee stands adjourned.

[Additional submissions by Mr. Byrne follows:]

February 15, 2017

The Honorable Bradley Byrne
Chairman
Subcommittee Workforce Protections
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mark Takano
Ranking Member
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Byrne and Ranking Member Takano,

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I write today in regard to the Subcommittee on Workforce Protections Feb.16 hearing, "Federal Wage and Hour Policies in the Twenty-First Century Economy." We appreciate you calling this hearing and drawing attention to the policies and enforcement tactics of the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), as it is vital that WHD protects American workers and fosters an environment that allows the economy to grow.

Over the last eight years, the WHD has promulgated rules and policies that, while well-intentioned, have had numerous unintended consequences, including fewer employee hours, reduced advancement opportunities and overly burdensome compliance requirements.

On March 23, 2016, the WHD promulgated the overtime final rule, also known as Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Final Rule. The rule changes the federal exemptions to overtime pay under the Fair Labor Standards Act (FLSA) for "white collar" workers by doubling the current minimum salary level for exemption from $23,660 to $47,476 per year and automatically increasing it every three years. While well-intentioned, the final rule fails to consider the flexibility and variability of the 21st century workforce.

DOL's overtime final rule will have a long list of unintended consequences for ABC members, including increased labor costs and an undue burden on certain regions of the country, including southern states and rural areas. The unprecedented automatic indexing provision circumvents the intent of Congress under the FLSA and is particularly problematic for construction business owners who often need to project costs and workforce needs over multiple years for projects managed by exempt employees. We encourage the WHD to reopen the rule, which was temporarily blocked by the U.S. District Court for the Eastern District of Texas, and lower the minimum salary threshold as well as eliminate the automatic indexing.

The WHD can also adapt to the 21st century by improving the survey process of the 80-plus-year-old wage subsidy law known as the Davis-Bacon Act to better reflect prevailing wages. Numerous government agency reports and Congressional hearings have highlighted the failure of DOL to properly determine prevailing wage rates under the Davis-Bacon Act. Despite years of low union

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density in the construction industry, DOL's flawed wage survey process somehow mandates union wage rates more than 60 percent of the time. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit shop construction industry.

According to the nonpartisan Congressional Budget Office, a repeal of Davis-Bacon would save taxpayers and the federal government $13 billion from 2018 through 2026[i]. Given these obvious and enormous cost savings, in the absence of full repeal, an effort to reform the survey process to better reflect market wages is a sensible and rational request.

We appreciate the chairman and Subcommittee holding this hearing to help draw attention to this important matter. We stand willing and ready to work with both parties to improve wage and hour policies so that they will protect workers and grow the economy.

Sincerely,

Kristen Swearingen
Vice President of Legislative & Political Affairs

[i] https://www.cbo.gov/budget-options/2016/52225

STATEMENT FOR THE RECORD

OF THE

NATIONAL ASSOCIATION OF CONVENIENCE STORES

AND THE

SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

FOR THE

HEARING OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

FEBRUARY 16, 2017

"FEDERAL WAGE AND HOUR POLICIES

IN THE TWENTY-FIRST CENTURY ECONOMY"

This statement is submitted on behalf of the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA"). We thank the Subcommittee for holding today's hearing on federal wage and hour policies in the modern-day economy. NACS and SIGMA appreciate the opportunity to offer our views regarding the Department of Labor's ("DOL") Overtime Rule, updated and finalized in 2016.

NACS and SIGMA collectively represent approximately 80% of retail fuel sales in the United States. These associations' members employee over 2.7 million individuals and have over 154,000 stores throughout the United States.

While NACS and SIGMA were supportive of DOL's objective to update the overtime salary threshold, we believe the final rule will have substantial adverse effects on the retail fuel industry. The final rule contained questionable methodology and lacked adequate economic analysis, especially with respect to the disparate impact the rule will have on small businesses, those in the retail industry, and those in rural areas. We have included our detailed comments to the DOL that outline these concerns, amongst others.

As the Subcommittee is aware, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction that halted DOL's updated overtime requirements immediately before the rule was to take effect on December 1, 2016, and the case is working its way through the courts. While many in the business community cheered the preliminary injunction, the uncertainty surrounding the future of the overtime standards is troubling for business owners and operators. This uncertainty prevents these businesses from effectively managing their workforce and from planning for future operating expenses.

NACS and SIGMA supported legislation last Congress that would have halted the DOL's proposed rule until the DOL performed more in-depth economic analysis of the proposed rule's effects on small businesses and on the salary and cost of living differences across various regions. Given the far-reaching effects of DOL's final rule, we continue to believe that it is appropriate for DOL to do greater analysis on the impact of raising the overtime threshold before any rule takes effect.

We thank this Subcommittee for its oversight of this matter and look forward to working with Congress to create 21st century federal wage and hour policies that are reasonable for both workers and business owners.

NACS

COMMENTS BY

THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

REGARDING PROPOSED REVISIONS OF THE FAIR LABOR STANDARDS ACT'S

SECTION 13(a)(1) REGULATIONS

(RIN 1235-AA11)

The National Association of Convenience Stores and Petroleum Retailing ("NACS") is an international nonprofit trade organization representing more than 2,200 retail and 1,800 supplier company members with the majority of its members based in the United States.

The convenience and petroleum retailing industry has become a fixture in American society and a critical component of the nation's economy, with stores in each and every Congressional district. In 2014 the industry employed more than two million workers and generated $696.1 billion in total sales.

NACS and its members have a strong interest in the requirements governing the application of the exemptions set forth in Section 13(a)(1) of the Fair Labor Standards Act, because those provisions have a substantial impact upon the industry. This is particularly the case as to the "executive" exemption, because many industry employers rely upon that exemption for first- and second-line managerial employees at thousands of individual, freestanding establishments. NACS therefore welcomes the opportunity to submit comments in response to the "Proposed rule and request for comments" published by the U.S. Labor Department ("USDOL" or "Agency") on July 6, 2015 at 80 Federal Register 38516, Regulatory Information Number (RIN) 1235-AA11.

1. The Salary Level

The Agency proposes to increase the threshold salary for exempt status to $921 per week. However, it also suggests that, under its contemplated methodology, the figure might even be $970 per week by the time any regulatory changes become final. 80 Fed. Reg. 38517; *Id.* at n. 1. Either level will be devastating to NACS's membership.

To begin with, even a figure of $921 per week will represent another $466 per week added to the $300-per-week rise that went into effect in 2004, *i.e.*, there will have been a nearly six-fold increase over the pre-2004 threshold. NACS realizes that more than ten years have now passed since the prior change

The adverse impact that such a substantial change will have upon the industry is starkly revealed when one takes into account the current salary levels for first- and second-line managerial employees in convenience stores. Due to the economic realities of the modern-day convenience industry, those salary levels for most such managerial employees are relatively low. For example, convenience-store companies employ a substantial number of Store Managers at a weighted-mean salary of about $ 39,580

The Association for Convenience & Fuel Retailing

1600 Duke Street ■ Alexandria, Virginia 22314-3436, USA ■ (703) 684-3600 ■ FAX (703) 836-4564 ■ nacsonline.com

annually. For Assistant Store Managers, the median/mean is about $ 26,024 annually. Obviously, then, raising the threshold even to $921 per week would put a large number of industry employers to the impossible choice between increasing salaries versus abandoning the exemption for Store Managers and (for those who today qualify for exempt status) Assistant Store Managers.

Throughout the history of the Section 13(a)(1) exemptions, the salary threshold has been set to "serve as a guide to the classification [of exempt employees] and *not as a barrier to their exemption*." Weiss Report at 15 (emphasis added).[1] It is especially relevant that Mr. Weiss's statement was made with specific reference to "the executives of small establishments". *Id.* Establishing a dollar-level test that would cause thousands of these employees to change from exempt status to nonexempt status overnight *for that reason alone* will erect precisely such a barrier to the exemption of many employees. It will also represent a departure from USDOL's expressed concerns in 2004 (and, for that matter, in prior decades) that an increased salary not impose a disproportionate hardship upon retailing. *See, e.g.*, 69 Fed. Reg. 22170-71 (April 23, 2004).

NACS is of course mindful that the role of the salary-level test is to *assist* in drawing a line between employees who are properly treated as exempt and those who are not. We also realize that, wherever the threshold is set, some employees who meet the tests for exempt status will fall below it.

Nevertheless, for decades, USDOL has assiduously tried to avoid that effect to the maximum extent it can. It has been especially careful about this where retailing is concerned. The relatively-lower salaries prevailing among those workers are the result of financial and economic characteristics, rather than being a reflection of any allegedly "borderline" nature of the duties they perform. In other words, failing to weight these retailing-specific financial and economic factors heavily thereby transforms the salary level into the *only* test for exempt status as to a disproportionately-high number of retail employees, and it does so without appreciably advancing the distinctions called for in applying the exemptions.

This is at least as true in the convenience-store segment of retailing as it is of any others, as the above compensation data illustrate. A figure as great as $921 will therefore operate as a "barrier to [the] exemption" of thousands of industry employees without facilitating the effectiveness of the line-drawing to be done. As we will later point out in a different context, in crafting the exemptions both Congress and USDOL have long recognized the unique responsibilities of managerial employees at individual retail establishments.

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[1] In portions of this discussion, NACS will refer to historical USDOL documents relating to the Section 13(a)(1) exemptions and revisions of the Regulations at Part 541. These reports were produced by Harold Stein in 1940 ("Stein Report"), Harry Weiss in 1949 ("Weiss Report"), and Harry S. Kantor in 1958 ("Kantor Report"). Page numbers in these citations refer to the corresponding location in the actual report, rather than to any reproduction of the report.

The Agency has not tailored its dollar-test proposal by specifically adjusting it in recognition of the lower-wage characteristics of retailing. *See, e.g.*, 80 Fed. Reg. at 38528. This departs from not only the approach taken in 2004 (as USDOL acknowledges), but also from even-earlier decades of practice in setting the salary level. The Agency contends that its proposed methodology "already accounts for" and "adequately protects low-wage industries" by selecting a 40th percentile to apply to the data it has selected, *see, e.g.*, 80 Fed. Reg. at 38532, 38541. On the contrary, there is serious reason to question whether USDOL has actually done a sufficient analysis of the matter.

For one thing, as is the salary proposal generally speaking, the entire discussion of the percentile selected is tainted by USDOL's repeated reliance upon data said to have to do with "full-time salaried employees", "full-time salaried workers", and so on. Indeed, although USDOL refers to the data as having to do with "actual *salaries* paid to employees", "all full-time *salaried* employees", "*salary* levels throughout the economy", and many more formulations to the same effect, the information instead relates to "full-time . . . *non-hourly paid* employees." *See, e.g.*, 80 Fed. Reg. at 38517 n. 1; 80 Fed. Reg. at 38527 n. 20; 80 Fed. Reg. at 38540 n. 37; 80 Fed. Reg. at 38548 n. 54 (all emphasis added). USDOL says that it "considers" the data to be "an appropriate proxy for compensation paid to salaried workers," *see, e.g.*, 80 Fed. Reg. at 38527 n.20; 80 Fed. Reg. at 38548 n. 54, but it is difficult to see how this could be so in any relevant way. The employees to whom this information relates might be largely or entirely commissioned; or paid on a day-rate basis, a job-rate basis, or a piece-rate basis; or paid a salary for 40 hours; or paid on a fluctuating-workweek basis; or paid via a combination of these methods; or paid in a variety of other unspecified ways. NACS further understands that the data include overtime pay, commissions, and tips; whether other kinds of payments are included is unclear. Finally, these data are self-reported and are therefore not subject to verification.

We also note that USDOL's explanation repeatedly uses the words "salary" and "salaried" to mean different things in different places. The concepts of "salary" and "salary basis" have a very specific meaning under the pertinent exemptions. *See, e.g.*, 29 C.F.R. § 541.602. Whether an employee is paid on a "salary basis" is itself an indicator of exempt status, independently of the salary's amount. By contrast, it appears that, in many if not most instances, USDOL is not referring to "salary" or "salaried" in the exemption-related sense. This has likely led to flaws in USDOL's analysis, in part because juxtaposing "non-hourly paid" compensation with compensation on a "salary basis" as that phrase relates to the exemptions is necessarily an apples-and-oranges proposition.

NACS believes that the setting of a salary level should be based upon reasonably contemporaneous data and statistics relating to *salaries* (as defined by the regulations) of *exempt* employees. The salary level was established in this way from at least as early as 1949, based upon the view that "[a]ctual data showing the increases in the prevailing minimum salary levels of bona fide executive, administrative and professional employees . . . would be the best evidence of the appropriate salary increases for the revised regulations." Weiss Report at 12. Wages and earnings among nonexempt employees were relied upon only where "no direct evidence was available or where the available data were fragmentary . . . ." *Id.*

This was also the case in 1958, when USDOL's decisions were informed by information that included "salaries paid to employees who qualified for exemption." Kantor Report at 6. These figures included "tabulations of salaries grouped by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups." *Id.* This "most direct evidence of actual salaries paid", "obtained as a by-product of the Divisions' regular investigation program rather than as a special statistical survey," was judged to "reflect[] the salary patterns with reasonable accuracy." *Id.* 28 Fed. Reg. 7002 (July 9, 1963); 35 Fed. Reg. 883, 884-85 (Jan. 22, 1970).

The Agency should return to the compelling practice of predicating the salary level to the maximum extent possible upon "a sample limited to exempt salaried employees." *See* 80 Fed. Reg. at 38528. Clearly, information having to do precisely with the matter being decided is "the best evidence" upon which to base any adjustment in the salary level.

And USDOL apparently already has that information and has evaluated it in the present proceedings. For instance, the proposals' explanation says:

- "Currently, approximately 85 percent of white collar salaried workers who fail the EAP duties test earn at least $455 per week."
- "Increasing the standard salary level to the 40th percentile of weekly earnings for full-time salaried workers would reduce by 6.3 million the number of white collar employees for whom employers must perform a duties analysis."
- "Conversely, only approximately 4 percent of all white collar salaried employees who meet the duties test earn less than the current salary level.
- "The proposed increase in the standard salary level would increase the number of overtime-eligible white collar salaried employees who meet the duties test and earn less than the proposed salary level to approximately 25 percent."
- "The Department notes that currently approximately 75 percent of white collar employees who do not meet the duties test earn less than the proposed salary threshold."
- "The Department notes that currently approximately 78 percent of all exempt EAP workers — those who are paid on a salary basis of at least $455 per week and meet the duties test — earn at least $921 per week."
- "Approximately 41 percent of white collar workers who do not pass the duties test earn at least the proposed salary level ($921 per week). Conversely, approximately 25 percent of employees who

pass the standard duties test (and 22 percent of employees who are currently exempt) earn less that the proposed salary level."

- "[F]or the Kantor method we further limited the population of interest by only including those workers determined as likely to be EAP exempt . . . ."

- "[F]or the Kantor method we further limited the population of interest by only including those workers determined as likely to be EAP exempt . . . ."

80 Fed. Reg. at 38529, 38532, 38557, 38560 n.82. These statistics are obviously derived from internal data that are directly relevant to current salary levels as they relate to the application of the exemptions.

The Agency suggests that employing such information is undesirable on the premises that:

> in order to create such a pool of likely-exempt salaried employees one would have to rely upon 'uncertain assumptions regarding which employees are actually exempt.' In addition, the Department used [Current Population Survey or] CPS data rather than salary data from the limited pool of our own investigations because there would have been too few observations from these investigations to yield statistically meaningful results.

Whatever uncertainties there might be as to the above-referenced internal evaluations carried out by USDOL personnel with deep experience in such matters (the statistical meaningfulness of which NACS cannot assess without seeing the underlying information), those arising from the Agency's current reliance upon "non-hourly paid employees" must be, though of a different kind, at least as great.

Furthermore, the Agency apparently remains committed to a single standard salary level for nationwide application. Therefore, as have most of its predecessors, it must weigh more heavily than it has the fact what it has proposed might tend to eliminate employees who are "obviously nonexempt", Weiss Report at 18, reasonably well in high-income industries will at the same time be a "barrier to the[] exemption", Weiss Report at 15, of disproportionately-many employees who meet the duties tests but who work in relatively low-income industries. Such a threshold impermissibly shortcuts the qualitative determination called for under the exemptions for employees in the lower-wage industries.

NACS recognizes that some such effect is an outcome of having a single salary threshold. But then this is the product of a structure that USDOL itself formulated and embraced in the past and proposes to maintain. Because the Agency has made that choice, its responsibilities can be adequately carried out only by significantly limiting that effect, that is, by setting the salary rate near the lower end of the appropriate scale. It is for this very reason that USDOL has set a lower-end salary in the past, and the Agency must do so again. Whatever nationwide figure is established must be set so as to, as Mr. Kantor put it, exclude a relatively small percentage "of those in the lowest-

range 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 . . . ." Kantor Report at 6-7.

By contrast, USDOL has so far declined to tailor its dollar-test proposal to the compensation characteristics of regions or industries. *See, e.g*, 80 Fed. Reg. at 38528. As the Agency acknowledges, this departs from the approach taken in 2004, and it also abandons decades of earlier practice in setting the salary level. The Agency says that its proposed methodology "already accounts for" and "adequately protects low-wage industries and areas" by selecting a 40th percentile, *see, e.g.*, 80 Fed. Reg. at 38532, 38541, but, putting aside that the entire "already accounts for" construct rests upon a flawed data set, there is serious reason to doubt that this has actually accounted for the characteristics of such industries.

The Agency's initial "already accounts for" remarks defer to the explanation's Section VII.D. for a discussion of why USDOL "believes [its] proposal is appropriate in low-wage areas and low-wage industries." 80 Fed. Reg. at 38532. However, all that appears in that section on the point is an assertion that employers in lower-wage industries "may perceive a greater impact" from the proposed level,[2] but that, "because the vast majority of potentially affected workers reside in [Metropolitan Statistical Areas or] MSAs and *do not work in low-wage industries*," USDOL "believes that the proposed salary level is appropriate." 80 Fed. Reg. at 38564 (emphasis added). With all respect, this is hardly an adequate explanation to offer to lower-wage industries and to the employees in them who will be disproportionately excluded from exempt status as the result of USDOL's proposal.

Moreover, USDOL appears to have considered only three industries to be "low-wage" ones: "Leisure and hospitality, other services, and public administration." 80 Fed. Reg. at 38557.[3] What these labels actually encompass is indefinite, but they do not include retailing. *See, e.g.*, 80 Fed. Reg. at 38556, Table 11. Retailing has of course been explicitly considered a lower-wage category in repeated salary-level rulemakings, and the Agency's own data indicate that "Retail trade" represents 7.5% of the "potentially affected EAP workers", the second-highest percentage in the entire list. *See* 80 Fed. Reg. at 38602, Appendix B, Table B1.

The Agency says it engaged in a process involving undescribed "estimated . . . distributions" of unstated "weekly *earnings*" of two groups from which unspecified "alternate *salary* levels" were somehow "identified" by applying "pre-determined percentiles". 80 Fed. Reg. at 38557 (emphasis added). This analysis generated figures that were $344 lower than the proposal under one method and $264 lower under the

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[2] Those employers and employees will do more than merely "perceive" such an impact. They will in fact *experience* such an impact.

[3] As is true in many instances throughout USDOL's presentation, these entangled discussions of and references to the current proposal, the 2004 rulemaking, and the Kantor Report in the same sentences and paragraphs, using present and past tenses indiscriminately as to each, often make it difficult for the reader to discern to which the Agency is actually referring.

other. 80 Fed. Reg. at 38558. Even so, the $921 proposal has not been adjusted, apparently "because the vast majority of potentially affected workers . . . do not work in low-wage industries . . . ." 80 Fed. Reg. at 38564.

NACS also submits that the data USDOL relied upon in formulating its proposal are not appropriate to the task. For one thing, even if they were pertinent to the question at hand, USDOL has employed them as a *national composite*. Doing so fails to give "appropriate consideration . . . to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries . . . in an economy as complex and diversified as that of the United States." Kantor Report at 5.

The Agency further says that it "considered" non-Metropolitan Statistical Area regions to be lower-wage ones in choosing the proposed salary level. 80 Fed. Reg. at 38557. There is no discussion of whether USDOL has made an appropriate use of these statistical divisions, whether they were correctly used in those ways, or whether the fact that the delineations do not represent an urban/rural distinction might be a pertinent consideration. *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 13-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas* (2013).[4]

In addition, USDOL says that an analysis of "the historical relationship between the 40th percentile benchmark and the [CPI Index for all urban consumers ("CPI-U")]" has led it to determine "that the data does not substantiate . . . past concerns about the likely effects on low-wage regions and industries . . . ." 80 Fed. Reg. at 38541. However, CPI-U provides no information specific to low-wage *industries* and "is designed to measure inflation for the U.S. *urban* population and thus may not accurately reflect the experience of people living in rural areas" (emphasis added).[5]

It is also true that information related to the salaries of exempt employees has historically been used to establish a salary level "near the lower end" of the range so modeled. *See, e.g.*, Weiss Report at 12. This is especially warranted as to a relatively lower-wage industry such as that comprising NACS' membership.

Furthermore, the *amount* set is not and has never been the only compensation-oriented consideration or limitation. Instead, in pertinent part an exempt employee must also be paid on a "salary basis", which itself plays a role in distinguishing exempt employees from nonexempt ones. Weiss Report at 24. This too militates in favor of restraint in setting the salary level, in that the qualitative *nature* of the employee's compensation facilitates defining and delimiting exempt status.

Finally, NACS reminds the Agency that the impact will not be limited to those employees whose salaries would have to be raised to maintain the exemption. There

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[4] http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf.

[5] Dep't of Labor Bureau of Labor Statistics, *Consumer Price Index: Frequently Asked Questions*, http://stats.bls.gov/cpi/cpifaq.htm#Question_21 (last visited Aug. 20, 2015).

would also be a "ripple effect" throughout the rest of the workforce, both exempt and nonexempt. Salary increases caused by the threshold rise must be worked-into the salary levels of more-highly-paid exempt employees in order to avoid compression in the compensation structure. Many voluntary and legally-required benefits are tied to or at least sensitive to those salary levels, as are legally-mandated employer contributions.

Industry employers have only so much in the way of resources to devote to labor costs. Consequently, among the results of any increase of the magnitude proposed will be that industry employment will decrease through layoffs, unreplaced attrition, the elimination of positions, or deferring or elimination of expansion plans. Pressure to reallocate resources will also cause industry employers to eliminate or reduce benefits and to reduce wages and other compensation by changing their kind and/or amount.

Inelastic consumer spending and the low industry profit margins simply will not support the absorption of more than a small fraction of yet-another large salary increase and the related costs so as to squeeze industry employers to (in some cases perhaps beyond) the breaking-point. Even so, there will also unavoidably be a resulting higher cost to consumers of the industry's goods and services. The adverse effects will be even greater in relatively lower-wage geographical regions.

Against this background, NACS recommends the following:

- The proposed level is ill-founded and too high, and the entire proposal should be withdrawn;
- USDOL should conduct an entirely new evaluation and should make a different proposal on the basis of the internal, exemption-specific information (as updated, if need be) and analysis to which it has referred in the current explanation;
- USDOL should publish a detailed report on both the contents and results of the exemption-specific analysis to which the proposals refer and upon which the new proposal will presumably be based; and
- USDOL should return to the 20% guideline selected in 2004 and should apply it to the array of reasonably-current salaries paid on a "salary basis" to exempt employees in the lowest geographical and industry sectors, rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.

2. Proposed Automatic Update

USDOL's proposal to update the salary level automatically should not be adopted. First, USDOL "is not proposing specific regulatory text", 80 Fed. Reg. at 38539, so the adoption of any such indexing mechanism would be unlawful and without effect under the Administrative Procedure Act.

Such a mechanism would also disserve some of the very interests USDOL has sought to promote. Furthermore, the other rationales articulated are unsupported, outweighed by other considerations, and fraught with the very-real potential for unforeseen and unintended consequences.

To begin with, USDOL recognizes that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula." 80 Fed. Reg. at 38527. But the proposal involves exactly this: Taking the new salary level and then annually extrapolating it into the indefinite future based upon "a standard formula".

One articulated rationale is that "frequent updates are imperative to keep pace with changing employee salary levels." 80 Fed. Reg. at 38539. To the extent that this is so, USDOL provides no reason why any such imperative cannot be addressed without resort to an automatic mechanism.

The explanation makes multiple references to historically-uneven and sometimes-long intervals between adjustments in the salary levels. *Id.* But surely past administrative inaction, which could be improved upon, is an insufficient justification for such an extreme and unprecedented change.

NACS is concerned that USDOL has expressed no intention to undertake substantive salary re-evaluations regularly *in the future*. There is no assurance that the underlying determinations leading to the coming figure will go un-reconsidered indefinitely, thus leaving whatever the figure is in five, ten, or even twenty years simply to the cumulative impact of annually applying "*a standard formula*" that calls for simply:

- Statistically locating the 40th percentile of a data set; or
- Calculating a CPI-U-derived percentage increase in the predicate salary.

Apparently in anticipation of such a response, USDOL refers to:

- Competing regulatory priorities;
- Overall agency workload; and
- The time- and resource-intensive nature of notice-and-comment rulemaking.

80 Fed. Reg. at 38539. NACS respectfully submits that these concerns are better resolved internally when evaluating priorities and allocations of resources. This is particularly true in light of the fact that the salary test itself is entirely a creature of USDOL's making in the first place, one that, in its own words, "cannot be reduced to a standard formula."

Implementing the indexing proposal would also mean that USDOL had effectively abandoned its responsibility for and practice of making substantive judgments about the inflationary effects of increases in the salary level, including as to lower-wage

sectors such as the retail industry and small business. *See, e.g.*, 69 Fed. Reg. at 22168; 40 Fed. Reg. 7091 (Feb. 19, 1975). The impact would be especially pronounced in a period of high inflation and could in fact contribute to a serious inflationary spiral. Nor would this effect be limited to the amount of the jump in the minimum salary itself; that move would also spark increases in:

- ◇ Salaries paid *above* the minimum level so as to avoid compression in compensation scales among exempt employees; and

- ◇ Compensation and benefits of a non-salary nature that are directly or indirectly keyed to the salaries of exempt employees.

The Agency contends that indexing would have no disproportionately harmful effect upon lower-wage regions or industries. This is said to be so in part because USDOL selected the 40th percentile rather than a higher one "to account for low-wage regions and industries." 80 Fed. Reg. at 38541. However, the 40th percentile does not "adequately protect" them given the shortcomings NACS discussed previously.

If there were nevertheless to be some proposed indexing procedure in the future, then it would be wise to include these features:

A. The Re-Evaluation Period

First, changes should not occur annually. Yearly revisions will seriously complicate and interfere with management's ability to formulate both short-term and longer-term budgets.

In addition, it is unwarranted to derive from USDOL's recounting lengthy hiatuses in re-visiting the salary test the proposition that an *annual* re-set is somehow necessary. Furthermore, such a frequency would undercut USDOL's stated desire to promote simplicity, efficiency, consistency, and predictability where the exemptions are concerned.

NACS recommends that any such re-evaluation period be not less than every three years. NACS also recommends that the period of advance notice be extended to 180 days. Against the background of a period of at least three years, it is highly unlikely that an amount derived from the underlying statistical information would be materially affected by the difference between 60 days' notice versus 180 days' notice.

B. A Per-Revision "Cap" Or "Maximum"

USDOL states that an index approach is intended to replace "more drastic" changes with "gradual changes", but no safeguards have been proposed to protect against drastic increases (or decreases) in the salary level. 80 Fed. Reg. at 38523. We recommend that the change in salary level be no more than five percent of the prior salary level. This is slightly higher than the annualized increase in the salary level over the exemptions' history.

C. A "Safety Valve" For Exceptional Or Unforeseen Circumstances

There could also be times of national emergency, episodes of extraordinarily high unemployment, or a host of other exigencies that would render automatic salary indexing undesirable and untenable for at least some period. The day might well come when the actual or threatened effects of the indexing mechanism should not be permitted to persist or occur. For instance, there might again be a period of high inflation comparable to or even worse than that of the late 1970s, or conceivably there might someday even be a period of prolonged and exacerbated *de*flation.

NACS recommends that the Secretary of Labor or the Wage and Hour Administrator be expressly authorized to modify or suspend any "update" procedure for such reasons, in such ways, and for such periods as are justified under the circumstances and are expressly articulated. Of course, the fact that such an exception should be provided for is yet another illustration of why the mechanism is ill-advised in the first place.

D. CPI-U Or Percentage-of-Earnings?

The Agency proposes that any such "update" be based upon either:

- The 40th percentile of what it refers to as "all full-time salaried workers"; or
- Changes in the CPI-U as applied to a predicate salary level.

80 Fed. Reg. at 38540. The Agency seeks comments on both methods, including as to which is "better suited" to the undertaking. 80 Fed. Reg. at 38541. NACS contends that *neither* method is an appropriate way to index future salary levels.

NACS has earlier discussed the infirmities of selecting a 40th percentile and will therefore not repeat those points here. What the percentile would be *applied to* is ambiguous; USDOL refers without citation to "[t]he chosen population – all full-time salaried workers" and to "the BLS data for this pool . . . ." 80 Fed. Reg. at 38540. The Agency says that the "pool" would purportedly "be based upon actual salaries that employers are currently paying", but the actual citations are only to information about "non-hourly paid employees". Whatever else those data do or do not represent, they are in no relevant way representative of "actual salaries that employers are currently paying" on a "salary basis" to employees who do or might also meet the exemptions' duties tests.

The only data set USDOL specifically cites and appears to intend to use has to do with a Bureau of Labor Statistics "table of deciles of the weekly wages of full-time salaried workers, calculated using CPS data . . . ." 80 Fed. Reg. at 38540 n. 37. But, again, neither do these data "specifically identify salaried workers" and certainly not employees paid on a "salary basis". They instead include unverified, unverifiable, and unspecified "usual weekly earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received" as given by "workers who do not

report being paid an hourly rate."[6] What else these "earnings" might consist of is unstated and probably unknowable. *Id.* Moreover, whereas USDOL refers elsewhere to a sample of 60,000 "households", these data represent a sub-sample of only "one-fourth of the CPS monthly sample", or presumably as few as 15,000 "households". *Id.*

Furthermore, by initially increasing the minimum salary level to the 40th percentile of the "salaried workers" data set, USDOL will also skew those very data in favor of substantial increases when future adjustments are made. For example, assuming for the moment that the 40th percentile of "salaried workers" in 2016 is the projected $970 per workweek, employers will overwhelmingly (1) convert employees who are currently paid on a salary basis at a lower rate to nonexempt, hourly-paid ones; and/or (2) increase the salaries of employees who will remain exempt to at least $970 per workweek, along with raising the salaries of more-highly-paid employees to prevent or mitigate compression. The first option will necessarily reduce the proportion of exempt employees paid on a "salary basis" in the "salaried workers" data pool USDOL proposes to use, and the second will substantially increase the amount which that remaining pool is paid. In sum, USDOL's proposal will result in a smaller group of "salaried workers" who will in turn be paid at higher salary levels, thereby artificially and unduly influencing the "prevailing minimum salary levels" used to compute the new minimum salary for exempt status.

As for the CPI-U approach, NACS has said earlier why CPI-U is an unsatisfactory reference. More to the point, however, is that, as USDOL itself recognizes, "inflation has been used as a method for setting the precise salary level *only in the breach* . . . ." 80 Fed. Reg. at 38533 (emphasis added). The Agency summarizes some of the "prior concern[s]" among its predecessors with an inflation-based approach, and it "acknowledges these concerns". 80 Fed. Reg. at 38540. However, it apparently believes that these difficulties are overcome by applying the CPI-U to the salary level to be proposed, because (i) this will be done only prospectively; and (ii) the salary level will be set "using current data on *wages* being paid to full-time *salaried* workers . . . ." *Id.* (emphasis added). On the contrary, this simply layers one ill-founded proposition upon another, including that those "current data" do not reveal specific information about "salaries" generally speaking, employees paid on a "salary basis", or exempt employees. Setting the salary level based upon some nebulous composite of "wages" is not proper.

For largely the same reasons NACS discussed earlier, USDOL should instead make a different proposal to conduct an "update" via the use of internal, exemption-specific information of the sort to which it has referred in the current explanation. Of course, if the Agency rigorously maintains a contemporaneous database of such information, then this would dispense with the need to set the salary level according to any measure other than the amounts of actual salaries paid on a "salary basis" to employees who are or are likely to be exempt, taking into account lower-wage regions and industries.

3. Crediting Nondiscretionary Payments

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[6] http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

NACS favors counting nondiscretionary bonuses and incentive payments toward the standard salary level. It is commonplace for employers in the industry to offer incentive-pay plans and bonuses, the single-most-important evaluative factor in which is profits, followed closely by sales and inventory control. In part, this reflects the fact that the labor-intensiveness of the industry, taken in conjunction with the price-sensitive nature of retail receipts, mandates that wage increases be accompanied by increases in employee efficiency, output, and revenue generation.

Incentive and bonus payments are closely tied to the unique control exercised in these areas by managerial employees at individual convenience-store establishments. The effectiveness of an establishment's management has a strong impact, sometimes a determinative one, upon the location's commercial success. Thus, taking these amounts into account in connection with an earnings test is entirely consistent with the statutory obligation to define and delimit the exemptions.

The Agency has not described how it envisions that such a mechanism would actually work. Depending upon what USDOL means, it might well be that this is *already* "permitted". In any event, NACS recommends that:

- The salary test *should* explicitly "permit" this crediting;
- The proportion of such payments that could be credited *should not be* limited to any particular percentage;
- "Commissions" *should be* included in such a provision, for reasons NACS will discuss below; and
- The crediting *should not be* limited to any particular timeframe.

If an employee is paid on a "salary *basis*" (a freestanding indicator of exempt status *in itself*), the *source* of the dollars comprising the predetermined amount is irrelevant. An employer's ensuring payment of a predetermined amount at the requisite dollar level still serves as "the best single test of the employer's good faith in attributing importance to the employee's services", Stein Report at 21, even if that amount consists in whole or in part of nondiscretionary sums ultimately derived from elsewhere.

Moreover, crediting these payments could at least reduce to some limited extent the impact of USDOL's doubling *both* the current salary level *and* the percentile that was last used as a benchmark, and its doing so without specifically adjusting the dollar amount in consideration of particular industries. This would be especially true with respect to the convenience-store industry, in which the payment of incentives and bonuses of various kinds is common. Convenience-store companies pay Store Managers and Assistant Store Managers at a weighted-mean average of $6,191 annually and $1,765 annually, respectively, in the form of bonuses or other incentive pay. While it would do little to negate the impact of any substantial salary level increase, NACS submits that, to the extent these amounts are nondiscretionary and paid on a "salary basis", they should be credited for purposes of meeting the salary level.

The Agency "believes it is important to strictly limit the amount of the salary requirement that could be satisfied" in this way and is considering restricting the offset to 10 percent. 80 Fed. Reg. at 38535. There is no discussion of specifically *why* USDOL believes this, nor any explanation for why 10 percent would be a proper proportion to consider, as opposed to, say, 50 percent, or 80 percent, or any other specific percentage.

It has long been the case that an incentive-based pay plan including the payment of a predetermined amount on a properly-maintained "salary basis" meets the exemption's requirements without regard to the fact that incentive compensation might ultimately make up *the entirety of* the employee's pay. The Agency has done so without expressing any concern whatsoever that there might be an alleged need to impose a percentage limit upon the extent to which this was done. As Mr. Stein observed in 1940:

> In some instances persons . . . are paid in part *or in full* by methods of compensation which include commissions, drawing accounts, and other items. In such instances *the salary requirement will be met* if the employee is guaranteed a net compensation of not less than $30 a week 'free and clear'.

Stein Report at 23 (emphasis added). *See also Opinion Letter of Acting Wage-Hour Administrator FLSA2006-43* (Nov. 27, 2006); *Opinion Letter of Wage-Hour Administrator No. 999*, CCH Administrative Opinions ¶ 30,546 (June 6, 1969); *Opinion Letter of Wage-Hour Administrator of March 3, 1964* (WHD Index Nos. 21 BA 203, 21 BA 205); *Opinion Letter of Director, Division of Minimum Wage and Hour Standards, of March 15, 1976*. This is not distinguishable in any relevant way from an employer's crediting 100% of the nondiscretionary payments made to an otherwise-exempt employee, provided only that the employer ensures that the "salary basis" is maintained and that the employee's net compensation be not less than the amount prescribed in the regulations.

Furthermore, as USDOL has also long recognized, these principles are just as applicable to "commissions" as they are to any other kind of nondiscretionary bonuses or incentive compensation. *See, e.g.*, Stein Report at 23; *Opinion Letter of Acting Wage-Hour Administrator FLSA2006-43, supra*; *Opinion Letter of Wage-Hour Administrator No. 999, supra*; *Opinion Letter of Wage-Hour Administrator of March 3, 1964, supra.* There is no reason to regard "commission" payments any differently from bonuses or any other sort of nondiscretionary payment, and USDOL has offered none. The Agency's only statement in this regard has to do with its being concerned that commission recipients "are generally unable to satisfy the standard duties test . . . ." 80 Fed. Reg. at 38536.

This is an overly broad generalization about the alleged nature of the work performed by anyone who as a practical matter would be in consideration for one of these exemptions. Nevertheless, the "standard duties test" and the salary test are of course different and freestanding requirements calling for independent and unrelated analyses. If an employee for whom the employer takes a commission-against-salary credit does not meet the duties requirements for exempt status, then the employee is nonexempt *without regard to* any credit. What is supposedly the case as to the

"standard duties test" for exempt status *overall* does not and should not have anything to do with how *the salary test* is constructed.

In a different vein, USDOL states that "the time period over which such compensation should be considered must be limited." 80 Fed. Reg. at 38536. On the contrary, as the foregoing authorities demonstrate, the qualitative requirements of the "salary basis", including the necessity that a "predetermined amount" be paid *each pay period*, obviate any need to restrict the counting of nondiscretionary bonuses, incentive payments, or "commissions" to a month or to any other timeframe.[7] But if some such maximum period is adopted, then NACS recommends that it be either:

- A "representative period" along the lines of what has been used under the FLSA's Section 7(i) exemption for decades (*see, e.g.,* 29 C.F.R. §§ 779.415-418); or

- As long as a calendar quarter, which experience suggests is a not-uncommon frequency for the payment of such amounts.

4. Hypothetical Changes In The Duties Tests

The Agency says that, while "it is not proposing specific regulatory changes *at this time*, [it] is seeking additional information on the duties tests *for consideration in the Final Rule*." 80 Fed. Reg. at 38543 (emphasis added). Whether or not USDOL intended such an implication, this sentence may fairly be read to suggest that in the Final Rule it will purport to make actual changes in those portions of Part 541 relating to these requirements. Post-publication remarks made by Wage and Hour Administrator David Weil appear to mean that no such changes will be made. With that understanding, NACS offers the following discussions.

A. Minimum-Percentage Requirements

The Agency's Questions B and C deal with largely the same consideration: Whether there should there be a requirement that an employee spend a minimum amount of time in the requisite primary duty in order to be exempt. 80 Fed. Reg. at 38543. NACS submits that there should be no such minimum.

Since 1938, the Agency has viewed the primary-duty test as being an ultimately-qualitative one. Whether an employee spends more than 50% of his or her time in work of the requisite kind has been no more than a "good rule of thumb" or a "useful guide", but did not "seem reasonable in all situations." Weiss Report at 51. As a result, this consideration has always been only *one* of a number of factors to consider.

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[7] In the case of "commissions", experience suggests that industry payments usually so described *are* typically computed on a monthly basis. However, this is no reason to impose such a limit as a matter of regulation.

And in 2004, the Agency recognized this long history and properly rejected the idea that there should be a minimum percentage. It did so with reference to a proposal that the threshold be 50%, but the same reasoning would apply to *any* particular percentage:

> Adopting a strict 50-percent rule for the first time would not be appropriate . . . because of the difficulties of tracking the amount of time spent on exempt tasks. * * * Such a 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).

69 Fed. Reg. at 22186. The Agency's remarks were in part based upon its earlier observation that there was no timekeeping requirement for exempt employees, 69 Fed. Reg. at 22126, and of course that remains the case today. 29 C.F.R. § 516.3.

In light of the decades-long practice of evaluating "primary duty" on a *qualitative* basis, the Agency, the courts, and other interested members of the public have become familiar with these principles and have developed approaches to applying them. But USDOL now questions whether this 75-year period of policy and practice should be abandoned because of some concern that some employees might be "spending a significant amount of their work time performing non-exempt work" and that, "at some point, a disproportionate amount of time spent on nonexempt duties may call into question whether an employee is, in fact, a bona fide EAP employee." 80 Fed. Reg. at 38543.[8] Another apparent USDOL concern is that these and similar matters "can lead to varying results." *Id.*

Whether and to what extent some employees are or are not in fact spending "a significant amount" of time or "a disproportionate amount" of time on nonexempt work so as to "call into question" their exempt status are matters that are no more or less perplexing now than in 1938. Similarly, the fact that "varying results" might occur is just as true of the application of many other duties tests to an endless variety of inherently-uncertain facts and circumstances. *No* set of regulations properly defining and delimiting the exemptions will ever avoid "varying results".

As for whether USDOL should look to California wage orders to adopt a 50% threshold, obviously NACS does not feel that it should. However, were the Agency to adopt California's *quantitative* time test, then we submit that it must also look to and incorporate all of California's regulations addressing the duties test, including that portion of the California test which attempts to compensate for the flaws of its time test by requiring *qualitative* consideration of "the employer's realistic expectations and the realistic requirements of the job" in determining whether the requirement is met. *See, e.g.*, Cal. Indus. Welfare Comm'n, Order No. 1-2001, Section 1(A)(1)(e) (promulgated

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[8] It is also true that, while the concept of "primary duty" and the impact of nonexempt work are of course related, they are nevertheless *different* considerations entailing *separate* analysis and evaluation. *Compare, e.g.*, 29 C.F.R. § 541.700 *with* 29 C.F.R. § 541.702. NACS believes that USDOL's having conflated these principles has led to its misplaced concerns.

under Cal. Code of Regs, tit. 8, § 11010(1)(A)(1)(e)). Otherwise, USDOL would be imposing exemption standards that are *more stringent* than California's.

B. "Concurrent Duties" Concept

The Agency asks whether 29 C.F.R. § 541.106 "is working appropriately" or instead "needs to be modified". 80 Fed. Reg. at 38543. Our comments relating to "primary duty" are also apt here.

The current Section 541.106 was adopted in 2004 but did nothing more than incorporate a longstanding concept. *See, e.g.*, 69 Fed. Reg. at 22136-37; *Opinion Letter of Deputy Wage-Hour Administrator* FLSA2005-19 (Aug. 2, 2005) (section was "not a change in the Department's position"). Indeed, such considerations were embraced at least as long ago as 1949. Weiss Report at 35. Thus, it is not the case that the regulation was introduced recently, such that whether it is "working appropriately" is merely a regulatory check-up on a recent development. As we said in the preceding discussion, the Agency, the courts, and other interested parties who are familiar with the concept's parameters have become accustomed to it over many decades and have long experience with applying it, and its fundamentals should not be changed.

Furthermore, the concurrent performance of exempt and nonexempt work has to do with whether an employee meets the "primary duty" requirement – *not* whether the employee is supposedly performing "too much" nonexempt work. 29 C.F.R. § 541.106(a) ("Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is . . . based on the factors *set forth in §541.700*." (emphasis added)). Therefore, the principle is not an exemption requirement in itself; it simply has a bearing upon the evaluation of a requirement. This in itself "avoid[s] sweeping nonexempt employees into the exemption." 80 Fed. Reg. at 38543.

The Agency's formulation of Section 541.106 further "avoid[s] sweeping nonexempt employees into the exemption" by articulating qualitative ways to distinguish between instances in which nonexempt work is performed concurrently with exempt work from those in which it is not:

> Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

29 C.F.R. § 541.106(a). Taken along with the illustrations that follow this passage, the character and impact of concurrent performance can be evaluated with certainly no more difficulty than is presented by other duties requirements.

The "concurrent duties" concept is of particular relevance to retailing, and especially to the convenience-store industry. Consider, as an illustration, a Store Manager who, in stocking shelves, simultaneously trains a new clerk in how shelves are to be stocked for merchandising and security purposes, gathers information as to stock levels to use in ordering, and checks on the performance of subordinates in their stocking work. As another example, a Store Manager who is working at a cash register is not simply "ringing sales" but is also monitoring store conditions and security, watching employee performance, noting customer comments, complaints, and preferences, and reviewing documents and reports prepared by others and preparing reports of his or her own.

And once again, that the application of the regulation might be "difficult" and might "lead to varying results" can be said of most if not all of the other duties-related tests for exempt status in a multitude of situations. Moreover, difficulty and "varying results" cannot be eliminated by *any* set of regulations that will also be consistent with USDOL's responsibilities in defining and delimiting the exemptions.

Finally, the Agency has asked "[t]o what extent . . . exempt lower-level executive employees [are] performing nonexempt work." 80 Fed. Reg. at 38543. Of course, if these hypothetical employees are exempt, then how much nonexempt work they are doing is irrelevant. As for the extent to which lower-level executive employees who might or might not be exempt are doing nonexempt work, it is highly unlikely that any response to such a question will be an adequate or legitimate predicate for rulemaking.

C. Reintroducing A Long-Test Provision

The Agency says throughout its proposals that its charge includes modernizing and simplifying the regulations, making them easier to understand, increasing vague "efficiencies" of their application, and reducing the frequency and amount of FLSA litigation. NACS assumes that USDOL is referring to adopting something along the lines of the pre-2004 exemption structure so as to impose a "long test" percentage limitation upon nonexempt work. These aims would not appear to be served by re-introducing a more-complicated "long/short duties test structure" that was formulated nearly 75 years ago and was dispensed with more than a decade ago. Stein Report at 14-15; 80 Fed. Reg. at 38543.

While the "long test" would have a *superficial* appearance of a rigorous numerical standard, in truth any such impression was and would be only an illusion. Stating such a percentage accomplishes nothing in itself; this simply moves the uncertainty to a different area and reveals why this approach was, and again would be, ineffectual.

From early on, the Agency, the courts, and the relevant public faced intractable difficulties in discerning what "nonexempt work" consisted of in the first place. *See, e.g.*, Weiss Report at 29-31. The concept of work that is "directly and closely related" to exempt duties evolved from an effort to provide more clarity. Weiss Report at 32. Note that this formulation moved the inquiry back to what counted as "exempt" work, only affected the issue of what work was "nonexempt" by negative implication, and had much more to do with "primary duty" than with percentage limitations.

The long test persisted for a while thereafter largely by virtue of historical inertia (including that it had largely ceased to have any practical function for probably more than two decades) until it was wisely and appropriately eliminated in 2004. This occurred in significant part in recognition of the fact that long experience had shown the test not to contribute in any appreciable or effective way to distinguishing between exempt employees and nonexempt ones. At the same time, the principle of identifying activities that are "directly and closely related" to exempt work was preserved and remains in effect; it is incorporated into the meaning of "exempt work"; and both are proper, integral parts of "primary duty". *Compare* 29 C.F.R. § 541.700 *with* § 541.702 *and* § 541.703. This arrangement is historically well-founded and analytically elegant, and the exercise of determining exempt status will not be served by superimposing another layer upon it.

And as USDOL rightly recognized in 2004, a *qualitative* discernment of "nonexempt work" is one thing; undertaking to measure *quantitatively* how much of it is done from hour-to-hour, workday-to-workday, and workweek-to-workweek is quite another altogether. 69 Fed. Reg. at 22126-27. There is currently no requirement to maintain any records of the amount of such work, and there is serious reason to doubt that the quantification could be done in any useful and reliable way. Furthermore, if a percentage limitation were re-imposed on a *workweek* basis, as it applied before, the exacerbated practical burdens imposed by trying to measure these things (even if that can be done) and by dealing with possible exempt-one-workweek/nonexempt-the-next-workweek scenarios are too obvious to warrant more discussion. For instance, untangling and quantifying "exempt" work and "nonexempt" work in just the couple of common "concurrent duties" situations NACS posed in the preceding section even once would be daunting at best and unreliable in result, not to mention the probable impossibility of doing so in an meaningful way on a workweek-by-workweek basis.

There is no reason to re-impose the long-test/short-test dichotomy; there is every reason *not* to do so. Such a requirement would accomplish nothing that a competent evaluation of the existing principles cannot achieve. Instead, any such step:

- Would *complicate* rather than "simplify" the exemptions' application;
- Would "modernize" nothing but would instead revive a requirement that time has shown to be unnecessary and unworkable;
- Would make the requirements *harder* to understand;
- Would introduce *in*efficiencies that do not exist today, including with respect to the USDOL's investigative efforts;
- Would increase *un*certainty in the exemptions' application;
- Would produce "varying results" to a *greater* extent; and
- Would *increase* the frequency and volume of litigation.

D. Managers At Individual Retail Or Service Establishments

The Agency has declined to give any specific consideration to the adverse impact that increasing and indexing the salary level will have upon the retail and service industries. Therefore, in response to the Agency's invitation to propose other changes in the duties tests, and especially if some over-50% primary-duty is ultimately adopted, we recommend that the executive exemption be modified in future rulemaking to recognize the likelihood that the role and circumstances of the manager of an individual retail or service establishment support exempt status.

This could be accomplished by redesignating the current 29 C.F.R. § 541.100(b) as 29 C.F.R. § 541.100(c) and then substituting the following as a new Subsection (b):

> The highest-ranking employee at a retail or service establishment who is customarily assigned the principal on-site responsibility for the daily operations of the establishment is deemed to have management as his or her primary duty.

Note that, unlike in past recommended formulations, this addition would not pronounce such a manager to *be* exempt; the salary tests and the other duties requirements would also have to be met. Such a provision would not, of course, preclude the exemption's application to other, lower-ranking employees in the establishment if they satisfied the exemption's tests.[9]

The Agency's adoption of such a provision would clearly be justified and appropriate. As Mr. Stein recognized nearly 75 years ago as to an employee who is in charge of an establishment:

> [c]learly, if such an employee [has] at least two other employees to supervise and is not himself supervised at the location where he works, he possesses a degree of executive freedom that would not be the case if he had a job of comparable importance in charge of a department inside a plant. Due weight must be given to this freedom from direct supervision enjoyed by the top person in an independent establishment or in a branch establishment physically separated from the supervising office of the company.

Stein Report at 17-18. Mr. Stein also took note of "the comparatively high degree of freedom" and the "consequent weight of the executive responsibility involved" in such an employee's work. Stein Report at 18.

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[9] Further, if some quantitative primary-duty analysis is adopted, to the extent that a lower-ranking employee is the highest-ranking employee on-site (for example, an assistant manager), we would submit that the activities and time be deemed exempt.

Finally, a provision specifically relating to these industries is indisputably consistent with Congressional intent and will in fact advance this intent. After all, Section 13(a)(1)'s still-existing amendment dealing explicitly with "an employee of a retail or service establishment" demonstrates the solicitude with which Congress has viewed the executive exemption (and for that matter the administrative exemption) where the retail and service industries are concerned. That Congress included this reference with respect to the now-defunct percentage limitation upon nonexempt work does not diminish the fact that Congress regarded the retail and service industries with particular deference where the relevant exemptions are concerned.

5. The Effective Date

We also wish to address one final matter of importance: Any final revision's effective date. If the current proposal to increase the salary level substantially is not withdrawn, then employers will need considerable time to evaluate alternatives and to make and implement important business decisions in light of the revisions.

As just a selection of illustrations, employers will find it necessary to:

- Evaluate how the changes will affect their workforces in the near- and intermediate terms, including determining who will continue to be treated as exempt and what the resulting cost will be of salary increases (both those increases for at-the-new-threshold employees and those necessitated by the need to avoid compensation compression);

- Design new pay plans and reduce the straight-time compensation for employees who will thereafter be treated as nonexempt;

- Determine to what extent to reduce or eliminate benefits or other advantages of employment to offset composite increases in labor costs; and/or

- Determine what workforce reductions or freezes are called for.

A substantial adjustment period longer than that provided in 2004 is certainly justified. *See* 69 Fed. Reg. at 22122. We recommend that the delay for this over *100%* increase be *not less than one year* after the revisions are published in their final form. Notably, this still is significantly less time than Congress provided in 2007 when, after nearly a decade at $5.15, it ultimately increased the federal minimum wage by (approximately *40%*, incrementally, from July 23, 2007 to July 24, 2009) comparatively far less than the salary level increase USDOL proposes. *See* 29 U.S.C. § 206(a)(1). *See also* Pay Workers a Living Wage Act, S. 1832, 114th Cong. (2015) (proposing an over 100% increase in the federal minimum wage, incrementally, over a four-year period).

R. Timothy Columbus
202 429 6222
tcolumbus@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

September 4, 2015

The Honorable Thomas Perez
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, D.C. 20210

The Honorable David Weil
Administrator, Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, NW
Room S3502
Washington, D.C. 20210

RE: Proposed Rule to Define and Delimit the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; RIN: 1235–AA11

Dear Secretary Perez and Administrator Weil:

On behalf of the Society of Independent Gasoline Marketers of America ("SIGMA"), I am pleased to provide these comments on the Department of Labor ("DOL" or "the Department"), Wage and Hour Division's proposed rule (the "Proposed Rule" or "Proposal")[1] to update and revise regulations implementing overtime pay exemptions under the Fair Labor Standards Act of 1938 ("FLSA").[2] SIGMA supports the Department's goal to raise the overtime salary threshold to ensure that it accurately protects American workers. Nevertheless, as articulated below, the Proposal raises significant concerns insofar as it would adversely impact the ability of small business fuel retailers to hire full-time fixed salary employees.

SIGMA supports a change in the overtime salary threshold, however, we believe that this level should be set as a percentile of the salary of full-time salaried employees in two populations: the South and the retail industry—the methodology used in the 2004 Final Rule.[3] The current Proposal would raise the overtime salary threshold to a level much higher than the salaries paid to first-line managers in our members' stores in many parts of the country. This is problematic because it will discourage long-term full-salary hiring in an industry that is a major entry-level employer generally, and a major employer for entry-level management positions in particular.

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[1] "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 80 Fed. Reg. 38516 (proposed July 6, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf.

[2] 29 U.S.C. §201, *et seq.*

[3] 2004 Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004).

Furthermore, while SIGMA favors scheduled salary updates that will prevent unpredictable jumps in the overtime threshold, we believe such automatic updates should occur every three to five years. Annual or biennial updates would create significant compliance costs that would ultimately frustrate the Department's goals and disincentivize full-time salary hiring. Lastly, SIGMA supports the existing duties test and cautions the Department against making alterations that would not account for industry differences.

I. BACKGROUND

A. SIGMA Members are Significant Entry-Level Employers.

The fuel retailing industry is a significant entry-level employer, employing over 2.47 million people. In fact, one in nine (11 %) adult Americans have worked at a retail motor fuel outlet or convenience store at some point in their working lives. Significantly, because our industry tends to promote from within, we are also a significant entry-level employer for management jobs. In 2014, SIGMA members alone provided over 353,000 jobs in fuel and convenience store operations.

The retail side of the industry as whole, with approximately 153,000 stores across the United States, posted $482 billion in motor fuel sales and $696 billion in total sales in 2014—representing approximately 2.5 percent of United States GDP.

SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel that sell more than 50 percent of motor fuel sold in the United States. Most SIGMA members are involved in gasoline retailing, approximately two-thirds are involved in wholesaling, 36 percent transport product, 25 percent have bulk plant operations, and 15 percent operate terminals. Member retail outlets come in many forms, including travel plazas, traditional "gas stations," convenience stores with gas pumps, cardlocks, and unattended public fueling locations. Some members sell gasoline over the Internet and a few are leaders in mobile refueling.

B. Nearly All Retail Gasoline Outlets Are Owned and Operated by Small Businesses that Operate on Thin Margins.

Despite the fact that one in every 23 dollars spent in the American economy is spent in our members' channel of trade, which conducts more than 160 million transactions per day, we are an industry of small businesses. Under five percent of the retail motor fuel outlets in the United States are owned or operated by integrated oil companies. The vast majority of branded outlets are locally owned and more than 70 percent of retail motor fuel and/or convenience store companies operate ten stores or less. In fact, more than 60 percent of businesses that sell motor fuels at retail operate just one store. For our industry, any additional regulatory burdens resulting from the Proposal will generally fall upon small businesses and their customers.

The retail fuel market is one of the most competitive in the United States. SIGMA members operate on tiny margins – generally two-to-three cents per gallon of fuel sold. The

average annual pretax profit per store is approximately $47,000.[4] SIGMA members are unable to absorb incremental cost increases without passing them on to consumers.

Therefore, it is important that the final rule set a realistic salary threshold that encourages business innovation and hiring. This means that the Department must adjust the underlying data set used to calculate the salary level to account for regional and industry variations. Moreover, DOL should use a salary update mechanism that will promote certainty and be cost-effective for businesses. Otherwise, the Proposal will end up creating additional hurdles for small business owners that will deter investment and long-term job growth. Finally, the Department should not make alterations to the existing duties test that fail to account for industry differences.

II. COMMENTS ON THE PROPOSAL

SIGMA recognizes and supports the Department's objective in setting an adequate salary threshold for the overtime exemption. However, we remain concerned with the underlying methodology used by DOL to set the salary threshold, which is not supported by the rulemaking record, will have a negative impact on the people the Proposal seeks to benefit, and will conflict with the Department's objectives in revising this rule.

A. SIGMA Supports Raising the Salary Threshold But Opposes the Methodology Used in the Proposal.

The Department is proposing to update the salary threshold that triggers the overtime exemption to the 40th percentile of earnings for *national* full-time salaried workers across all industries: $970 per week, approximately $50,440 for a full-year worker.[5] This is a significantly higher percentile of the salary distribution from the standard level set in the 2004, which set the required standard salary level at approximately the 20th percentile of salaried employees based on data from salaried employees in the South and in the retail industry: $455 per week, approximately $23,660 per year for a full-time worker.[6] Raising the salary threshold to the 40th percentile of *national* full-time salaried workers without regard to the type of business in which people are employed is inconsistent with the Department's statutory mandate in this area and the rulemaking record. An increase in the salary threshold must account for regional and industry

[4] *See generally* National Association of Convenience Stores ("NACS"), State of the Industry Annual Report for 2014. This number was calculated using the average pretax profits for stores between 2010 and 2013, which ranged from $45,100 to $48,251per store. The average pretax profit for stores between 2010-2014 is $51,121. This higher number includes the average pretax profit in 2014 ($68,065), which is considered an anomaly resulting from the unusual behaviors of the crude oil market that year.

[5] The Proposal specifies raising the salary threshold to $921 per week, or $47,892 annually for a full-time salaried worker. However, we have chosen to refer to the numbers that will be in place if and when the rule is finalized as proposed (2016 data, projected to be $970 per week, $50,440 per year). DOL is also proposing to increase the Highly Compensated Employee annual compensation requirement to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.

[6] 2004 Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004).

differences in order to avoid negative consequences for employment in regions and industries with lower mean salary levels today.

i. The Proposal's Methodology is a Significant Departure From the Methodology Used in Previous Rulemakings.

In the seven overtime rulemakings since enactment of the FLSA, DOL has relied upon a common methodology to set appropriate salary levels. With some slight variation, the Department has, in almost every prior rulemaking, surveyed a broad set of data on actual wages paid to salaried employees and then set the salary level at an amount slightly lower than might be indicated by the data.[7] The earliest rulemakings (1940 and 1949) set the salary level based on the lowest level of exempt employees.[8] Starting in 1958 with the Kantor Report, the Department began setting salary levels with distinct consideration for low-wage regions, employment size groups, city size, and industry sectors.[9]

In its most recent 2004 rulemaking, DOL used Current Population Survey ("CPS") data that encompassed "most salaried employees, and set the salary level to exclude roughly the bottom 20 percent of those salaried employees in each of the subpopulations (1) the South and (2) the retail industry."[10] While the 2004 methodology was slightly modified from earlier rulemakings, it still considered pay disparities among industries and regions when calculating the salary threshold. In fact, the Department specifically utilized "lower-salary" data sets from the South and the retail industry in 2004 to "*accommodate those businesses for which salaries were generally lower due to geographic or industry-specific reasons.*"[11] The Department did not use this methodology in the current rulemaking. Rather, the Department used nationwide data for full-time salaried employees without limiting it to subpopulations with lower-salary data sets (i.e. the South and the retail industry).

This is the first time the Department has ever taken this approach and this departure will harm workers and businesses. The Department's Proposal fails to account for the marketplace reality found across the retail industry and in rural and southern America. As the Department recognized in 2004, the retail industry and the South generally have salaries that are lower than the rest of the nation.

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[7] *See* 80 Fed. Reg. at 38526.

[8] *Id.*; *See generally* Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541, Weiss Report (June 30, 1949) and Kantor Report (Mar. 3, 1958). As early as the 1949 Weiss Report, DOL recognized that in order for the exemption to function effectively, salary levels had to be set with consideration for disparities in pay across the nation and in different size establishments.

[9] Kantor Report at 5 (describing that "the salary tests have thus been set for the country as a whole...with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States").

[10] 80 Fed. Reg. at 38526.

[11] *Id.*, emphasis added.

In fact, it is common practice for the Federal Government to address these regional variations. For example, the Federal Government, in paying its own employees, requires locality-based comparability payments to adjust for regional pay disparities between government and private sector employees.[12] The Davis-Bacon Act requires DOL to determine locally prevailing wage rates to ensure that federal contractors and subcontractors in a particular area are paid at a rate no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects.[13] Similarly, Medicaid and Medicare physician payments are adjusted according to geographic indices to account for regional price differences.[14] For the Department to completely disregard geographic and industry disparities in salary level runs counter to the Department's statutory mandate and past practice and will harm workers in some regions and industries.

By roping in all salaried employees across the country and across all industries into its base data set, DOL is creating a salary level that is out of sync with reality. In our industry, the average compensation for a store manager is approximately $39,580 and the average wage for an assistant store manager is $26,024.[15] These numbers vary greatly by region and company size, however, with some store managers in rural and southern areas earning closer to $24,000 and some assistant managers earning approximately $19,000 per year. By raising the overtime salary threshold from $23,660 to $50,440, in essence, DOL would be mandating at least a $10,000 salary jump ($25,000 in some instances) for managers and an over $24,000 jump ($31,000 in some instances) for assistant managers. Should our industry adjust salaries to those levels, the costs would run into the billions of dollars—and given the small profit margins in our industry that would not be sustainable.

While DOL may view companies adjusting up to meet the salary threshold as a positive development, the huge costs involved mean that will not happen. Instead, the industry will move to a system of hourly-wage employees, exactly what the Department is trying to avoid. This will happen because it will be significantly more cost efficient for employers to have employees work the same amount of hours they are working now at hourly rates, rather than pay their management employees at the threshold set by DOL. This will result in a net negative result for employees. By reverting to hourly employment, employees will lose job security and a significant amount in terms of benefits (e.g. paid sick leave and vacation time). And, hours will be more limited. Employees will then make less money, and have fewer benefits and less job security due to the DOL rule. This return to hourly-employment would be particularly damaging for employees in the fuel retailing industry because the industry is a major entry-level employer for first-line managers.

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[12] *See e.g.*, 5 U.S.C. § 5304.

[13] The Davis-Bacon Act, 40 U.S.C. § 3141. *See also* Wage and Hour Division, Davis-Bacon and Related Acts, *available at* http://www.dol.gov/whd/contracts/dbra.htm.

[14] *See e.g.*, 42 U.S.C. 1395w–4.

[15] NACS, State of the Industry: Compensation Report 2014, pages 29-31.

According to the Proposal, raising the salary level according to the 2004 methodology (20th percentile of subpopulation data), would result in a salary level of $577 per week, approximately $30,004 per year. Using the Kantor method (10th percentile of likely exempt employees in low-wage regions, employment size groups, city size, and industries) would result in a salary level of $657 per week, approximately $34,164 per week.[16] Interestingly, both of these methods, which address regional and industry variations, are more reflective of what are realistic wages in our industry. The Department, however, has rejected these methods without support, merely noting that using nationwide data creates a more "robust" sample.[17]

Although the Department analyzes the regulatory alternatives just described, it notably fails to consider a 40th percentile increase in wages using the 2004 methodology.[18] Raising the salary threshold to the 40th percentile of full-time salaried employees based on the 2004 data set – i.e. based on both exempt and nonexempt full-time salaried workers in the low-wage South and retail industry – would result in a salary level of $812 per week, approximately $42,224 per year. This would be $18,564 more than the current threshold and much higher than current wages in low-income areas. Yet, the Department failed to consider this option. Departing from the 2004 methodology without analysis or support was arbitrary and capricious, an abuse of discretion and contrary to the Department's statutory mandate.

ii. The Rulemaking Record Lacks Analysis to Support the Department's Proposal.

Under the FLSA, DOL is charged, among other things, with prescribing and enforcing standards relating to wages and overtime pay.[19] Unfortunately, the Department has come up short with its present Proposal. The rulemaking record shows that DOL has failed to consider or properly analyze several important issues that are critical to setting any effective overtime standard. Significantly, DOL has not considered the potential impact of its proposed changes on different regions and industries throughout the country.[20] While DOL does include some data

[16] 80 Fed. Reg. at 38582. The 1958 Kantor method used data regarding the wages of exempt employees, and set the salary level so that "no more than about 10 percent" of such exempt employees "in the lowest-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." Kantor Report, *supra* note 8, at pages 5-7. 69 Fed. Reg. at 22168.

[17] In addition to disregarding regional and industry variations, DOL's Proposal adds many groups to the sample pool that had previously been excluded. For example, the Proposal states that "while the self-employed...agricultural workers...teachers...and federal employees were excluded from the 2004 sample because they are not subject to the part 541 salary level test, they nonetheless are part of the universe of salaried employees and, as such, their salaries shed light on the salaries paid to employees performing exempt EAP duties." 80 Fed. Reg. at 38528. DOL explains the radically altered sample data by noting only that the old sample size may not "yield statistically meaningful results"—it does not provide any substantive analysis to account for this change.

[18] *See generally*, Table 12, Weekly Earnings Distribution, 2013, 80 Fed. Reg. at 38558.

[19] *See generally*, 29 U.S.C. §201, et seq.; *see also* the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

[20] It is unclear, for example, how DOL arrived at its estimate that "the average annualized direct employer costs will total between $239.6 and $255.3 million per year." 80 Fed. Reg. at 38518. In fact, given the lack of analysis conducted by DOL, these numbers could not account for the huge costs that will be foisted upon certain industries and regions of the country.

(divided by industry) on the number of EAP workers that may be affected by raising the threshold, it does not actually calculate and analyze how the Proposal would impact a particular industry beyond considering how many workers may now become overtime ineligible. Moreover, it does not conduct proper analysis to reach its conclusions, in part because the Department relies on certain assumptions when performing calculations that are without foundation and not supported by data.[21] Similarly, the Proposal does not compare how the rule's impact would vary by industry. The Department only asks stakeholders to estimate the potential impact on a regional or industry basis, otherwise abdicating its responsibility to perform in-depth analysis. Alternatively, in the few places where DOL highlights a potential impact, it then neglects to follow through with analysis. For instance, the Proposal highlights that increasing the overtime threshold may lead to a reduction in profits available to firms for business investment—but it never actually scrutinizes this statement or quantifies the potential loss in profit and related investment opportunity loss.

The absence of analysis relating to regional impact is particularly troubling since improperly set wage levels can destroy local economies.[22] Although the Department may ultimately conclude that changing the overtime regulations will not harm certain regions, the problem here is that it has not performed the analysis that would be necessary to reach that conclusion. While the Proposal notes the possibility of other alternatives, it does so without analyzing the outcomes that would result from those alternatives and comparing them to the outcomes that would result from the approach taken in the Proposal. This is not adequate and provides no foundation for the Department's decisions.

For example, the Department failed to compare salary levels by industry and analyze the impacts on each industry of imposing a salary level based on a national data set. The same is true for regional differences. The Department did not compare regional salary levels and analyze how different regions of the country would be impacted by imposing a salary level based on a national data set. The Department does not, therefore, know whether its Proposal will reduce wages, employment, and business profitability in particular industries or regions. The Department similarly does not know whether or to what extent its Proposal will push more workers in certain industries and regions into hourly rather than salaried positions.

The Department's failures to conduct the basic types of analysis that would be expected by any rational decision-maker in this area are striking and cannot be justified. By jumping to conclusions without support, the Proposal violates the Administrative Procedure Act.

iii. Nondiscretionary Bonuses and Incentive Payments Should Count Towards the Standard Salary Level Test for the Executive, Administrative, and Professional ("EAP") Exemption.

[21] For example, the Department at one point notes that to estimate the total regulatory familiarization costs, its analysis assumes that a mid-level human resource workers paid a median wage will review the rule and that it will only require one hour of time for regulatory familiarization. Yet, DOL does not clarify how it can assume that only one hour is needed for an employee to familiarize himself with the rule.

[22] *See e.g.*, Preston Cooper, The Federal Minimum Wage Is Killing Puerto Rico's Economy (July 5, 2015), *available at* http://www.economics21.org/commentary/federal-minimum-wage-killing-puerto-ricos-economy.

The Department has consistently assessed compliance with the standard salary level test by looking "only at the actual salary or fee payments made to employees" and has not included bonus payments of any kind in this calculation.[23] Bonuses, however, are "actual" payments and the Department cannot justify a finding that they are not. In the retail industry, in particular, it is very common for a substantial part of salaried employees' earnings to be in the form of such bonuses because they foster a sense of ownership and align managers' incentives with those of the business. To account for this practice, SIGMA supports including nondiscretionary bonuses to satisfy the overtime salary threshold. While the Proposal considers whether to permit such payments to satisfy 10 percent of the standard weekly salary level,[24] there is no good reason to set a cap at that amount. Nondiscretionary bonuses and incentive payments form a part of employee compensation. As such those payments should be fully counted as part of the standard salary level.

In addition, there is no principled reason why employers should not be able to credit such compensation to the standard salary level on an annual basis. As compensation, nondiscretionary bonuses should be counted towards the standard salary level even if they are paid out yearly. According to the Department, the weekly time requirement would be necessary to protect workers and ensure that they receive a minimum level of compensation on a consistent basis. This statement is without foundation—yearly salaries also provide consistency. Moreover, permitting employers to count bonuses annually incentivizes them to hire employees on an annual basis, ultimately promoting job security and long-term employment. Should DOL reject annual payments, however, quarterly payments should suffice as they provide businesses with flexibility in making adjustments to budget and outlays while supporting employees. More frequent monthly or weekly payments would burden businesses with compliance costs that would disincentivize bonus payments altogether and decrease overall compensation levels.

B. SIGMA Supports Automatically Updating the Salary Threshold on a 3-5 Year Cycle According to a Fixed Percentile of Wages.

SIGMA recognizes that the overtime salary threshold has become outdated due to the long periods of time between rulemakings. Sudden, large adjustments to the threshold without warning can cause dislocation in the industry, increase compliance costs, and provide disincentives to employing people on a salaried rather than an hourly basis. To avoid this outcome, we support establishing scheduled salary threshold updates to ensure that the salary threshold continues to be a reliable proxy for identifying overtime-eligible white collar employees while insulating small businesses from extreme changes in the salary threshold.

These automatic updates should not be annual. Rather, we support the Department automatically updating the salary level (with an accompanying rulemaking to approve the update) every three to five years. Annually updating the salary threshold will create an environment of uncertainty that will harm businesses and ultimately impede DOL's goal: setting a predictable and simple overtime salary threshold that is easy for businesses to comply with. If

[23] 80 Fed. Reg. at 38535.

[24] *Id.* at 38535.

the salary threshold were to change yearly, there would be significant compliance costs imposed on businesses. While regulatory familiarization costs would be of concern, the biggest costs would be the adjustment and managerial costs. Every time the salary threshold is changed, our members incur adjustment costs as they must update payroll systems, reevaluate employees' exempt status, and inform employees of policy changes. Relatedly, our members incur managerial costs as they work to adjust scheduling and monitor employee hours to ensure they are in compliance with the overtime rule. In practice, therefore, annual overtime salary adjustments would impose significant costs on SIGMA members and would make it extremely difficult for them to be able to plan or budget effectively. This, in turn, will incentivize a return to hourly employment practices and discourage long-term business investment. In contrast, if the threshold were updated on a three to five year cycle, companies would have the ability to implement business plans without worrying about frequently reworking numbers and adjusting work schedules and hiring practices. This certainty and consistency will be much more cost-efficient for businesses and will ensure that companies are not losing money that could go towards supporting long-term employment and hiring.

We support updating the salary threshold by using a fixed percentile of wages based on data sets that take into account regional and industry wage disparities. By using the methodology DOL employed in the 2004 Final Rule, which established the salary threshold based upon data that accounted for geographic and industry wage disparities, setting a fixed percentile will help the threshold keep pace with actual wage changes in the market. Adjusting the threshold based on inflation is not a valid way to proceed. Inflation and wages can increase at very different rates and the Department will risk harming workers and businesses if it uses inflation as the measure of future adjustments to the rule. Any automatic updates should also take into account any downward changes in wages.

SIGMA opposes using the Consumer Product Index for All Urban Consumers ("CPI-U") to update the salary threshold.[25] Using the CPI-U would run counter to the Department's past practice, whereby DOL has "repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries."[26] While the CPI-U covers approximately 89

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[25] *See, e.g.*, http://www.bls.gov/cpi/cpifaq.htm (describing how "The CPI reflects spending patterns for each of two population groups: all urban consumers and urban wage earners and clerical workers. The all urban consumer group represents about 87 percent of the total U.S. population. the CPI for All Urban Consumers (CPI-U) and the Chained CPI for All Urban Consumers (C-CPI-U)"); *but see* BLS, Consumer Price Index May 2015, *available at* http://www.bls.gov/news.release/archives/cpi_06182015.pdf (describing the CPI-U as "cover[ing] approximately 89 percent of the total population").

[26] 69 Fed. Reg. at 22171-22172. DOL's regulatory history consistently has looked to information on actual salaries and incomes, not inflation-adjusted amounts. The 1949 Weiss Report, for example, considered and rejected proposals to increase salary levels based upon the change in the cost of living from the 1940 levels. *Weiss Report*, *supra* note 8 at 15. The Department also expressed concern in the 2003 NPRM about the effect that adjusting the 1975 salary levels for inflation "would have on certain segments of industry and geographic areas of the county, particularly in the retail industry and in the South, which tend to pay lower salaries." 2003 Proposed Rule, 68 Fed. Reg.15560, at 15570. In the 2004 Final Rule, DOL explained that these concerns applied "equally when considering automatic increases to the salary levels" and did not institute an automatic update mechanism. 69 Fed. Reg. at 22171–22172. *See generally* 80 Fed. Reg. at 38541. The Proposal implies that present data does not substantiate the

percent of the total population, it does not represent rural consumers.[27] As such, we believe it would lead to an inaccurate salary adjustment that does not account for regional wage and consumer cost differences. This is particularly significant for the fuel retailing industry. Our industry, while servicing urban, suburban, and rural populations, has a proportionately greater presence in rural areas where our stores may be the only source of fresh food, staple goods, or gasoline for miles. Consequently, our industry is a very important employer and service provider in rural America. To adjust the salary threshold by the CPI-U, which does not consider rural cost data, would place significant burdens on rural businesses as any update would not reflect the wage reality in those places.

C. SIGMA Supports the Existing Duties Test and Cautions the Department Against Making Alterations to the Duties Test That Would Not Account for Industry Differences.

The current standard duties test adequately ensures that overtime-eligible employees are not erroneously identified as overtime exempt.

The retail industry has a unique structure and unique characteristics. It is not uncommon for a manager to run a store independently (which necessitates the completion of nonexempt duties) or to assist overtime eligible employees with nonexempt tasks to enhance morale and build company culture. Moreover, as a major entry-level employer – particularly for entry-level management positions – the fuel retailing industry's "all hands on deck" business model, which generally requires participation in all consumer-facing activities, is an important way for entry-level managers to learn the business and gain experience so that they can become eligible for upper-level management job opportunities. The existing duties test acknowledges this reality.

SIGMA supports the existing regulations that have a flexible 50 percent primary duty rule of thumb to account for EAP differences across industries. Under the current regulations, "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement."[28] Significantly, however, the 50 percent is not a strict cut-off. For example, the regulations allow an assistant manager in a retail establishment to spend more than 50 percent of his time performing nonexempt work (e.g. running the cash register) and still be found overtime ineligible.[29] By acknowledging differences in manager job duties that occur across disparate industries, the current duties test and accompanying regulations support a workable overtime rule. Changing the test to enforce more rigid requirements will be very impractical in our industry where it is quite common for the store manager to set the work

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Department's past concerns about the impact of inflation measures on low-wage areas—but that statement is not supported in the rulemaking record.

[27] *See* BLS, Consumer Price Index May 2015, *available at* http://www.bls.gov/news.release/archives/cpi_06182015.pdf. DOL increased the salary threshold in 1975 based on changes in the CPI, it then rejected that methodology in the 2004 Final Rule.

[28] 29 C.F.R. §541.700(b).

[29] 29 C.F.R. §541.700(c).

According to the Proposal, raising the salary level according to the 2004 methodology (20th percentile of subpopulation data), would result in a salary level of $577 per week, approximately $30,004 per year. Using the Kantor method (10th percentile of likely exempt employees in low-wage regions, employment size groups, city size, and industries) would result in a salary level of $657 per week, approximately $34,164 per week.[16] Interestingly, both of these methods, which address regional and industry variations, are more reflective of what are realistic wages in our industry. The Department, however, has rejected these methods without support, merely noting that using nationwide data creates a more "robust" sample.[17]

Although the Department analyzes the regulatory alternatives just described, it notably fails to consider a 40th percentile increase in wages using the 2004 methodology.[18] Raising the salary threshold to the 40th percentile of full-time salaried employees based on the 2004 data set – i.e. based on both exempt and nonexempt full-time salaried workers in the low-wage South and retail industry – would result in a salary level of $812 per week, approximately $42,224 per year. This would be $18,564 more than the current threshold and much higher than current wages in low-income areas. Yet, the Department failed to consider this option. Departing from the 2004 methodology without analysis or support was arbitrary and capricious, an abuse of discretion and contrary to the Department's statutory mandate.

ii. The Rulemaking Record Lacks Analysis to Support the Department's Proposal.

Under the FLSA, DOL is charged, among other things, with prescribing and enforcing standards relating to wages and overtime pay.[19] Unfortunately, the Department has come up short with its present Proposal. The rulemaking record shows that DOL has failed to consider or properly analyze several important issues that are critical to setting any effective overtime standard. Significantly, DOL has not considered the potential impact of its proposed changes on different regions and industries throughout the country.[20] While DOL does include some data

[16] 80 Fed. Reg. at 38582. The 1958 Kantor method used data regarding the wages of exempt employees, and set the salary level so that "no more than about 10 percent" of such exempt employees "in the lowest-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." Kantor Report, *supra* note 8, at pages 5-7. 69 Fed. Reg. at 22168.

[17] In addition to disregarding regional and industry variations, DOL's Proposal adds many groups to the sample pool that had previously been excluded. For example, the Proposal states that "while the self-employed...agricultural workers...teachers...and federal employees were excluded from the 2004 sample because they are not subject to the part 541 salary level test, they nonetheless are part of the universe of salaried employees and, as such, their salaries shed light on the salaries paid to employees performing exempt EAP duties." 80 Fed. Reg. at 38528. DOL explains the radically altered sample data by noting only that the old sample size may not "yield statistically meaningful results"—it does not provide any substantive analysis to account for this change.

[18] *See generally*, Table 12, Weekly Earnings Distribution, 2013, 80 Fed. Reg. at 38558.

[19] *See generally*, 29 U.S.C. §201, et seq.; *see also* the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

[20] It is unclear, for example, how DOL arrived at its estimate that "the average annualized direct employer costs will total between $239.6 and $255.3 million per year." 80 Fed. Reg. at 38518. In fact, given the lack of analysis conducted by DOL, these numbers could not account for the huge costs that will be foisted upon certain industries and regions of the country.

[Extensive material was submitted by Ms. Riner. The submission for the record is in the committee archive for this hearing.}

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

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