RESTORING THE VALUE OF WORK: EVALUATING DOL'S EFFORTS TO UNDERMINE STRONG OVERTIME PROTECTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 12, 2019

Serial No. 116–28

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C O N T E N T S

RESTORING THE VALUE OF WORK: EVALUATING EVALUATING DOL'S EFFORTS TO UNDERMINE STRONG OVERTIME PROTECTIONS

Wednesday, June 12, 2019
House of Representatives,
Subcommittee on Workforce Protections,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:17 a.m., in room 2175, Rayburn House Office Building, Hon. Alma Adams [chairwoman of the subcommittee] presiding.

Present: Representatives Adams, DeSaulnier, Takano, Jayapal, Wild, McBath, Omar, Stevens, Scott (ex officio), Byrne, Walker, Cline, and Foxx (ex officio).

Also present: Representative Morelle.

Staff present: Tylease Alli, Chief Clerk; Ilana Brunner, General Counsel, Health and Labor; Emma Eatman, Press Assistant; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Jaria Martin, Staff Assistant; Richard Miller, Director of Labor Policy; Max Moore, Office Aide; Udochi Onwubiko, Labor Policy Counsel; Veronique Pluviose, Staff Director; Banyon Vassar, Deputy Director of Information Technology; Joshua Weisz, Communications Director; Rachel West, Senior Economic Policy Advisor; Cyrus Artz, Minority Parliamentarian; Courtney Butcher, Minority Coalitions and Members Services Coordinator; Cate Dillon, Minority Staff Assistant; Rob Green, Minority Director of Workforce Policy; Bridget Handy, Minority Communications Assistant; John Martin, Minority Workforce Policy Counsel; Sarah Martin, Minority Professional Staff Member; Kelley McNabb, Minority Communications Director; Brandon Renz, Minority Staff Director; Ben Ridder, Minority Legislative Assistant; Meredith Schellin, Minority Deputy Press Secretary and Digital Advisor; and Heather Wadyka, Minority Staff Assistant.

Chairwoman ADAMS. The Subcommittee on Workforce Protections will come to order.

Welcome, everyone. I note that a quorum is present.

Representative Joe Morelle of New York will be participating in today's hearing, with the understanding that his questions will come only after all members of the Workforce Protection Subcommittee on both sides of the aisle who are present have an opportunity to question the witnesses.

Without objection, so ordered.

The subcommittee is meeting today in an oversight and legislative hearing to hear testimony on evaluating the Department of Labor's efforts to undermine strong overtime protections.

Pursuant to committee rule 7(c), opening statements are limited to the chair and ranking member. This allows us to hear from our witnesses sooner and provides all members with adequate time to ask questions.

I now recognize myself for the purpose of making an opening statement.

Today, we will discuss the importance of strong overtime pay protections for American workers. Since the passage of the Fair Labor Standards Act in 1938, Congress has guaranteed basic overtime protections by requiring certain workers to be paid 1–1/2 times their regular rate of pay for any hours worked over 40 in a workweek.

As our witnesses will discuss, strong overtime protections help achieve three key goals. They protect workers from being forced to work excessive hours; they ensure that working extra time comes with extra pay; and they encourage employers to hire more employees rather than overwork current employees.

Unfortunately, due to weak overtime standards, some employers are relying on a business model that shifts extra work normally done by workers with overtime protections to workers without overtime protections. This leaves some salaried workers who should be eligible for overtime working 50- and 60-hour weeks without additional pay and other workers with too few hours.

While growing income inequality and the declining power of workers have only reinforced the need for strong overtime protections, the Federal Government has repeatedly failed to properly update overtime standards to keep pace with the economy.

Under fair standard—under Fair Labor Standards Act regulations, salaried workers who earn below a salary level established by the Department of Labor are automatically eligible for overtime pay.

In 1975, the Department of Labor set the salary level to $13,000 per year. That was equivalent to almost $58,000 a year when translated into 2020 dollars. At that salary level, over 60 percent of full-time salaried workers were eligible for overtime pay based on their salaries alone.

Twenty-nine years later, in 2004, the Department of Labor, under the Bush Administration, set the salary level to $23,660 a year. This is equivalent of about $33,000 a year in 2020. The salary level covered only about 13 percent of the full-time salaried work force in 2004, compared with 60 percent back in 1975. This salary threshold was developed using a flawed methodology.

Over the next decade, failure to update the salary level meant more and more workers were without overtime protections.

In 2016, the $23,600-a-year salary level covered fewer than 7 percent of the full-time salaried work force.

Recognizing this harmful trend, the Obama Administration finalized a rule to raise the salary level to roughly $47,500 in 2016.

This long overdue update would have extended overtime protections for 4.2 million workers, restored overtime protections to one-third of the full-time salaried work force, put $1.2 billion into the pockets of lower-and middle-wage workers, and established automatic updates to prevent another lapse in overtime protections.

In 2020, the salary level would have been approximately $51,000 a year. Unfortunately, a flawed district court ruling blocked the Department from implementing and enforcing the rule. Rather than defending the Obama-era overtime update in court, the Department of Labor is now proposing a new lower salary level of about $35,000 a year to take effect in 2020.

The Trump administration's proposed salary level, based on a flawed methodology first used in 2004, would cover only 15 percent of full-time salaried workers compared to the 33 percent that would have been covered under the Obama rule. It would leave 8.2 million workers behind and deny American workers more than $1.2 billion in additional pay.

The new proposal also fails to include automatic updates to the salary level, leaving salaried workers vulnerable to, once again, losing overtime protections in the foreseeable future.

After more than 40 years, without an adequate update to the overtime rule, the Trump administration's proposals falls well short of what workers deserve. Despite the President's promise to fight for American workers, his administration continues to block Federal policies that would lift working families into the middle class. Congressional Democrats stand ready to protect workers where the administration fails to do so.

The Restoring Overtime Pay Act, H.R. 3197, introduced by Congressman Mark Takano, would codify the strong salary threshold set in the 2016 final rule and require automatic updates every 3 years to ensure the level remains in line with overall increases in workers' wages.

Restoring workers' access to strong overtime protections, raising the Federal minimum wage, and protecting workers' right to join a union are Federal policies that would improve standards of living and stimulate local economies across the country. These three pillars are essential labor market institutions upon which working people rely. However, the Trump administration continues to oppose each of these efforts to give hardworking Americans a raise.

Today's hearing is an opportunity to examine the Federal Government's responsibility to restore overtime protections for millions of workers. It is also a chance to discuss the importance of building an economy that works for all Americans, not just the wealthy few.

I want to thank all of our witnesses for being here today, and I look forward to your testimony.

I now recognize the distinguished ranking member for the purpose of making an opening statement.

[The statement of Chairwoman Adams follows:]

Prepared Statement of Hon. Alma S. Adams, Chairwoman, Subcommittee on Workforce Protections

Today, we will discuss the importance of strong overtime pay protections for American workers.

Since the passage of the Fair Labor Standards Act in 1938, Congress has guaranteed basic overtime protections by requiring certain workers be paid one-and-a-half times their regular rate of pay for any hours worked over 40 in a workweek.

As our witnesses will discuss, strong overtime protections help achieve three key goals:

They prevent workers from being forced to work excessive hours,

They ensure that working extra time comes with extra pay, and

They encourage employers to hire more employees rather than overwork current employees.

Unfortunately, due to weak overtime standards, some employers are relying on a business model that shifts extra work normally done by workers with overtime protections to workers without overtime protections.

This leaves some salaried workers—who should be eligible for overtime—working 50-and 60-hour weeks without any additional pay and other workers with too few hours.

While growing income inequality and the declining power of workers have only reinforced the need for strong overtime protections, the Federal Government has repeatedly failed to properly update overtime standards to keep pace with the economy.

Under Fair Labor Standard Act regulations, salaried workers who earn below a salary level established by the DOL are automatically eligible for overtime pay.

In 1975, the Department of Labor set the salary level to $13,000 per year.

That was equivalent to almost $58,000 a year when translated into 2020 dollars.

At that salary level, over 60 percent of full-time, salaried workers were eligible for overtime pay based on their salaries alone.

Twenty-nine years later in 2004, the Department of Labor under the Bush Administration set the salary level to $23,660 a year.

This is the equivalent of about $33,000 a year in 2020.

This salary level covered only about 13 percent of the full-time, salaried work force in 2004, compared with 60 percent back in 1975.

This salary threshold was developed using a flawed methodology.

Over the next decade, failure to update the salary level meant more and more workers were without overtime protections.

In 2016, the $23,660 a year salary level covered fewer than 7 percent of the full-time, salaried work force. Recognizing this harmful trend, the Obama Administration finalized a rule to raise the salary level to roughly $47,500 in 2016.

This long-overdue update would have:

Extended overtime protections for 4.2 million workers,

Restored overtime protections to one-third of the full-time, salaried work force,

Put $1.2 billion into the pockets of lower-and middle-wage workers, and

Established automatic updates to prevent another lapse in overtime protections.

In 2020, the salary level would have been approximately $51,000 a year.

Unfortunately, a flawed district court ruling blocked the Department from implementing and enforcing the rule.

Rather than defending the Obama-era overtime update in court, the Department of Labor is now proposing a new, lower salary level of about $35,000 a year to take effect in 2020.

The Trump administration's proposed salary level, based on a flawed methodology first used in 2004, would cover only 15 percent of full-time, salaried workers compared to the 33 percent that would have been covered under the Obama-era rule.

It would leave 8.2 million workers behind and deny American workers more than $1.2 billion in additional pay.

The new proposal also fails to include automatic updates to the salary level, leaving salaried workers vulnerable to once again losing overtime protections in the foreseeable future.

After more than 40 years without an adequate update to the overtime rule, the Trump administration's proposal falls well short of what workers deserve.

Despite the president's promise to fight for American workers, his administration continues to block Federal policies that would lift working families into the middle class.

Congressional Democrats stand ready to protect workers where the Administration fails to do so.

The Restoring Overtime Pay Act, H.R. 3197, introduced by Congressman Mark Takano, would codify the strong salary threshold set in the 2016 final rule and require automatic updates every 3 years to ensure the level remains in line with overall increases in workers' wages.

Restoring workers' access to strong overtime protections, raising the Federal minimum wage, and protecting workers' right to join a union are Federal policies that would improve standards of living and stimulate local economies across the country.

These three pillars are essential labor market institutions upon which working people rely.

However, the Trump administration continues to oppose each of these efforts to give hardworking Americans a raise.

Today' s hearing is an opportunity to examine the Federal Government's responsibility to restore overtime protections for millions of workers.

It is also a chance to discuss the importance of building an economy that works for all Americans, not just the wealthy few.

I want to thank all of our witnesses for being with us today and I look forward to your testimony. I now yield to the Ranking Member, Mr. Byrne for his opening statement.

Mr. BYRNE. Thank you, Madam Chairwoman.

And hello and welcome to all of the witnesses that are here.

After clocking 40 hours of work, there are few incentives as attractive as overtime pay to motivate an individual to come back for more that week. The Department of Labor should make sure those entitled to overtime pay receive it, and the proposed overtime rule from the Department of Labor will help ensure that. But my colleagues on the other side of the gavel aren't hearing it.

This spring, the Department of Labor published a notice of proposed rulemaking in the Federal Register which raised the annual salary threshold to be exempt from overtime pay by over $11,000. This rule would make over 1 million additional American workers eligible for overtime pay. One million.

So when I see the label for this hearing where it says DOL's efforts to undermine strong overtime protections, I see 1 million reasons why that statement is untrue.

For some reason, this sensible proposal to modernize the overtime pay salary threshold doesn't make my friends on the other side happy. Rather than welcoming this exceptional opportunity, they would rather wallow in their partisan opposition to President Trump and oppose any and every policy coming out of his administration, even when the policies are as reasonable as this one.

We are here today because of stunts in political point scoring, the other side insists on revisiting the radical and discredited Obama-era overtime rule, which everyone should recall was invalidated in a U.S. District Court. The Obama rule was invalidated in a U.S. District Court.

The Obama rule proposed to hike the threshold for exemption from overtime pay by over 100 percent to a salary of almost $50,000. As the court wrote in its decision invalidating the rule, quote, The Department has exceeded its authority and gone too far with the final rule, close quote. A Federal district court said that.

In addition to being excessive, misguided, and unworkable, this spike wasn't projected to help workers in the long run. Young Americans would have been particularly harmed by the rule because it would have increased college costs and made it harder for graduates to begin their careers.

We heard from a number of universities in the past two or 3 years that it would decimate their ability to offer services to college students. And that is one of the most important things we deal with on this committee, is education.

The Obama scheme would have resulted in fewer job prospects, less flexibility in the workplace, and less opportunity to move up the economic ladder. Small businesses, nonprofit employers, colleges and universities, and the people all these American institutions serve, would have been hit the hardest by the Obama Administration's rule. That is ironic considering we presumably work on this committee to promote and protect these very sectors of our country.

I want to remind my colleagues on the other side that the Department of Labor reached its salary threshold in the proposed rule using the same sound methodology as the Bush Administration did in 2004, which set the current minimum that we use today, $23,660. It is entirely reasonable and, indeed, wise in this time of economic growth to look at what has worked before. Instead of rebelling in political outcry, we would all serve America's middle-class workers well to take a step back and be objective about this.

Times have changed and the economy along with it. And this proposed rule is a responsible, reasonable, and workable answer in keeping with the purpose and historical level of the overtime salary threshold, and most importantly, in affirming the value of every American worker.

Madam Chairwoman, to you and to everybody who is here today, I am going to offer my apologies. I am on another committee, the Armed Services Committee. We are marking up the National Defense Authorization Act today, and it may very well be that I get up and leave before the hearing is over to go vote in that committee. I am not angry. I am not put out. I really would rather be here. But I think it is important that I have my vote over there. So, I want you to understand that I will be back as quickly as I can if that occurs.

And with that, I yield back.

[The statement of Mr. Byrne follows:]

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

Thank you for yielding.

After clocking 40 hours of work, there are few incentives as attractive as overtime pay to motivate an individual to come back for more that week. The Department of Labor should make sure those entitled to overtime pay receive it, and the proposed overtime rule will help ensure that. But my colleagues on the other side of the gavel aren't hearing it.

This spring, the DOL published a Notice of Proposed Rulemaking in the Federal Register, which raised the annual salary threshold to be exempt from overtime pay by over $11,000. This rule would make over one million additional American workers eligible for overtime pay. One million.

For some reason, this sensible proposal to modernize the overtime pay salary threshold doesn't make Democrats happy. Rather than welcoming this exceptional opportunity, they would rather wallow in their partisan opposition to President Trump and oppose any and every policy coming out of this administration, even when the policies are as reasonable as this one. We're here today because, in stunts of political point-scoring, Democrats insist on revisiting the radical and discredited Obama-era overtime rule, which everyone should recall, was invalidated in a U.S. District Court.

The Obama rule proposed to hike the threshold for exemption from overtime pay by over 100 percent to a salary of almost $50,000. As the court wrote in its decision invalidating the rule: "The Department has exceeded its authority and gone too far with the Final Rule." In addition to being excessive, misguided, and unworkable, this spike wasn't projected to help workers in the long run. Young Americans would have been particularly harmed by the rule, because it would have increased college costs and made it harder for graduates to begin their careers. The Obama scheme would have resulted in fewer job prospects, less flexibility in the workplace, and less opportunity to move up the economic ladder.

Small businesses, non-profit employers, colleges and universities, and the people all these American institutions serve would have been hit the hardest by the Obama Administration's rule. That's ironic, considering we presumably work on this committee to promote and protect those very sectors of our country.

I want to remind my Democrat colleagues that the DOL reached its new salary threshold in the proposed rule using the same sound methodology as the Bush Administration in 2004, which set the current minimum that we use today: $23,660. It is entirely reasonable and, indeed, wise in this time of economic growth to look at what has worked before. Instead of rebelling in political outcry, we would all serve American middle-class workers well to take a step back and be objective about this.

Times have changed and the economy along with it, and this proposed rule is a responsible, reasonable, and workable answer in keeping with the purpose and historical level of the overtime salary threshold and most importantly, in affirming the value of every American worker.

Thank you.

Chairwoman ADAMS. Thank you. Thank you very much.

Without objection, all of the members who wish to insert written statements into the record may do so by submitting them to the committee clerk electronically in Microsoft Word format by 5 p.m. on Tuesday, June 25.

I will now introduce our witnesses.

Dr. Heidi Shierholz is Senior Economist and Director of Policy at the Economic Policy Institute. Dr. Shierholz previously served as Chief Economist to the U.S. Secretary of Labor under Secretary Thomas Perez.

Ms. Tammy McCutchen is a Principal in Littler Mendelson's Washington, DC. office. Ms. McCutchen previously served as Administrator of the Wage and Hour Division of the U.S. Department of Labor.

Mr. Pete Winebrake is the Founder and Managing Partner of Winebrake and Santillo, LLC, based in Dresher, Pennsylvania. Mr. Winebrake has litigated hundreds of wage and overtime lawsuits in courts throughout the United States.

I am pleased now to recognize my colleague, Representative Morelle, to briefly introduce his constituent who is appearing before us as a witness today.

Mr. MORELLE. Thank you, Madame Chairwoman, for the courtesy to a nonmember of the subcommittee, allowing me a moment to introduce my constituent.

I am pleased to welcome to this Workforce Protection Subcommittee, Ms. Anne Babcock-Stiner. Anne is an attorney and the Senior Vice President of Human Resources for PathStone Corporation, a not-for-profit community development organization in my district of Rochester, New York. She previously served as a Deputy Attorney General for the Indiana Attorney General's Homeowner Protection Unit. In her capacity at PathStone, Ms. Babcock-Stiner has provided comprehensive holistic services to those in need from work force development initiatives, education, and health services, to ensuring safe, stable housing.

PathStone helps create opportunities for individuals and families throughout our community. I am so grateful to PathStone for their many contributions to our community and for their continued commitment to advocating for stronger worker protections, and I am particularly delighted to have Ms. Babcock-Stiner here today.

And I would ask my colleagues also to note that she is spending her birthday with us, and I wish her all the best wishes on another safe trip around the sun.

So happy birthday.

And thank you, Madame Chair.

Chairwoman ADAMS. And thank you.

And happy birthday.

We appreciate all of the witnesses for being here today and look forward to your testimony.

Let me remind the witnesses that we have read your written statements, and they will appear in full in the hearing record.

Pursuant to committee rule 7(d) and committee practice, each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

And let me remind the witnesses that pursuant to title 18 of the U.S. Code, section 1001, it is illegal to knowingly and willfully falsify any statement, representation, written document, or material fact presented to Congress, or otherwise conceal or cover up material fact.

Before you begin your testimony, please remember to press the button on the microphone in front of you so that it will turn on and the members can hear you. As you begin to speak, the light in front of you will turn green. After 4 minutes, the light will turn yellow to signal that you have 1 minute remaining. When the light turns red, your 5 minutes have expired, and we ask that you would please wrap up your testimony.

We will let the entire panel make their presentations before we move to member questions. When answering a question, please remember to, once again, turn your microphone on.

I am going to first recognize Dr. Shierholz.

STATEMENT OF HEIDI SHIERHOLZ, PH.D., SENIOR ECONOMIST AND DIRECTOR OF POLICY, ECONOMIC POLICY INSTITUTE

Ms. SHIERHOLZ. Chair Adams, Ranking Member Byrne, and members of the subcommittee, thank you very much for the opportunity to testify here today.

The overtime protections of the Fair Labor Standards Act are a crucial part of a vibrant middle class because they give employers the incentive to hire more workers rather than overwork existing employees, and they ensure that workers are fairly compensated when they are asked to work long hours.

In the Fair Labor Standards Act, Congress provided overtime protections to most workers, but directed the Secretary—the Secretary of Labor to exempt a limited number of well-paid, bona fide managers, executives, or highly trained professionals, since these workers command enough bargaining power, enough control over their own work and schedules that they don't actually need the protections.

For an employee to be exempt from overtime protections under this exemption, they must earn a salary, they must pass the duties test based on the actual work that they do, and they must earn above the salary threshold.

The salary threshold can best be thought of as a bright-line proxy for the duties test that simplifies the determination of exemption, it helps ensure that frontline supervisors who get relatively low pay and have little bargaining power are not taken advantage of, and it reduces the misclassification of nonexempt workers as exempt.

In 2016, the Department finalized an overtime rule following an exhaustive rulemaking process. That rule increased the salary threshold to roughly $47,000, which is the 40th percentile of earnings of full-time salaried workers in the lowest wage census region.

However, a single district court judge in Texas held the rule to be invalid. And instead of defending this rigorously determined rule, the Department, under the current administration, has proposed a new rule with a much lower threshold. The Department's current threshold set—current proposal sets the threshold at roughly $35,000 in 2020, which is essentially the 20th percentile of earnings of full-time salaried workers in the lowest wage census region. So this is the same methodology that was used in the 2004 rule. Unfortunately, the methodology in the 2004 rule was fundamentally flawed.

So historically, the Department sets tests for overtime eligibility in one of two ways. It pairs a low salary threshold, which covers few workers, with a strong duties test, which covers more workers, or it pairs a strong—a high salary threshold, which covers more workers, with a weak duties test, which covers fewer workers.

Both of those options create the intended balance. But in 2004, the Department paired a low salary threshold with a weak duties test. And because of this erroneous mismatch, the methodology from the 2004 rule departs from decades of historical precedent and is fundamentally inappropriate.

In 2016, the Department corrected this error by keeping the same lenient duties test that was used in the 2004 rule but correctly pairing it with a higher salary threshold. In fact, in 2016, the Department picked nearly the lowest possible threshold, consistent with historic precedent.

According to the methodology that was used to calculate the thresholds from 1958 until the 2004 error, the Department should have set the threshold in 2016 somewhere between $46,000 and $65,000. They chose $47,000.

So, a key thing this highlights is that while the increase in the threshold in the 2016 rule was large, it was only because it had been over 40 years since the threshold had been appropriately updated.

At its core, the Department's proposal is based on the notion that someone making $35,000 a year is a well-paid executive who does not need or deserve overtime protections.

My analysis, which uses the exact same methodology that DOL does to look at their impact, finds that 8.2 million workers who would have benefited from the 2016 rule will be left behind by the Department's proposal. That includes 4.2 million women, 3.0 million people of color, and 2.7 million parents of children under the age of 18. And together, workers will lose $1.2 billion annually.

Congress should step in and pass the Restoring Overtime Pay Act, which codifies the 2016 rule as a floor and upholds the purpose of the overtime provisions of the Fair Labor Standards Act.

Thank you.

[The statement of Ms. Shierholz follows:]

Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections

Testimony before the
U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections

Heidi Shierholz, Ph.D.
Senior Economist and Director of Policy
Economic Policy Institute

June 12, 2019

Chair Adams, Ranking Member Byrne, and members of the subcommittee, thank you for the opportunity to testify today. My name is Heidi Shierholz and I am a senior economist and the director of policy at the Economic Policy Institute (EPI) in Washington, D.C. EPI is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-wage workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-wage workers, and assesses policies with respect to how well they further those goals. I was also the Chief Economist at the U.S. Department of Labor from mid-2014 to early 2017, where I worked extensively on the 2016 overtime rule.

My testimony first discusses the significance and purpose of overtime protections and provides background on overtime rulemaking. I show why the 2004 rule was fundamentally flawed and why the 2004 methodology is therefore an inappropriate methodology to use to set the overtime salary threshold. I show that the 2016 rule used a highly appropriate, albeit conservative, threshold. I also discuss the importance of automatic indexing of the threshold to ensure that it doesn't erode over time. Finally, I describe the workers affected by the Department of Labor's current proposal, including the impact on their earnings. Unless otherwise noted, the empirical analysis cited in this testimony is based on pooled 2016–2018 Current Population Survey Merged Outgoing Rotation Group microdata from the Bureau of Labor Statistics, following the same methodology used by the Department of Labor in its overtime analyses.

The significance and purpose of overtime protections

The Fair Labor Standards Act (FLSA) requires employers to pay their employees at least the federal minimum wage for all hours worked, and caps at 40 the number of hours an employee can work in a workweek without additional compensation, with employers being required to pay overtime premium pay of 1.5 times the employee's regular rate of pay for all hours worked beyond 40 hours. These overtime protections ensure that employers have "skin in the game" when they ask employees to work long hours, which leads to two key outcomes: (1) employers are incentivized to hire more employees rather than overworking existing employees, and (2) employees are fairly compensated when they are required to work long hours. These effects make overtime protections a crucial part of the foundation of a vibrant middle class.

In the FLSA, Congress provided overtime protections to most workers, but directed the Secretary of Labor to exempt bona fide executive, administrative, and professional (EAP) employees from these protections. While most workers need overtime protections because they do not have sufficient individual bargaining power and control over their work to protect themselves from overwork for low pay, EAP workers could be exempted because they command enough bargaining power and responsibility to be able to successfully advocate for themselves. For an employee to be exempt from overtime protection based on the EAP exemption, they must satisfy *each* of the following three conditions: 1) they must earn a salary, i.e., not be paid by the hour; 2) they must pass the duties test, meaning that they are a bona fide executive, manager, supervisor, or highly trained professional based on the characteristics of the work they do; and 3) they must earn above the salary threshold.

The salary threshold can best be thought of as a rough proxy for a duties test—a bright dividing line that simplifies the determination of exemption for employers and employees alike, helps ensure that those with relatively low pay who do a great deal of nonexempt work are not taken advantage of, and reduces the misclassification of non-EAP workers as exempt. The duties test serves as a more specific mechanism for making the determination of exemption for salaried workers who earn above the threshold.

Background on the recent overtime rulemaking

Just three years ago, the Department finalized an overtime rule following an exhaustive, more-than-two-year rulemaking process.[1] During this process, the Department met with over 200 organizations, including employees, employers, business associations, nonprofit organizations, employee advocates, unions, state and local government representatives, tribal representatives, and small businesses. The Department also received and reviewed over a quarter million public comments. In the 2016 Final Rule, the Department responded comprehensively to those comments and conducted a thorough economic impact analysis incorporating that input, along with a careful review of the academic literature.

The core provision of the 2016 rule was to increase the salary threshold under which most salaried workers are eligible for overtime pay when they work more than 40 hours per week from $455 per week ($23,660 for a full-year worker) to $913 per week ($47,476 for a full-year worker), the latter being the 40th percentile of the earnings of full-time salaried workers in the lowest-wage census region, which was at the time, and continues to be, the South. Further, the rule provided that the threshold would be updated every three years to the 40th percentile of the earnings of full-time salaried workers in the lowest-wage census region, in order that the threshold would not continually erode over time as overall wages rise. I project that the 2020 level of the threshold under the 2016 rule would be $982 ($51,064 for a full-year worker).

In November 2016—just before the 2016 rule was set to go into effect—a single district court judge in Texas enjoined the Department from enforcing the rule; the court later erroneously held the rule to be invalid. Instead of defending the rigorously determined threshold, the Department has proposed to rescind its 2016 rule and promulgate a new regulation with a much lower standard salary threshold. The core provision of the Department's 2019 proposal is to set the salary threshold under which most salaried workers are eligible for overtime pay when they work more than 40 hours per week at $679 per week in 2020 ($35,308 for a full-year worker), which is the projection to January 2020 of the 20th percentile of the earnings of full-time salaried workers in the lowest-wage census region, currently the South, and/or in the retail industry, excluding nonexempt workers and workers who are not subject to the FLSA or who are not subject to the salary level test. The proposal does not include automatic

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32396 (May 23, 2016).

updating. This methodology for setting the threshold is the same methodology used in the 2004 final rule.

The 2004 rule was deeply flawed

Unfortunately, the methodology for setting the standard salary threshold in the 2004 rule was fundamentally flawed. Prior to the 2004 rule, there were two sets of tests, each of which involved a duties test and a salary test. The duties test and salary test within each set had always worked together.[2] One set of tests was the "long-test" set, which combined a low salary threshold with a stringent duties test (which included a 20 percent cap—40 percent in the retail industry—on the amount of time overtime-exempt employees could spend on nonexempt duties). The other was the "short-test" set, which combined a high salary threshold with a much more lenient duties test. Thus an employer who wanted to assert that a relatively low-paid employee was exempt had to show more rigorously that their duties were "bona fide executive, administrative, or professional" in nature, whereas for a more highly paid employee the employer did not have to make as rigorous of a showing.

In the 2004 rule, the Department included just one set of tests. For this set of tests, the Department created a "standard" duties test that was essentially the more lenient "short test" for duties. To remain consistent with the prior methodology, the Department should have paired this duties test with a higher salary threshold consistent with a short duties test. Instead, they used a low salary level consistent with a long duties test; in the 2004 final rule, the threshold is actually referred to as a long-test salary level.[3] This was a fundamental error. Because of the mismatch between the duties test and the salary threshold in the 2004 rule, the methodology from the 2004 rule is not an appropriate methodology for setting the salary threshold. If the Department were to set the threshold according to the 2004 methodology in the final rule, it would be doubling down on a fundamentally flawed approach.

It is worth noting that because the Department erred in 2004 and paired a "short" duties test with a low, "long-test" salary threshold, the one and only way the 2004 methodology for calculating the standard salary threshold could be used appropriately would be if the Department were to strengthen the duties test to align with the historical long test and account for Congress's intent that only bona fide executive, administrative, and professional employees be exempt from overtime pay. The Department notes, "Because the *long* [emphasis added] duties test included a limit on the amount of nonexempt work that could be performed, it could be paired with a low salary that excluded few employees performing EAP duties."[4] The Department could, for example, set a bright-line duties test requiring a large majority of a worker's work to be exempt, as previous rules did.

[2] "The Department has always recognized that the salary level test works in tandem with the duties requirements to identify bona fide EAP employees and protect the overtime rights of nonexempt white collar workers" (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32444 [May 23, 2016]).

[3] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 69 Fed. Reg. 22121 (April 23, 2004); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [request for information], 82 Fed. Reg. 34616 (July 26, 2017).

[4] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32465 (May 23, 2016).

The standard threshold in the 2016 rule was appropriate, albeit conservative

In 2016, the Department chose to correct the error in the 2004 final rule by retaining the same lenient duties test that was used in the 2004 rule, but correctly pairing it with a higher salary level consistent with a short duties test. In fact, the Department picked close to the lowest possible value that would be consistent with the historical level of the short test. According to the Kantor method, which was the method used to calculate salary thresholds from 1958 until the 2004 elimination of the long test, the Department should have set the value somewhere between $889 and $1,245.[5] The threshold the Department chose, $913, was at the very low end of that range. The fact that the 2016 salary threshold was highly conservative by historic standards is underscored by two additional points. First, the 2016 rule covered far fewer workers than the threshold did historically. In 1975, more than 60 percent of full-time salaried workers earned below the threshold and so were automatically eligible for overtime based on their pay. By 2016, that share had dropped to less than 7 percent, and the 2016 rule would have only partially restored it, to around 33 percent. Second, if the 1975 rule had simply been updated for inflation, it would have been well over $50,000 in 2016, substantially higher than the $47,476 threshold in the 2016 rule.

Despite this clear record, the Department appears to have adopted two erroneous concerns of the district court judge who enjoined the 2016 rule: (1) that the 2016 salary threshold was too high because the *number* of newly overtime-eligible workers was large, and (2) that the large number of newly overtime-eligible workers under the 2016 threshold meant that the salary threshold was so high that it displaced the role of the duties test.[6] Both of these concerns are deeply misguided. First, the raw number of workers affected by any increase in the salary threshold is an absurd metric to use to assess whether the threshold is appropriate, because the number is affected by factors that are wholly unrelated to the appropriateness of the threshold, including how long it has been since the prior update and whether the prior threshold was set at an appropriate level. The longer it has been since the previous update, the more workers will be affected, as inflation and the overall wage structure rise over time and erode the effective level of the threshold. In the case of the 2016 update, it had been over a decade since the prior update. And if the prior threshold had been set inappropriately low, as it was in the 2004 rule, the number of workers affected would need to be larger to correct the error.

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[5] The Kantor method is a two-stage process: It involves first calculating the long-test salary threshold as the 10th percentile of earnings of exempt workers for low-wage regions, industries, and other low-wage groups, and then multiplying that threshold by somewhere between 130 and 182 percent—with the average multiplier being 149 percent—to arrive at the short-test salary level. The value of the long-test threshold for the 2016 rulemaking was $684. Following the two-stage process, to get to the short-test threshold, the Department should have multiplied $684 by somewhere between 1.3 and 1.82, which would have resulted in a short-test threshold range of between $889 and $1,245. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32463, 32467 (May 23, 2016).

[6] The Department states: "The district court's decision raised concerns regarding the large number of exempt workers—4.2 million—who earned between $455 and $913 per week and thus would "automatically become eligible" for overtime under the $913 per week standard salary level. The district court noted that this relatively high number indicated that the salary level was displacing the role of the duties test in determining exemption status. The Department acknowledges these concerns and, additionally, in this proposal seeks to update the standard salary level in a manner that does not unduly disrupt employers' operations; dramatically shift employee salaries, hours, or morale; or result in adverse economic effects." See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10909 (March 22, 2019).

The number of workers affected by any increase in the salary threshold can be decomposed into two main components: workers affected as a result of the passage of time since the previous update, and workers affected as a result of any change in methodology from the previous update. One way to isolate the "time" component is to simply look at how many workers would have been affected as a result of the 2016 rule if the methodology had been the same in 2004 and 2016—that is, if the 2004 threshold had been set at the 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage census region, as it was in 2016. In 2002—the data year the 2004 threshold is based on—the 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage census region, the South, was $660. If in 2016 the threshold had been increased from $660 to $913 instead of from $455 to $913, the number of workers affected would have been 2.9 million.[7] That means that 2.9 million of the 4.1 million workers affected by the 2016 rule were affected as a result of the erosion of the effective level of the threshold since the prior update, not as a result of the change in methodology. The remaining 1.2 million workers were affected as a result of the change in methodology from the flawed 2004 methodology to the appropriate methodology of the 2016 final rule.

The other concern that the Department seems to adopt, that the large number of newly overtime-eligible workers under the 2016 threshold meant that salary threshold was so high that it displaced the role of the duties test, is flatly refuted by the Department's own analysis. A figure in the 2016 final rule shows that 47 percent of white-collar workers who failed the duties test earned *above* the 2016 salary level.[8] This means that of white-collar salaried workers who were eligible for overtime, nearly half—6.5 million workers—had their overtime-eligible status determined by the duties test alone, demonstrating that the duties test was not somehow "displaced" by the 2016 salary threshold but was, in fact, still essential to the exemption.[9] Lowering the threshold in the interest of not displacing the duties test is solving a problem that the Department's own analysis shows does not exist.

If the Department is concerned about the number of workers affected in a given year by raising the salary threshold to an appropriate level, it should simply phase in an appropriate threshold over time instead of reducing the threshold to an inappropriate level. For example, the Department could implement a three-stage phase-in, raising the threshold to $679 (or $35,308 for a full-year worker) in 2020; raising it to $866 (or $45,032 for a full-year worker) in 2021; and, finally, raising it in 2022 to be equal to the 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage census region. (I project that this will be $1,030—or $53,560 for a full-year worker—in 2021Q2; 2021Q2 data could be used to set the threshold for 2022).

A final point worth making about the 2016 rule is the scope of its economic impact. According to the Department, the 2016 rule would have led to an aggregate increase in payroll costs to business of roughly $1.5 billion dollars annually.[10] That may sound like a large number—and the rule would certainly have a meaningful effect for workers who see higher pay, work fewer hours, or just gain clarity about

[7] Note that this is an underestimate to the extent that if the threshold were $660, there would likely be more people earning $660 instead of somewhat below $660 than what we actually see in the data, as some workers earning somewhat below $660 would have been bumped up to $660 so their employers could claim the exemption.

[8] See Figure 3 of Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32465 (May 23, 2016).

[9] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32465 (May 23, 2016).

[10] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32468-32469 (May 23, 2016).

their overtime-eligibility status—but total U.S. payroll costs are more than $8 trillion dollars per year.[11] In other words, $1.5 billion is less than one-tenth of one percent of total U.S. payroll costs. The department does not need to promulgate a weaker rule than the 2016 rule in order to have a rule that does not have a disruptive effect on the labor market and the broader economy.

Automatic indexing is crucial

DOL has ample authority to index the salary threshold. The FLSA exemption from the minimum wage and overtime protections for EAP employees specifies that these exemptions must be "defined and delimited from time to time by regulations of the Secretary [of Labor]."[12] Given that indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL would be acting entirely reasonably and within its statutory authority[13] to adopt indexing as a means to define and delimit the EAP exemptions in a timely manner.

Despite this authority, the Department is not proposing automatic indexing and instead says it is "committing to evaluate" the threshold more frequently going forward—in particular mentioning that it has an intention to go through notice and comment rulemaking every four years to update the rule using the same methodology as the most recent final rule, but noting that the Labor Secretary could forestall this process at his or her discretion.[14]

This is problematic on many levels. First, if the rule really is updated every four years through notice and comment rulemaking, that is still too long between updates and will leave workers behind in the meantime. Updating should occur no further apart than every three years, with one year being optimal, to reduce the degree of erosion between updates.

Further, increasing the frequency of rulemaking in this way is a terribly inefficient way for the government to operate. Rulemaking is extremely time- and resource-intensive, and it doesn't make any sense to go through that process just to maintain the status quo. Automatic updating should be used to ensure that the standard doesn't continually erode until such time that policymakers want to change the actual substance of a rule, at which point notice and comment rulemaking is appropriate.

Perhaps more importantly, vague commitments to update the rule, rather than implementation of automatic updating, is what has led to long periods of inaction in the past, with workers getting the short end of the stick as their protections erode over long stretches of time. My analysis, described in greater depth below, shows that if this rule is implemented as proposed in 2020, workers will earn $1.2 billion dollars less in 2020 than they would have earned under the 2016 final rule in the first year of implementation—but the annual losses will grow to $1.6 billion over the first 10 years of implementation due to the lack of automatic updating.

Finally, automatic updating is important for employers, too. With automatic updating, as opposed to a flexible intention to update the rule every four years, employers know exactly what to expect and when to expect it, which provides businesses the crucial predictability they need to plan for the future.

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[11] U.S. Bureau of Economic Analysis, "Table 1.10. Gross Domestic Income by Type of Income."
[12] 29 U.S.C. § 213(a)(1).
[13] See this letter from a group of law professors on DOL's authority to index the salary threshold: https://www.regulations.gov/document?D=WHD-2015-0001-4585.
[14] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10914-10915 (March 22, 2019).

Millions of workers will be left behind by the Department's current proposal

If the Department finalizes its new proposal, millions of workers who should get overtime protections will fall through the cracks. In its proposal, the Department estimates that 2.8 million fewer workers will be impacted under its proposal than under the 2016 rule.[15] However, this is a vast underestimate, for two reasons. First, the Department uses pooled 2015–2017 data, benchmarked to 2017 wage and employment levels, and states that these figures "are the Department's best approximation for impacts starting in 2020."[16] This leads to an underestimate because it doesn't account for employment growth and other changes in the three years between 2017 and 2020. In my analysis, I correct for this issue by using more updated data—pooled 2016–2018 data, benchmarked to 2018 wage and employment levels—and inflating employment and wage levels based on Congressional Budget Office economic projections for 2018–2020.[17]

Second, the Department's estimate of those left behind leaves out an entire group of workers who would be affected by the rule—those who will no longer get *strengthened* protections. To understand what a large omission this is, it is useful to keep in mind that there are two groups of workers who would be affected by any update to the overtime threshold. One group consists of those workers who get *new* protections under a new threshold—namely, salaried workers who pass the duties test who earn above the old threshold but below the new threshold. These workers are not legally entitled to overtime protections under the old threshold but would be overtime-eligible under the new threshold. Another large group of workers who are affected by any increase in the threshold are workers who get *strengthened* protections—salaried workers who earn above the old threshold and below the new threshold but who do *not* pass the duties test. These workers *should* have overtime protections under the old threshold—but because they earn a salary above the threshold, they are vulnerable to being misclassified by their employer as overtime-exempt. As mentioned above, research shows that this type of misclassification is pervasive. However, once the threshold rises above their earnings level, the status of these workers as overtime-eligible becomes very clear. In its estimate of how many workers would be left behind by its proposal, the Department ignores the millions of workers who will not get strengthened protections under its proposal but who would have gotten strengthened protections under the 2016 threshold.[18]

Our analysis shows that 8.2 million workers who would have benefited from the 2016 final rule will be left behind by this proposal. The 8.2 million workers left behind by this proposal are made up of 3.1 million workers who would have gotten new overtime protections under the 2016 rule and another 5.1 million workers who would have gotten strengthened overtime protections under that rule. The 8.2 million workers left behind include 4.2 million women, 3.0 million people of color, 4.7 million workers

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[15] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10951 (March 22, 2019).

[16] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10950 (March 22, 2019).

[17] Heidi Shierholz, *More Than Eight Million Workers Will Be Left Behind by the Trump Overtime Proposal*, Economic Policy Institute, April 2019.

[18] While the Department does not include this group in its analysis of how many fewer workers will be impacted under its proposal than under the 2016 rule, it does mention them elsewhere in the proposal: "The Department also anticipates that 3.6 million employees paid between $455 and $679 per week who fail the standard duties test (*i.e.,* that are and will remain nonexempt)—2.0 million salaried white collar workers and 1.6 million salaried blue collar workers—will have their nonexempt status made clearer because their salary will fall below the proposed threshold" (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10911 [March 22, 2019]).

without a college degree, and 2.7 million parents of children under the age of 18. Of the 2.7 million parents left behind, more than half (1.4 million) are mothers. It's worth noting that being left out of coverage under the FLSA's overtime provisions has particular disadvantages for new mothers, since the Affordable Care Act's protections requiring employers to provide time and space for nursing mothers to express milk at work apply only to employees who are not exempt from overtime pay.[19]

Further, because the Department is using a flawed methodology that sets the threshold far below where it was set using the appropriate methodology of the 2016 rule, workers will lose $1.2 billion dollars each year. This calculation includes both wages lost by workers who would have gotten new protections under the 2016 rule but would not get new protections under the current proposal, and wages lost by workers who would get new protections under both the current proposal and the 2016 rule but who would have gotten a larger raise under the 2016 threshold. The calculation does *not* include earnings losses by those who would have gotten strengthened protections under the 2016 rule but would not get them under the current proposal. As described above, the annual earnings losses would grow from $1.2 billion to $1.6 billion (in inflation-adjusted terms) over the first 10 years of implementation due to the fact that the current proposal does not include automatic indexing.

Conclusion

The Department's current proposal lets down millions of workers and their families by failing to set the overtime salary threshold at a level that would lead to better use of one of the most precious resources of working families in this country—their time. The standard salary threshold in the proposal is so low that it fails to provide a true incentive for employers to balance the additional hours they ask of their workers with the costs of either overtime pay or of raising salaries to the new salary threshold. That incentive is inseparable from a fundamental principle embodied in the Fair Labor Standards Act—that workers should receive a fair day's pay for a long day's work.

The Department's proposed rule—which at its heart is based on the notion that someone making $35,308 a year is a well-paid executive who doesn't need or deserve overtime protections—flies in the face of those principles. As currently proposed, the Department's proposal will have detrimental effects on workers, depart from decades of historical precedent, and undercut the purpose of the Fair Labor Standards Act's overtime provisions, leaving behind millions of workers who would have been covered by the painstakingly determined 2016 rule. Congress should step in and pass the *Restoring Overtime Pay Act*, which codifies the 2016 rule, setting the threshold at an appropriate level and automatically updating it going forward, helping create a fairer economy while at the same time providing crucial predictability to employers and employees alike.

[19] Heidi Shierholz, "Millions of Working Women of Childbearing Age Are Not Included in Protections for Nursing Mothers," *Working Economics Blog* (Economic Policy Institute), December 10, 2018.

Chairwoman ADAMS. Thank you very much.

Ms. Babcock-Stiner, you are recognized for 5 minutes.

STATEMENT OF ANNE BABCOCK-STINER, SENIOR VICE PRESIDENT OF HUMAN RESOURCES, PATHSTONE CORPORATION

Ms. Babcock-Stiner. Thank you, Chairwoman Adams, Ranking Member Byrne, and other members of the subcommittee, for the opportunity to present at today's hearing.

My name is Anne Babcock-Stiner, and I am the Senior Vice President of Human Resources at PathStone Corporation, a New York-based nonprofit with a mission of building economic self-sufficiency for families and communities. I am honored to be here representing an employer that has a rich history of advocating for strong worker protections.

PathStone has about 600 employees in seven different States and in Puerto Rico, who serve more than 41,000 individuals each year through our work force, community and housing development programs.

Back in 2016 when the Department of Labor proposed raising the salary threshold to $47,476, PathStone was compelled to conduct a mission-based analysis to determine what this would mean for our constituents and for our employees. We concluded that we must support and implement the proposed salary threshold, and we remain firmly committed to this position today.

A higher salary threshold has value to both employees and employers. As the Department has noted, many nonexempt classifications can be made with a salary level test alone. While the classifications under the salary level test can be made with a quick payroll report, the duties test can be subject to multiple interpretations. Each exemption has a lengthy list of factors that must be analyzed. And this task goes far beyond an examination of job descriptions, work plans, and organizational charts.

The law requires that we must examine what the employee is actually doing, and this process must be repeated every single time we make a program adjustment or a staffing change.

Because the duties test is so difficult to apply in practice, the salary threshold becomes even more important. However, the value of the salary threshold is dependent on the level at which it is set, as demonstrated by an analysis of PathStone's 490 full-time employees.

At the current salary threshold of just about $23,000, PathStone has to review the job duties of 176 employees to determine their exemption status. At the proposed threshold of $35,000, we have to review the job duties of 133 employees. And at the 2016 proposed threshold of about $47,000, we have to review the job duties of only 102 employees.

It quickly becomes clear that as the salary threshold increases, the number of employees that must be continuously reviewed under the duties test decreases.

There are numerous strategies that can be deployed once it is determined that an employee is subject to reclassification, none of which are specifically mandated by the law. For employees who routinely work no more than 30 hours per week, we can reclassify them with little to no financial impact. For employees who are close to the new salary threshold and who routinely work more than 40 hours per week, we can increase their salaries to maintain their exempt status, and we can mitigate the financial impact by reorganizing job duties and workloads.

Reallocating job duties is particularly effective when job duties are moved from an employee who has been reclassified as nonexempt to an employee who is given an increase to maintain their exempt status because we can directly tie the salary increase to additional job duties.

Some critics claim that reclassification reduces scheduling flexibility and benefit eligibility. However, not all employers tie benefit packages to exemption status. At PathStone, our president and CEO has the same benefit package as an entry level receptionist.

Furthermore, while nonexempt employees certainly do come with more timekeeping requirements, technology is making this task significantly easier.

Nonprofits have been held up as a poster child for employers that will be hurt by an increased salary threshold. But this argument is invariably advanced by those who are not familiar with mission-based work. There is no question that a higher salary threshold will impact our operations, particularly considering that we are prohibited from renegotiating our Federal contracts. However, just as our mission must guide our actions when we serve our constituents, it must also guide us when we act as an employer.

PathStone's mission of economic self-sufficiency compels us to support robust regulations and oppose the Department's attempt to undermine strong overtime protections.

Thank you.

[The statement of Ms. Babcock-Stiner follows:]

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TESTIMONY BEFORE THE

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS, UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON

"RESTORING THE VALUE OF WORK: EVALUATING THE DOL'S EFFORTS TO UNDERMINE STRONG OVERTIME PROTECTIONS"

June 12, 2019

Anne R. Babcock-Stiner, Esq.
Sr. Vice President of Human Resources, PathStone Corporation

Thank you, Chairman Scott, Ranking Member Foxx and members of the Committee on Education and Labor for the opportunity to participate in today's hearing, "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections."

My name is Anne Babcock-Stiner and I am a licensed attorney and the Senior Vice President for Human Resources at PathStone Corporation, a New York-based nonprofit. I am honored to be here representing an employer that has a rich history of advocating for strong worker protections.

Introduction

PathStone Corporation

PathStone is a 501(c)(3) nonprofit corporation organized under the Not-For-Profit Corporation Law of New York State with a mission of building economic self-sufficiency for families, communities, and individuals. PathStone serves more than 41,000 individuals and families each year through the following main areas of service:

- **Workforce Development**: Enhance the skills, performance and potential of individuals, leading to meaningful employment.
- **Education & Health**: Promote and enhance lifelong learning, healthy living and employability for individuals and families.
- **Emergency & Supportive Services**: Assist individuals and families in crisis to achieve safety and stability, which enable individuals to pursue education and employment.
- **Housing Services**: Financial counseling and resources designed to stabilize living environments and provide the foundation for economic security.
- **Community & Housing Development**: Opportunities for people to live and work in thriving, diverse communities from which they can create family assets and access robust community services.

PathStone operates 122 offices in seven different states—New York, Vermont, New Jersey, Pennsylvania, Ohio, Indiana and Virginia—as well as in Puerto Rico. PathStone has an annual operating budget of just over $80 million and has between 550 and 600 employees, depending on the season.

Position Statement

Back in 2016 when the Obama administration proposed raising the salary threshold from $23,660 to $47,476, PathStone's initial reaction was that such a dramatic increase would have a negative impact on our operations, particularly in a time of reduced funding. However, as a nonprofit that serves low-wage workers on their journey to economic self-sufficiency, we felt obligated to take a step back and conduct a mission-based analysis of the proposed regulations. This meant that we had to look not only at how the increase would impact our operations, but also how it would impact the people that we serve. We also had to look at how it would impact our own employees, many of whom are low-wage workers. Our analysis led us to the conclusion that we must support the proposed increased salary threshold of $47,476 and we remain firmly committed to this position today.

Value of the Salary Threshold

Because an employee has to pass both the duties test and the salary level test, an initial exemption determination can be made with just one of the tests. From an employer's perspective, the salary level test is an easily administered, bright line test to determine who is eligible for overtime under federal law—an employee is either above the threshold or below it. The value of the salary level threshold becomes greater when we compare it to the duties test, which is notoriously difficult to apply in practice.

Unlike the salary level test, the duties tests can be ambiguous and it is very easy to make a good faith misclassification. Each duties exemption test has a lengthy list of factors to consider that are spelled out in multiple sources, including DOL regulations, case law and DOL opinion letters. For example, the executive exemption requires that an employer make a determination on 17 different factors. The administrative exemption requires a determination on 32 different factors. Each factor requires an analysis of an employee's job duties and functions, as well as their level of authority and discretion.

Reviewing job duties and functions goes far beyond an examination of job descriptions, work plans and organizational charts. A good faith duties-based classification can be made only after interviewing the employee and their manager to find out what the employee is *actually* doing. The law is quite clear that just because a job description or work plan has primarily exempt duties doesn't mean that the employee is actually doing an exempt job.

The exemption determination process needs to be repeated each and every time an employee's job duties change and each and every time that there is a significant performance issue. For example, if a reduction in funding causes a supervisor to lose one of their two direct reports, their exemption status has to be reviewed and changed. In a time when the needs of our constituents are becoming greater and greater, we as direct service nonprofits are called on to make rapid adjustments in our service delivery models. Each time we do this, job duties shift and exemption statuses must be reviewed. When a program manager is underperforming to the extent that their recommendations are no longer relied on by their director, the manager's exemption status needs to be reviewed. Exemption classifications are made on an individual basis and it is impossible to run a duties test on one job description and then apply the classification to everyone in that position.

Further complicating the process are legal definitions that go against managers' understanding of commonly used language. If you ask any manager what the phrase "primary duty" means, they will invariably say that an employee's primary duty is the duty that they spend the most amount of their time on. When you tell a manager that the legal definition of primary duty is "the most important duty that an employee performs," they will usually say that all of their duties are important. This results in an extensive back-and-forth between managers and human resources that can be quite time consuming.

In short, because the job duties test is difficult to apply in practice, the bright line salary level test becomes even more important in making exemption determinations. However, the value of the salary threshold as an effective "shortcut" in making an exemption determination is dependent on the level at which it is set. In other words, a salary threshold that is too low doesn't act as a shortcut.

Reality of a Low Salary Threshold

Only some of employees who are below the salary threshold—those that are close to it—should be reviewed in greater detail to see if their job duties would qualify them for exempt status if their salary is increased, but all employees who are above the salary threshold must be reviewed because their job duties may not qualify them for exempt status. Therefore, a higher salary threshold actually simplifies the task of determining exemption status because it significantly reduces the number of positions that will be subject to the laborious and ambiguous duties test.

A quick review of PathStone's employee base demonstrates how this pans out. As of the writing of this testimony, PathStone has 598 active employees, 490 which are full-time (including seasonal). We can see how many positions need to be reviewed using the duties test when the salary level is set at three different levels: the current level of $23,660, the proposed level of $35,3058 and the Obama proposed level of $47,476.

Current Threshold:
PathStone has 22 active, full-time employees making less than the current threshold of $23,660. All of them can be classified as non-exempt based on what is known about their job duties because it is commonly understood that those duties will never been considered exempt (e.g. assistant preschool teacher, cook, receptionist). A blanket non-exempt determination can be made for this group of employees, as there is no legal risk in misclassifying someone as non-exempt and there is little financial risk of the employee working more than 40 hours. No job duties were reviewed for positions under the threshold.

However, the real work lies in evaluating the 468 active, full-time employees who are *above* the salary threshold because their job duties will need to be examined. We can automatically classify 239 as non-exempt, based their salary grade and the likelihood that their duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on their salaries and what is known about their job duties from day-to-day interactions. This means that 176 jobs over the threshold will need to be reviewed.

Grand total of jobs to review at the $23,660 threshold: 176

Proposed Threshold:
PathStone has 184 active, full-time employees making less than the proposed threshold of $35,308. One hundred and fifty five of these can be classified as non-exempt based on what is commonly known about their job duties. For the remaining 30, we look to see if their job duties are exempt such that an increase would qualify them for exempt status. Given the limitations of nonprofit budgets, a 5% increase is reasonable. Of the remaining 30 employees that are below the threshold who weren't categorically disqualified for exempt status based on their job duties, none are within 5% of the $35,308 threshold. No job duties were reviewed for positions under the threshold.

Again, the real work lies in evaluating the 306 active, full-time employees who are *above* the salary threshold. We can automatically classify 120 as non-exempt based on their salary grade and the likelihood that their job duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on their salaries and what is known about their job duties from day-to-day interactions. This means that 133 jobs over the threshold will need to be reviewed.

Grand total of jobs to review at the $35,308 threshold: 133

Proposed Threshold Under Obama:
PathStone has 336 active, full-time employees making less than the $47,476 threshold proposed by the Obama administration. Two hundred and fifty seven of these can be classified as non-exempt based on what is commonly known about their job duties. For the remaining 79, we look to see if their job duties are exempt such that an increase would qualify them for exempt status. Given the limitations of nonprofit budgets, a 5% increase is reasonable. Of the remaining 79 employees that are below the threshold who weren't categorically disqualified for exempt status based on their job duties, 19 are within 5% of the $47,476 threshold. This means that 19 jobs under the threshold will need to be reviewed.

Of the 154 active, full-time employees who are above the salary threshold, we can automatically classify 18 as non-exempt, based their salary grade and the likelihood that their duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on their salaries and what is known about their job duties from day-to-day interactions. This means that 83 jobs over the threshold will need to be reviewed.

Grand total of job to review at the $47,476 threshold: 102.

It quickly becomes clear that as the salary threshold increases, the number of positions that need to be individually reviewed on a continuous basis decreases. Now that we know who will be reclassified, we can determine how best to implement the change.

Implementation Strategies

When looking at the available implementation strategies, it is important to keep in mind that there is nothing in the regulations that mandates that employees receive a pay increase or even that employees be reclassified to non-exempt.[1]

There are several available implementation strategies, many of which are low- or no-cost, when dealing with an employee who is no longer exempt as the result of the increased salary threshold. In response to the proposed regulations in 2016, the Department of Labor issued the *Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act*, in which they outlined several options for responding to changes in the salary level, including raising salaries to maintain the exemption and reclassifying employees as non-exempt and paying overtime and/or reallocating job duties.

In evaluating the various implementation options, the first thing to determine is whether the employee in question actually routinely works more than 40 hours per week. If an employee routinely works 40 hours per week or less, there is little to no financial or operational burden imposed by reclassifying them from exempt to non-exempt.

Increase Salaries to Maintain Exempt Status

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10933 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

For employees who are close to the new salary threshold and who routinely work more than 40 hours per week, the first and most obvious answer is to increase their salaries to the new threshold to maintain their exempt status.

The financial impact of this approach can be mitigated by pairing it with a reallocation of job duties, as described in the example below.

Reclassify as Non-Exempt

For employees who are further away from the new salary threshold, the approach will depend on the degree to which the employee works more than 40 hours per week. For employees who are less likely to routinely work more than 40 hours per week, the most efficient and cost-effective approach would be to reclassify them as non-exempt and pay overtime. While this may sound frightening to employers, there are numerous strategies for mitigating overtime.

Job duties and workloads can be reorganized. Job duties that are required and/or predictable and routine could be assigned at the beginning of a workweek, thus allowing employers to eliminate more discretionary tasks at the end of the week if it appears likely that overtime will be incurred.

Schedules can also be adjusted for employees who regularly work outside of the 9 to 5 workday. For example, outreach workers who routinely work until 7:00 PM so they can attend community meetings to recruit people in need of services could work a regular schedule of 11:00 AM to 7:00 PM.

Job duties can also be reallocated amongst employees in order to reduce overtime. This is particularly effective when job duties are moved from an employee who has been reclassified as non-exempt to an employee who was given an increase to maintain their exempt status. Human resource administrators don't like giving increases to employees solely for compliance reasons and would much rather have a tangible change in work duties as the basis of a salary increase. In these cases, the salary increase can be directly tied to the additional job duties that were shifted from the employee who is being reclassified as non-exempt.

The DOL has identified costs, both quantified and non-quantified, associated with reclassifying an employee as non-exempt, including reduced scheduling flexibility and a potential loss in benefits.[2] It is important to note, however, that not all employers tie benefit packages to exemption status. At PathStone Corporation, our President & CEO has the exact same benefit package as an entry-level cook at one of our Migrant Head Start programs, save for the fact that he can participate in our 457(b) plan. Furthermore, scheduling flexibility is continuously improved by technology. While non-exempt employees do come with more timekeeping requirements and are indeed more likely to be monitored, technology is making this task significantly easier. A quick Google search of the phrase "time and attendance technology" yields 29,000 hits, one of which was thankfully an analysis of the top 80 time and attendance systems and a guide for selecting the system that best fits your needs.[3]

While there are indeed quantified costs associated with reclassifying employees as non-exempt, there are also significant benefits, primarily that employees are more likely to enjoy an adequate work-life balance. When employers don't have to pay overtime, there is little incentive for them to ensure that work is completed within 40 hours. There is little incentive for employers to become more efficient when there is no increased labor cost associated with inefficiencies. When employers face the possibility of paying overtime, they find ways to limit the workweek to 40 hours.

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[2] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10933 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

[3] BUSINESS NEWS DAILY, https://www.businessnewsdaily.com/6730-best-time-and-attendance-systems.html (last visited June 7, 2019).

And in today's day and age, the need to limit the workweek to 40 hours is significant. Employees need time to tend to the needs of their families, to care for themselves, and to be active and engaged citizens and community members. The demands of simultaneously caring for aging parents and adult children at the same time have become so significant that the phrase "sandwich generation" has been coined. Working fathers report experiencing a high level of conflict in balancing their professional and parenting roles: two of out of three working fathers desire to be an equal caregiver with their partner, but more than half also report that they feel unable to do so with the demands of their jobs.[4] In 2016, working mothers spent around 25 hours a week on paid work, up from nine hours in 1965. At the same time, they spent 14 hours a week on child care, up from 10 hours a week in 1965.[5] Millennials (64%) and Gen Xers (68%) are more likely to have a spouse/partner working 35 hours per week than Boomers (44%).[6]

Multiple Strategies Working Together

Implementations strategies can be combined effectively. This is best illustrated by an example:

> *Program Manager oversees a training and employment program for at-risk youth. Program Manager supervises two workforce developers and one outreach worker. Program Manager is currently exempt under the executive exemption and her salary is $32,000 per year. Program Manager has to do monthly reporting for funders and organize and manage on-site program audits. These tasks push her over 40 hours per week at least once per month.*
>
> *Compliance Officer is responsible for ensuring that programs operate within funder and regulatory requirements. While specific program requirements regarding effectiveness and quality of services vary, Compliance Officer monitors the entire organization's leadership, board governance, strategic planning, human resource management and financial operations and oversight. Compliance Officer has no direct reports and is currently exempt under the administrative exemption. Compliance Officer's salary is $34,000 per year.*
>
> *A good strategy would be to shift the program reporting duties from Program Manager to Compliance Officer. Program Manager would be reclassified as non-exempt, but she is unlikely to incur overtime now that these job duties have been transferred. Compliance Officer's salary will be raised to the new salary level threshold to preserve her exemption status and to compensate her for the additional job duties.*

The Value of Automatic Updates

Some employers oppose automatic updates to the salary threshold because they believe that the marketplace should dictate salaries and because they pose an administrative burden.

These arguments hold little water. First and foremost, the regulations do not dictate salaries or even the payment of overtime. Furthermore, automatic updates allow for predictable and incremental changes. Regulatory predictability is something that all businesses want. History has clearly shown that without automatic updates, we are left with inconsistent implementation that can leave us scrambling to implement significant increases. Since the inception of the salary threshold in 1938, employers have been subject to increases that are between

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[4] Brad Herrington, Jennifer Sabatini Fraone and Jegoo Lee, *The New Dad: The Career-Caregiving Conflict,* Boston College Center for Work & Family, 2017.

[5] PEW RESEARCH CENTER, https://www.pewresearch.org/fact-tank/2019/05/08/facts-about-u-s-mothers/ (last visited June 7, 2019).

[6] Ernst & Young, *Global Generations: A Global Study on Work-Life Challenges Across Generations,* 2015.

24% and 193% and that occur as frequently as 5 years apart and as infrequently as 29 years apart.[7] Increases have never been done in consistent time intervals or at consistent and predictable rates. Conversely, automatic updates grant employers a degree of predictability and allow them to plan more effectively for the future.

The Non-Profit Perspective

There are organizations out there that like to hold up nonprofits as the poster child for employers who will be negatively impacted by increasing the salary threshold. What these groups fail to understand is that nonprofits look beyond a single bottom line. We measure our success on the "triple bottom line" of social change and environmental and financial sustainability.

Without a doubt, nonprofits will face operational challenges in implementing higher salary thresholds. By the DOL's own analysis, nonprofits will be disproportionally impacted by an increase in the salary threshold when it projects that approximately 7% of nonprofit employees will be affected by the higher salary threshold, compared to 5% of for-profit employees.[8] This is largely due to the "mismatch" between salary and job duties with nonprofit employees: since nonprofit employees are generally paid lower wages, it is not uncommon to find employees with exempt job duties and non-exempt salary levels.

Not only are nonprofits disproportionally impacted by an increased salary threshold, but the governmental funding model for nonprofits also leaves them vulnerable. The nonprofit sector as a whole earns almost 33% of their revenues from government grants and contracts.[9] Nonprofits are generally locked into three year grants and contracts with government agencies and will now face increased costs that were not known at the time that the grants and contracts were entered into. In other words, nonprofits will find themselves contractually obligated to maintain existing services at an increased cost. Ironically, "[f]ederal for-profit contractors are entitled to seek 'labor standards adjustments' or 'equitable adjustments' to protect themselves from government-mandated labor cost increases, but that right is not currently available to non-profits performing work government grants."[10]

When looking at the challenges that lie ahead, we must always remember that nonprofits always operate under their missions—we serve our constituents with our mission in mind, we advocate with our mission in mind, we participate in our communities with our mission in mind and we act as an employer with our mission in mind. PathStone exists to help individuals, families and communities attain economic self-sufficiency, and this includes our own employees. Employees who work at nonprofits are no different than employees working at for-profits. There is no exception, nor should there be one, that allows nonprofits to exploit their workers. As stated by 150+ nonprofits in support of the 2016 proposed increase to $47,476:

> For many nonprofits, including those of us that provide human services or advocate for workers' rights, poverty reduction, or economic and social justice, this is a critical opportunity to improve the working conditions and the economic lives of the people we serve. At the same time, our own workers and the families they support also deserve fair compensation and greater economic security.
>
> As nonprofit organizations more broadly, we are dedicated to improving the public good. It is time to revisit the idea that working for the public good should somehow mean requiring the lowest-paid among us to support these efforts by working long hours, many of which are unpaid.[11]

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[8] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10929 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).
[9] National Council of Nonprofits, *The Nonprofit Overtime Implementation Conundrum*, 2016.
[10] National Council of Nonprofits, *DOL Proposed Overtime Reforms and the Impacts on Nonprofits*. March 11, 2019.
[11] Economic Policy Institute, https://www.epi.org/nonprofit-organizations-in-support-of-the-department-of-labors-new-overtime-regulations/ (last visited June 7, 2019).

Chairwoman ADAMS. Thank you very much.

I will now recognize Ms. McCutchen for 5 minutes.

STATEMENT OF TAMMY D. MCCUTCHEN, PRINCIPAL, LITTLER MENDELSON PC

Ms. MCCUTCHEN. Madam Chair, members of the Subcommittee, thank you for giving me the opportunity to speak today on the proposed overtime regulations.

I have been living with these regulations for almost 20 years now, revising the regulations in 2004 when I served as the Wage and Hour Administrator, and preparing comments for the Chamber in 2015, 2017, and for the current proposal.

For our conversation today, it is important to understand two things. First, in the FLSA, Congress created exemptions for executive, administrative, and professional employees based on job duties, without reference to salary. The text of the statute refers only to job duties.

Second, going back to 1940, again and again, the Department has Stated that the purpose of the salary level is only to screen out obviously nonexempt employees. If the salary level becomes too high, however, it stops serving as a proxy for the duties test. It becomes the whole test, which is what the Texas court found in his reason for invalidating the 2016 rule.

The Department proposes to increase the minimum salary level for exemption by nearly 50 percent, from less than $24,000 annually to over $35,000. Much of the commentary around the Department's proposal has focused on the salary level. But more important than the final number is the method the Department used to reach it.

The Department used, more or less, the same methodology as in 2004, a rule, by the way, that has been in effect for nearly 15 years without a single legal challenge. That methodology was the best choice for two reasons. First, it is consistent with historical practice in the Department; and, second, it is the approach that best finds that salary level that can serve as a proxy for job duties without replacing the job duties test.

Now, we must remember that the FLSA needs to work throughout the country, without adverse impact on local economies and jobs. It must work in every State and every industry, in large cities and tiny towns, for small businesses and large, for profits and nonprofits. Like the minimum wage, States can set a higher threshold salary level, and they have done so.

In California, for example, exempt employees must be paid an annual salary of $49,920. The State of Washington is expected to soon set a similar salary level for exempt employees in that State. In New York, the salary level is $58,500.

Now, while that high level may fit the economic conditions of New York, it does not work in Alabama, where it is less expensive to buy a house than it is to buy a parking spot in Manhattan.

In any case, applying the 2004 methodology to set the salary level was the Department's only viable option, given the Texas court's decision invalidating the 2016 rule. Referring to the statutory text, the court reasoned that Congress gave the Department authority to define the exemptions by reference to an employee's duties, not by reference to their salaries. The salary test was, therefore, lawful only when it did serve as a proxy for duties.

For most of its history, the Department used the salary test in just that way, but in 2016, the court found the Department exceeded its authority by setting out to reclassify millions of employees based on salary alone. The court also stated that if the Department had simply updated the salary levels using the 2004 methodology, its action would almost certainly have been lawful.

Most argue that it is time to increase the salary level. Those who oppose the proposed $35,000 salary level, that it is too low, want the Department to stubbornly defend the 2016 rule, offering no compromise between $24,000 and $48,000, even today. But defending that rule will almost certainly result in extensive and lengthy additional litigation, as the Trump administration did appeal the grant of the injunction to the Fifth Circuit and that appeal is still pending, and also perhaps a trip to the Supreme Court. Years of additional delay and—with uncertain results.

It was the overreach in 2016, the refusal to find compromise even today, which has undermined overtime protections for the last 3 years, not the current proposal. Thus, respectfully, I must take issue with the title of this hearing as I disagree with the conclusion that the Department is seeking to undermine the FLSA's overtime protections. The opposite is true. The Department's proposal will ensure that the salary level is increased now.

Thank you.

[The statement of Ms. McCutchen follows:]

Statement of the U.S. Chamber of Commerce

ON: **Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections**

TO: **U.S. House of Representatives Committee on Education and Labor**

DATE: **June 12, 2019**

BY: **Tammy D. McCutchen, Esq.**

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Testimony of

Tammy D. McCutchen, Esq.

Before the

United States House of Representatives
Committee on Education & Labor
Subcommittee on Workforce Protections

Hearing on

"Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections"

June 12, 2018

Madame Chair and members of the Subcommittee:

Thank you for the opportunity to speak with you about the U.S. Department of Labor's proposed revisions to 29 C.F.R. part 541, commonly known as the "white collar" overtime-exemption regulations.

Let me begin with a brief overview of my background. I am currently a principal in the Washington, D.C. office of Littler Mendelson, P.C., where I help employers comply with the Fair Labor Standards Act. Among other things, I help employers with internal audits on such issues as independent-contractor status, overtime exemptions, and other pay practices. I also represent employers in wage-and-hour investigations by the Department of Labor and serve as an expert witness in wage-and-hour class actions. For example, I served as an expert witness for the Department of Justice in *Nigg v. U.S. Postal Service*, where the plaintiffs alleged that the Postal Service misclassified postal inspectors as exempt from overtime. The courts ultimately found that the employees were properly classified.

In addition to my law practice, I also serve as Vice President and Managing Director, Strategic Solutions for ComplianceHR, which develops compliance applications to guide employers through key employment decisions, such as whether to classify an employee as exempt from overtime requirements.

Perhaps most relevant to our topic today, from 2001 to 2004, I served as the Administrator of the Department of Labor's Wage and Hour Division. During my tenure, I oversaw the 2004 revisions to the overtime regulations. Those revisions were the Department's first major overhaul of the regulations in 55 years.

Today, I am appearing on behalf of the U.S. Chamber of Commerce.

Madame Chair, I ask that my entire written testimony be entered into the record.

I. A Brief Regulatory History

Let me begin with a brief overview of the history of the white-collar exemptions. The Fair Labor Standards Act generally requires covered employers to pay each employee at least the minimum wage for all hours worked. It also requires employers to pay overtime at a rate of one-and-one-half times the employee's regular rate for all hours over 40 in a single workweek. Those general requirements, however, are subject to 51 partial or complete exemptions. The most well known of these exemptions—and the topic of today's discussion—are the exemptions for executive, administrative, and professional employees. These are the "white collar" exemptions.

The white-collar exemptions have been part of the FLSA since Congress first adopted the law in 1938. Congress did not, however, define "executive," "administrative," or "professional." Instead, it delegated authority to define those terms to the Secretary of Labor. Specifically, it wrote that the Secretary could "define and delimit" those terms "from time to time."

The Secretary first exercised that authority on October 20, 1938, when the Department adopted the regulations now at title 29, part 541 of the Code of Federal Regulations. Much as they do today, those original regulations defined the exemptions by two criteria: duties and salary. These two criteria worked together. To qualify for one of the white-collar exemptions, an employee had to satisfy both criteria—he or she had to both earn at least the minimum salary and perform primarily exempt duties.

The Department revisited the minimum salary level in 1940, and again in 1949. Its analysis from those revisions shows that it intended the salary level as a screening mechanism. Through its compliance investigations, it had learned that employees earning below a certain threshold almost invariably failed to satisfy the duties tests, and so failed to qualify for the exemptions. To save employers and investigators time and resources, it therefore adopted the salary test to screen out—in the Department's words—"obviously nonexempt" employees.

Also in 1949, the Department split the duties test in two. Instead of a single test, it provided a "long" test for most employees and a "short" test for "high salaried" employees. It reasoned that employees who earned large salaries were more likely to perform exempt duties, and so it made sense to apply a truncated duties test to those employees.

For the next three decades, the Department continued to revisit the salary levels every five to ten years. It originally set the minimum salary at $30 per week, but by 1975, it had raised the levels to $155 per week for executive and administrative employees, $170 per week for professionals, and $250 per week for employees subject to the short test.

Those levels remained unchanged until 2004, when the Department undertook its first major revision in decades. This revision sought to address two related problems. First, the duties tests were unnecessarily complicated. Employers and employees alike complained that using two different tests was confusing. Employers also complained that the short test was too rigid: it put a hard cap on nonexempt tasks, which required minute-by-minute tracking. Second, the salary levels had eroded in value. The long-test salary had fallen below the federal minimum wage, and the short test was only $1.10 above it. The levels had therefore stopped serving any meaningful screening function.

To address these problems, the Department made a number of changes, three of which are particularly relevant here:

- First, it combined the short and long tests into a single duties test. This test borrowed aspects from both tests, but abandoned the long test's cap on nonexempt work.

- Second, it adopted a new methodology for setting the minimum salary levels. This methodology used salary data collected by the Bureau of Labor Statistics as its baseline. It then focused on the lowest-wage Census region and the lowest-wage industry group. Within those groups, it set the salary level at the 20th percentile. That methodology produced a salary level of $455 per week, or $23,660 per year.

- Third, it adopted an exemption for "highly compensated" employees. This exemption provided a streamlined duties test with an elevated salary level. The Department initially set the salary level at $65,000 a year, but in response to public feedback, raised it to $100,000.

The Department left these standards in place until 2016, when it again proposed to raise the salary levels. But instead of applying the 2004 methodology, it adopted a dramatically different formula. It still looked at BLS data in lower-wage regions and industries, but departed significantly from the previous methodology in two key ways: expanding the geography covered to include the higher income jurisdictions of Maryland, Virginia, and the District of Columbia, and doubling the relevant percentile from 20 to 40. These changes caused the salary level to balloon from $23,660 to $47,476. The Department estimated that this new formula would cause more than four million workers to lose their exempt status based on their salaries alone. It decided, however, that such a result was justified by changes in the workforce and the potential for misclassification.

That approach proved legally fatal. In November 2016, the U.S. District Court for the Eastern District of Texas preliminarily enjoined the regulations from taking effect.[1] And the following August, the court struck them down, leaving the 2004 salary level as the current salary test.[2] Referring to the statutory text, the court reasoned that Congress gave the Department authority to define the exemptions by reference to employees' duties, not by reference to their salaries. The salary test was therefore lawful only when it served as a proxy for duties. For most of its history, the Department had used the test in just that way, always making sure to set the level at the lower end of the salary range. But in the final rule issued in 2016, the Department explicitly set out to reclassify whole swaths of the workforce on salary alone. The Department had therefore exceeded its authority. The court then added that if the Department had simply updated the salary levels using the 2004 methodology, its action would almost certainly have been lawful.[3]

II. Salary Levels

This past April, the Department again proposed to update the salary levels—by reverting to the 2004 methodology. That approach follows historical practice and falls comfortably within the Department's delegated authority.

a. The Department correctly returned to the 2004 methodology.

Much of the commentary around the Department's proposal has focused on the salary level—$35,308 per year. But more important than the final number is the method the Department used to reach it. The Department used, more or less, the same methodology it used in 2004. That methodology was the best choice for two reasons: (1) it is consistent with historical practice; and (2) it is the approach that best identifies a salary level that can be a floor to serve as a proxy for identifying exempt and nonexempt duties.

Again, the Department has always used salary levels for a limited purpose. Reports and analyses going back to 1940 emphasize this point again and again. For example, in 1958, the Department wrote that the salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees."[4] If the salary level becomes too

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[1] *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016).

[2] *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806–808 (E.D. Tex. 2017).

[3] *Id.* at 807 n.6 ("[I]f [the salary level] had been just adjusted for inflation, the 2004 figure, we wouldn't be here today . . . because [the salary level] would still be operating more the way it has . . . as more of a floor." (quoting court's statements during oral argument)).

[4] U.S. Dept. of Labor, Wage & Hour & Pub. Contracts Div., Report and Recommendations on Proposed Revision of Regulations, Part 541 under the Fair Labor Standards Act Defining the Terms "Executive, Administrative," "Professional," "Local Retailing Capacity," "Outside Salesman" 2–3 (1958).

high, however, it stops serving this function. It instead becomes determinative for large numbers of otherwise exempt workers. Rather than being a proxy for the duties test, it becomes the whole test.

The 2004 methodology recognizes that issue and so sets the levels at a reasonable point. It screens out fewer exempt workers and allows the duties test to take center stage. In that respect, it is consistent with the Department's longstanding practice.

Perhaps more importantly, it presents the only truly viable option. In proposing new levels, the Department had three choices. First, it could have used the method it used before 2004—sometimes called the "Kantor" method. That method, however, assumes that there will be two salary levels. After the Department consolidated the two duties tests into one, that method no longer made sense. Second, it could have returned to the 2016 method. But that method was declared invalid before the 2016 regulations ever went into effect. The Department could not have responsibly used it again. Third, the Department could simply update the salary levels using the methodology already in place—the 2004 methodology. That methodology had been in effect for nearly 15 years and was familiar to the regulated community. Its results had been applied in countless court decisions across the county. So given the 2016–17 litigation and the Department's historical practice, the 2004 methodology was its only reasonable choice.

b. Critics of the 2004 methodology have misrepresented and oversimplified the Department's approach.

The 2004 methodology is not, of course, without its detractors. It has drawn its share of criticism, mostly from groups who advocated for a significantly different kind of rule with much higher salary thresholds. These groups often argue that the 2004 methodology created a "mismatch" between the short and long tests. They assert that it did nothing more than match the short test's duties with the long test's salary. This, they claim, caused fewer people to be eligible for overtime.

That criticism is unwarranted. In 2004, the Department did more than simply paste the long salary level onto the short duties test; it incorporated elements from both tests. For example, it eliminated the hard cap on nonexempt work, which had proved difficult to track and enforce. In that respect, the new test resembled the short test. But it also incorporated requirements from the long test, such as the requirement that executive employees have the authority to hire and fire, or to make recommendations about hiring, firing, advancement, or other changes in status. The result was a brand new duties test mixing elements of both former tests.

The salary level was new as well. While the long test set its salary level using the 10th percentile of relevant salaries, the 2004 methodology doubled that threshold to the 20th percentile.

It did so in part to compensate for eliminating the long test's cap on nonexempt work. Again, the result was something entirely new—a formula that modernized the salary levels while remaining faithful to the salary test's original purpose.

Another common criticism is that the 2004 methodology increased misclassification—that too many employees have been classified as exempt who should be nonexempt. This argument stems from the Department's belief during the 2016 rulemaking that many workers had been misclassified under the 2004 regulations. Seizing on this statement, critics argue that by returning to the 2004 methodology, the Department is effectively suborning misclassification.

This argument puts the cart before the horse. By definition, misclassification is a misapplication of the rules. The rules therefore "cause" misclassification only when they are too complicated or abstruse to apply correctly. The 2004 regulations had the opposite effect: they streamlined the regulations and simplified compliance. So what the critics really mean when they say the regulations "caused" misclassification is that it allowed employers to classify employees as exempt who the critics believe should not be exempt. But by definition, these employees satisfied the duties tests; otherwise, they could not have been classified as exempt. The critics' real argument, then, is that employees who perform exempt duties should nevertheless receive overtime when they earn less than what the critics consider an adequate salary. But that argument clashes with the statutory text, amplified by the federal judge, which again defines the exemptions only by reference to duties.

Some employees, of course, were misclassified under the 2004 regulations. That is an inescapable reality. But it is also a reality that misclassification occurred long before the 2004 regulations, and will surely continue to occur into the foreseeable future. There will always be close cases where an employee's duties may be considered exempt or nonexempt depending on who is reviewing them. No amount of tinkering with the rules will change that. Misclassification can certainly be reduced, but the Department cannot do that it simply by raising the salary levels higher and higher. As the 2016 regulations proved, salary levels can rise only so high before they usurp the duties test. The answer, then, is to simplify the regulations, increase education, and improve enforcement.

Finally, some critics point to the fact that the 2004 methodology automatically classifies fewer employees as nonexempt than the 2016 methodology would have. That is, however, precisely the point. The salary levels have never been more than a sorting mechanism: they help employers and investigators identify employees who are unlikely to satisfy the duties tests. The 2016 regulations ignored that principle. Instead, they sought to use salaries to reclassify millions of otherwise exempt workers in a single stroke. In doing so, they exceeded the authority Congress delegated and, as a result, were struck down.

The Department's current proposal builds on that lesson. It returns to historical practice and comports with Congress's intent. For that reason, it deserves support.

c. *The Department correctly abandoned its proposal to automatically update salary levels.*

The proposal also deserves support for something it did not do—provide automatic updates.

In 2016, for the first time ever, the Department proposed to update salary levels every three years automatically. Stakeholders in the regulated community protested this change vehemently and warned that it exceeded the Department's authority. The Department disregarded that feedback, citing delays between prior updates through rulemaking. It argued, in effect, that rulemaking had proven too slow and cumbersome to keep up with rising salaries, and, therefore, the goal of keeping the salary level updated could no longer be entrusted to the Secretary as Congress had envisioned.

The Department's current proposal rejects that rationale. Instead, it proposes to revisit the salary levels every four years through notice-and-comment rulemaking. That approach is consistent with the Department's nearly 80-year practice. In the past, every time the Department has updated the salary levels, it has done so through rulemaking—and for good reason. Congress has never given the Department authority to update the salary levels automatically. Instead, it authorized the Department to define and delimit the exemptions "from time to time." That language suggests a deliberative, intentional process, not a formula tied to inflationary measures.

Moreover, automatic updates would have clashed with the Administrative Procedure Act (APA). In the APA, Congress directed agencies to effect major policy changes through formal notice-and-comment rulemaking. It recognized that agencies made better decisions when they drew on the widest possible range of information, including information provided by interested stakeholders. Rulemaking requires the agency to engage with the public and learn more about the issue. By circumventing the rulemaking process, the 2016 regulations would have deprived the Department of that give-and-take. It would have led to less nuanced analysis and, in all likelihood, worse decisions.

Proponents of the 2016 approach have argued that rulemaking is too slow and complex. They point to the gap between the Department's 1975 update and the 2004 regulations, during which the salary levels remained unchanged for nearly 30 years. But this argument ignores the fact that sometimes, slow change is a virtue. Congress designed the rulemaking process to make agencies accountable to the public. When rulemaking becomes difficult, or even impossible, it is sometimes because the public disagrees with the rule. Besides, Congress long ago judged that exchanging speed for accountability and legitimacy was a worthwhile trade. The Department's latest proposal respects that judgment.

III. Criticisms of the Department's Proposal

None of this is to say the Department's current proposal is perfect. It made several mistakes, not least of which was its application of the 2004 methodology.

Again, the 2004 methodology begins by looking at salary data from the lowest-wage Census region in the country. In 2004 and today, that region is the South. The South, however, is hardly uniform. It comprises three divisions: the South Atlantic, the East South Central, and the West South Central. The East and West South Central include largely lower-wage jurisdictions. The South Atlantic, by contrast, includes three of the highest-wage jurisdictions in the county: Maryland, Virginia, and Washington, D.C.

The Department recognized that discrepancy in 2004 and so excluded South Atlantic from its calculations. The Department's current proposal, however, includes all three divisions. The choice to include the South Atlantic skewed the Department's final numbers and resulted in a salary level higher than a strict application of the the 2004 approach would have suggested. This higher level will fall most heavily on small employers in lower-wage jurisdictions—the same employers the Department should be trying hardest to protect.

For much the same reason, the Department's proposal to raise the highly compensated salary level skewed far too high. The Department set the new level at the 90th percentile of nationwide salaries, excluding employees earning below the current minimum salary level ($455 per week). This approach differed from prior efforts—and indeed, from the Department's current approach to the standard salary levels—which had always looked to regional data instead. Unsurprisingly, the new approach inflated the salary level to $147,414. That level represents a nearly 50% increase over the current level—the largest single increase, dollar for dollar, the Department has ever proposed.

The Department offered no reason for such a dramatic change. Salaries have not risen 50% since 2004, and few suggest that the highly compensated exemption captured many otherwise nonexempt employees. Worse, the proposed level is so high that only large employers in major urban centers will be able to use it. It will become a benefit only for the financially powerful, a result the Department could not have intended.

IV. Conclusion

These criticisms aside, the Department's proposal is, on balance, a reasonable and measured approach to addressing real issues. Few can dispute that after 15 years, the 2004 salary levels are due for an update. The Department approached that update in a practical way. It looked to history, precedent, and the law, and chose the safest and most effective method of updating and modernizing the salary levels. That effort deserves our support and should be implemented.

This concludes my statement. I would be pleased to answer any questions.

Chairwoman ADAMS. Thank you.

Mr. Winebrake, you are recognized for 5 minutes.

STATEMENT OF PETE WINEBRAKE, MANAGING PARTNER, WINEBRAKE & SANTILLO, LLC

Mr. WINEBRAKE. Thank you, Chairwoman Adams and Ranking Member Byrne. It is a great pleasure to be here before you all today.

I am a workers' rights lawyer from Pennsylvania, and I have had the great privilege of representing thousands of workers throughout this country in Fair Labor Standards Act cases and hundreds of workers who have been paid salaries and have not gotten the benefit of overtime.

I want to—I want to tell you today about my clients, about my salaried clients. And all of the people I am going to tell you about today are individuals who make over $35,000 a year. Generally speaking, they make somewhere between 35 to the low 40's.

These salaried clients who I represent, almost none of them went to college. Very few went to college. They generally work between 55 and 70 hours per week. It is very important that you all realize that in fast food and in the retail industries, it is not uncommon for workers to work—salaried workers to work 65, 70, sometimes even 75 hours a week.

My clients are working class. Very few of them have any meaningful amount of savings. Very few of them have retirement accounts. Many of them lack reliable transportation. And I would say that the great majority of them are literally living paycheck to paycheck.

And what do my salaried clients do? What do they do on a day-to-day basis? I will tell you what they do. I have represented account managers. They get a fancy job title, "Account Manager," paid a salary of about $36,000, $37,000 a year for custodial service companies. These workers are basically doing janitorial work at nursing homes, cleaning the floors, washing windows, doing janitorial work.

The store managers and assistant store managers who I represent at small convenience stores and at dollar stores and at other retail establishments, what are they doing on a day-to-day basis? They are working the cash register, they are stocking shelves, they are cleaning the bathrooms, they are cleaning the floors. If they work in a convenience store that is associated with a gas station, they are going outside and they are cleaning near the—near the gas—where the gas is pumped.

The salaried employees who I represent in the restaurant and fast food industry, they are given the fancy job title of "Assistant Manager." But what are they really doing on a day-to-day basis? They are busing tables, they are serving customers, they are expediting food, they are cooking, they are washing dishes.

Over and over again—over and over again, it is the same business model that I see in every one of these cases. And the business model is very simple. Take a location, whether it be a store, a restaurant, staff it with one or two salaried employees and a bunch of hourly employees, set a very strict payroll budget that is very difficult to meet if you give the hourly employees overtime.

Remember, if you give the hourly employees overtime, you have to pay them overtime. Every extra hour that an hourly employee has to work is an hour that the company has to pay for. But if you give all that extra work to the salaried employee, the employer doesn't have to pay anything. It is free labor. So, the business model is very simple. Staff the location with a couple salaried employees, and whenever you need someone to do extra work, give that extra work to the salaried employee and benefit from that free work.

This fight that I have been watching, and in some ways have been a part of for the past 2 or 3 years, over these regulations, what this is all about is preserving that business model. The reason the chamber is putting up the fight that it is fighting is they will fight very hard to preserve that business model.

And I urge the members of this committee to do everything you can to take that business model away.

Thanks so much, and that is all that I have.

[The statement of Mr. Winebrake follows:]

Testimony of Pete Winebrake
Partner, Winebrake & Santillo, LLC
Dresher, PA

Submitted to the Subcommittee on Workforce Protections of the Committee on Education and Labor for the hearing entitled "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections"

Wednesday, June 12, 2019

2175 Rayburn Office Building

Let me begin by thanking Chairwoman Adams, Ranking Member Byrne, and other Members of the Subcommittee for the opportunity to testify about the Fair Labor Standards Act, which I believe is one of our Nation's most precious laws.

I am a wage and overtime rights lawyer from Pennsylvania. My three-person law firm is located several miles north of Philadelphia and exclusively represents employees. We work on a pure contingency fee basis because few of our clients can afford to pay a lawyer on an hourly basis.

Our firm handles both "individual" lawsuits that seek relief on behalf of a single employee and "class/collective" lawsuits that seek damages on behalf of groups of employees. Since opening in 2007, our firm has recovered unpaid wages for thousands of employees under the FLSA and similar state laws.

<u>Basic Requirements of the FLSA's "White Collar" Exemptions</u>

Many of my clients are salaried employees who have been classified as overtime-exempt "executives," "administrators," or "professionals" under the FLSA's "white-collar" exemptions. Generally speaking, the white-collar exemptions require the employer to satisfy two basic requirements:

First, the employee must earn a salary (or, in some cases, a "fee") of at least $455 per week. As discussed later, this $455 floor is so low that it is essentially meaningless.

Second, the employee must demonstrate that the employee's duties are "executive," "administrative," or "professional." This is where all the action is. The outcome of white-collar misclassification lawsuits almost always turns on competing arguments over the employees' duties.

My Clients – "Blue Collar" Workers with "White Collar" Job Titles

I have represented thousands of employees who have been denied overtime pay under the FLSA's white collar exemptions. These employees are classified as exempt "executives," "administrators," and "professionals" by their employers. Under current law, it is relatively easy for corporate lawyers and HR executives to concoct legal justifications for extending the FLSA's white collar exemptions to blue collar workers.

Our firm's current white-collar misclassification lawsuits will provide you with some real-life examples of the types of workers who are denied overtime pay under the current law:

- Dollar store "Manager" who earned approximately $38,000/year and regularly worked over 70 hours per week. She spent almost all of her time running the cash register, stocking shelves, waiting on customers, and doing the same type of work as the store's hourly employees.
- "Managers" at small convenience stores who generally earn annual salaries in the mid-$30,000's and regularly work over 55 hours per week. They spent most of their work hours either alone in the store or with only one other store employee. They spend almost all of their time waiting on customers, running the register, cleaning, and performing other non-managerial jobs.
- "Superintendents" who work for a real estate conglomerate for under $40,000/year,

regularly work over 50 hours per week, and spend almost all of their time performing janitorial and handyman duties in apartment buildings.

- "Assistant Managers" at a restaurant chain who earn around $40,000/year and often work over 60 hours per week. They spend almost all their time running food to customer tables, expediting food orders, working in the kitchen, cleaning, and performing other non-managerial duties.
- "Case Managers" who work for third-party contractors pursuant to a city's foster care program. They earn annual salaries in the low-$40,000's, and often work over 50 hours per week. Before the City privatized its foster care program, employees performing the same job were in a labor union and paid overtime.
- "Assistant Managers" at a large retail chain who are paid salaries in the mid-$40,000's and spend almost all of their time stocking shelves, taking inventory, assisting customers, running the cash register, and performing other non-managerial tasks.

I can assure you that the above clients would gladly trade away their managerial job titles in exchange for overtime pay. Job titles do not put food on the table or pay the mortgage or put the kids through college. And the HR department's designation of a job as "executive" or "administrative" or "professional" cannot alter what my clients know to be true: that their *actual* working hours are spent performing the same routine tasks as their hourly co-workers.

FLSA Misclassification Fuels a Business Model that Hurts *Both* Salaried and Hourly Employees

Over many years of handling FLSA cases, I have observed how the retail and fast food industries follow a business model that exploits both salaried and hourly workers. In these industries, the corporate office requires each individual store to comply with a very strict payroll budget. Failure to stay within the payroll budget can result in discipline and even termination for the store's highest-ranking employee (often called the "Store Manager") and for a higher-ranking employee with jurisdiction over multiple stores within a geographic area (often called a "District Manager" or "Territory Manager"). In fact, these individuals' bonuses usually are tied to compliance with the payroll budget.

Meanwhile, each individual store is staffed with a combination of hourly employees (who are eligible for overtime pay) and salaried employees (who are classified by HR as overtime-exempt). The store's salaried employees usually get job titles like "Assistant Manager" or "Department Manager."

Under the above scenario, paying any significant overtime to the store's hourly employees will put the store over its payroll budget. Since that is not an option, there is only one way for the store to both make its payroll budget and remain adequately staffed: the store's salaried employees must work *very* long hours. Since these salaried employees do not get any extra overtime pay, there is no impact on the payroll budget. From a payroll budget standpoint, every extra hour worked by a salaried employee is a "free" hour.

This business model (which our firm has repeatedly encountered) is profoundly unfair to salaried employees. As indicated earlier, many of our salaried clients in the retail industry work very long hours. In fact, our clients' "effective" hourly pay rates sometimes fall *below* the pay rates of their hourly co-workers. That's why many of our salaried clients complain that they were better off before they got "promoted" to a salaried position.

But that's only the half of it. The above business model also hurts the store's *hourly* employees. Many of these employees would relish the opportunity to work more hours and even earn "time and one-half" wages for overtime work. Unfortunately, such opportunities are rare.

Faced with a strict payroll budget, company decision-makers are incentivized to assign any extra work to the salaried employees (who work the extra hours free-of-charge) rather than the hourly employees (who get paid extra for working extra hours).

The above scenario contradicts the FLSA's public policy goals. As you know, the FLSA requires that employees receive extra "time and one-half" pay for working over 40 hours per week. *See* 29 U.S.C. § 207(a)(1). In enacting this requirement, Congress intended "to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a shorter week." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.).

This public policy favoring "work-spreading" is fundamental to the FLSA's overtime pay mandate. As the Supreme Court explained shortly after the FLSA's passage:

> The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement, ***although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage*** and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. ***In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.*** Reduction of hours was part of the plan from the beginning.

Overnight Motor Transport v. Missel, 316 U.S. 572, 577-78 (1941) (emphasis supplied); *see also Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 460 (1948) (overtime pay mandate intended "to spread employment through inducing employers to shorten hours because of the pressure of extra cost"); *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 423-24 (1945) (overtime pay mandate intended "to reduce the hours of work and to employ more men"); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S.

161, (1945) ("the plain design of § 7(a) to spread employment through imposing the overtime pay requirement on the employer"); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944) (overtime pay mandate intended "to spread employment by placing financial pressure on the employer through the overtime pay requirement").

In sum, when employers can too easily shift overtime work onto the backs of salaried employees, the FLSA's remedial purpose of spreading work hours across the workforce is undermined. It should not be so easy for companies to pay workers a low salary, classify them as overtime-exempt, and assign them all the overtime work. This practice greatly benefits the employer, who escapes the FLSA's overtime pay mandate. But it is terrible for *both* the salaried employee (who must work many extra hours without any extra pay) and for the hourly employee (who is deprived of the opportunity to work extra hours).

Increasing the Annual Salary Threshold to $47,476
Will Promote Certainty and Decrease Litigation

The current $455/week salary threshold is so low that it plays no meaningful role in the classification analysis. As a result, the outcome of white collar misclassification investigations and lawsuits turns on competing arguments over the employees' "duties." The employee argues that her duties are not "executive,' "administrative," or "professional." The employer argues the opposite. The analysis is highly subjective and unpredictable. *Compare*, *e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008) (Family Dollar store managers entitled to overtime), *with In re. Family Dollar FLSA Litig.*, 637 F.3d 508 (4th Cir. 2011) (Family Dollar store manager properly classified as overtime-exempt).

All this uncertainty is terrific for lawyers. But is terrible for both employers (who lack meaningful "bright-line" rules and must pay corporate law firms for advice and litigation defense) and employees (who cannot fathom the complicated duties test and must file DOL complaints and lawsuits to obtain overtime).

It does not need to be this way. If the white collar exemptions' salary threshold had been increased to $47,476/year under either the Obama Administration's 2016 Proposed Rule, *see* 81 Fed. Reg. 32391, or the Restoring Overtime Pay Act of 2017, many of the legal battles surrounding the duties test would be rendered irrelevant. Indeed, there would be little to litigate. Employees earning under $47,476/year would either (i) receive overtime pay from the employer or (ii) have a "slam dunk" legal claim that the employer could quickly and efficiently resolve. Meanwhile, employees earning over $47,476/year and classified as overtime-exempt would be far less likely to challenge their overtime-exempt status, since they would be paid a salary that differentiated themselves from their hourly co-workers. Plus, good plaintiffs' lawyers know that it is difficult to win a misclassification lawsuit when the employee earns a salary that most judges and jurors consider to be reflective of "white collar" status.

For the above reasons, I estimate that *over 70%* of my law firm's white collar misclassification lawsuits would never have been filed if the white collar exemptions had carried a $47,476/year salary threshold.

Unlike the 2016 Proposed Rule and the Restoring Overtime Pay Act, the Trump Administration's recently proposed rule will not significantly impact the litigation landscape. The proposed rule merely raises the salary threshold to $679/week (or $35,308/year). See 84 Fed. Reg. 10900 (Mar. 22, 2019). This is less than most of my firm's while-collar misclassification clients *already* earn.

The Trump Administration's proposed $679/week salary threshold simply does not go far enough to differentiate salaried-exempt employees from their hourly co-workers. A salaried employee who works and average of 60 hours per week (which is not unusual in the retail and restaurant industries) in exchange for $679 is only earning $11.32/hour [$679 *divided by* 60 hours]. Moreover, an overtime-eligible hourly employee working 60 hours would only need to earn $9.70/hour to earn $679 [($9.70 X 40 hours) + ($9.70 X 1.5 X 20 hours)]. Thus, many salaried employees earning $679/week will nonetheless have good grounds to feel cheated and pursue overtime claims under the duties test.

The White-Collar Exemptions Should Require the *Actual* Performance of Executive, Administrative, and Professional Work

As already discussed, litigation involving the FLSA's white-collar exemptions generally boils down to competing arguments regarding the salaried employee's job duties. The employee seeking overtime emphasizes the significant amount of time she actually spends performing the same routine activities as hourly co-workers. The employer, meanwhile, downplays the employee's actual work activities and, instead, focuses on her purported "responsibilities."

Here is an example of what I mean. Suppose Ms. Jones is an "Assistant Department Manager" working at a supermarket and wants to challenge her overtime-exempt classification. Under the FLSA's "executive" exemption, Ms. Jones is entitled to overtime unless her "primary duty" is "management." 29 C.F.R. § 541.100(a)(2). So Ms. Jones presents evidence that she spends 90% of her time performing non-managerial tasks such as stocking shelves, counting inventory, and cleaning.

One might think that, under the above circumstances, Ms. Jones is sure to win overtime. How, after all, can someone's "primary duty" be "management" if she spends 90% of her time performing non-managerial work?

Unfortunately, even under these facts, Ms. Jones can possibly to lose her bid for overtime pay. That's because, under interpretive guidance issued by the Department of Labor in 2004, "the amount of time spent performing exempt work" is merely one of four factors to be considered in determining whether the exempt work is an employee's "primary duty." *See* 29 C.F.R. § 541.700(a). The 2004 regulations go on to state: "Time alone . . . is not the sole test, and nothing in this section requires that exempt employees spend more than 50% of their time performing exempt work." *See id.* at § 541.700(b).

But that is not all. In addition to diminishing the role of time in the "primary duty" analysis, the DOL's 2004 guidance included a "Concurrent Duties" provision that sows more confusion by stating that purported "executives" can "concurrently" perform both managerial and non-managerial work at the same time. *See* 29 C.F.R. § 541.106. Under this guidance, DOL postulates that "[a]n assistant manager can supervise employees and serve customers at the same time without losing the exemption" and that "[a]n exempt employee can also simultaneously direct the work of other employees and stock shelves." *See id.* at § 541.106(b).

The above provisions cannot be squared with the FLSA's overtime pay mandate, which, as explained earlier, was enacted to ensure that employers spread work opportunities to *all* employees. As such, the amount of time a purportedly overtime-exempt spends on non-exempt activities should be paramount.

If Congress wants to level the playing field for salaried and hourly employees alike, it should draft legislation strictly limiting the FLSA's white collar exemptions to employees who ***actually*** spend ***the majority*** of their time on activities that are ***exclusively*** "executive," "administrative," or "professional." *See, e.g.*, California Industrial Welfare Commission Wage Order No. 4-2001 (focusing white collar exemption analysis on "[t]he work actually performed by the employee").

In sum, while increasing the salary threshold to $47,476/year is crucial, an additional legislative change reorienting the "duties" test towards the salaried employee's *actual* work performed will ensure that the salaried employee – regardless of her salary level – does not displace hourly employees' work opportunities.

Chairwoman ADAMS. Thank you very much.

And I want to thank all of the witnesses for their testimony.

Under committee rule 8(a), we will now question witnesses under the 5-minute rule.

I now recognize myself for 5 minutes.

Dr. Shierholz, as I understand it, if the Department's approach for setting the salary level is flawed, it will result in a salary level too low. And a salary level that is too low makes more employees likely to be improperly classified as exempt, depriving these workers of overtime pay.

So, can you speak to how the duties test and the salary level work together to draw a line between those workers who are eligible for overtime pay and those who are not under the white-collar exemption?

Ms. SHIERHOLZ. Yes. Thank you. So, the salary threshold—and Tammy talked about this too—can just best be thought of as a really bright-line proxy for the duties test. It makes it simple to determine exemption. It makes sure that workers who work a—who are—like, say, frontline supervisors who work limited number of—they do a great deal of nonexempt work and have little bargaining power, that those workers are not taken advantage of and helps reduce the misclassification of non-EAP workers as EAP exempt. So that is what the salary threshold does.

And then the duties test is a more specific mechanism that helps deter-—that determines exemption for people who pass the salary threshold. Those two tests have always worked together.

Unlike what was claimed by the district court judge, the 2016 rule did not eclipse the duties test. It was still needed for 6.5—the determination of overtime status for 6.5 million workers above the duties test. So those—that is the way those two tests work together.

Chairwoman ADAMS. Okay. Dr. Shierholz, the Department has based its current proposal on the methodology used in 2004. The slide that we have before you, we have—shows that the salary level set since 1949, inflated to 2020 dollars, so we can compare what the Department is proposing to historical levels.

I think the chart makes a few things clear. First, the 2014 salary level was not in line with the historical trends, and it tells me that there was something wrong with the methodology they used to that salary level. Secondly, the 2016 rule was in line with the historical trends. And, third, the current administration is taking an approach that would once again take us outside of the historical levels.

Why was the 2004 update to the salary level based on a flawed methodology?

Ms. SHIERHOLZ. Like I don't, I am not sure of the motivation for that, but it absolutely was in error. There was an absolute pairing of the—of a low salary threshold with a weak duties test. It shouldn't have happened, and that is what we have been stuck with until now. There is an opportunity to really fix that error.

Chairwoman ADAMS. Why would the Department choose to double down on a flawed methodology from 2004 with its current proposal, and how does the Department's approach affect working people?

Ms. SHIERHOLZ. To be honest, I think the Department is bowing to the interests of the Chamber of Commerce. The core provisions of their proposal is actually almost exactly what the chamber asked for. I think this department is really prioritizing the interest of corporate executives over those of working people and leaving working people behind.

Chairwoman ADAMS. Ms. McCutchen States that the Department had no choice but to use the 2004 methodology for its recent proposal. Is this true?

Ms. SHIERHOLZ. No, this is not true at all. The 2016 threshold was—the 2016 rule was vacated by a single district court judge in Texas. The Department could have defended it.

Chairwoman ADAMS. Okay. Thanks very much.

I am going to now recognize the Ranking Member for his questioning, 5 minutes.

Mr. BYRNE. Thank you, Madam Chairwoman.

Ms. McCutchen, if I am right, throughout the entire 8 years of the Clinton Administration, we didn't get an increase in the threshold. But midway through the Bush Administration, we did, under your leadership. And it was only at the very end of the Obama Administration that we got a new rule, and that rule was so flawed, it was struck down by a Federal court.

So, I agree with you that the overtime salary threshold should be updated, and I applaud the Labor Department for proposing a solution in this area and for being responsible.

My biggest worry is that setting the threshold too high—and I think you referred to this—will harm small businesses, nonprofits, and institutions of higher education, as well as the populations they serve.

In your opinion—in your opinion, does the proposed rule adequately take these distinct employers into account?

Ms. MCCUTCHEN. I share your concern, and I would add to that local government entities who operate on budgets and objected to this 2016 rule, as did nonprofits, higher education.

Except in 2016, the Department also shared your concern and thus set the salary level at the low end of salaries paid to employees in lower wage regions, industries, small businesses, et cetera. In 2016, we saw a huge negative reaction and concerns from the vast majority of nonprofits who filed comments, local governments and higher education.

I think most of the comments that have been submitted in response to this proposal support the $35,000 level, although that is not universal. And in meetings held by the Small Business Administration Office of Advocacy, we did hear from SAS it's a small business that even at $35,000, the new salary level would be devastating to them.

Mr. BYRNE. Well, that doesn't sound like a bunch of big corporate executives.

Ms. MCCUTCHEN. No.

Mr. BYRNE. These bad, mean corporate executives. It sounds like people that run colleges and universities and nonprofits and small businesses, as you say, municipalities. So, we do have to take that into account—or the Department of Labor has to take that into account when they set this rule, too. Don't they have to take that into account?

Ms. MCCUTCHEN. They certainly do. And that is why the Texas court invalidated it. And I do want to reemphasize that is on appeal. The Trump administration appealed it. And, you know, if that moves forward, because this proposal is pushed aside, we have years of litigation in front of us before we get any increase at all. And I think that would be devastating too.

Mr. BYRNE. I agree with that.

You know, it seems to me that sometimes we would rather litigate than actually solve a problem. And it sounds like the Department of Labor is doing is trying to solve a problem.

I have been listening to some of the testimony about a single district judge. That is our system. We have got single district judges that have ruled against President Trump all over the country, and it is in effect. That's the law. We all learned that in law school, that a single district judge can do that.

But as you say, that ruling is on appeal. And I hope that while it is on appeal, that the Department of Labor will take responsible action to take care of the working people in America out there.

Let me change subjects for a minute. We know that one of the most extreme impacts of the radical salary threshold included in the discredited Obama overtime rule would have been a mass reclassification of employees from white-collar salaried employees to hourly workers. By the way, I heard from some of those people, and they didn't like being reclassified.

What negative effects does this type of reclassification have on workplace advancement opportunities, worker status and morale, and workplace flexibility?

Ms. MCCUTCHEN. Well, Mr. Byrne, in response to the Department of Labor's 2017 Request for Information from the public about the impact of that high salary level, we did a survey of employers about how they reacted to it, particularly employers who implemented the change before the injunction was entered. And what they told us is that they have reduced hours, they have reduced jobs, they automated, and they raised consumer prices. And how that is good for employees, I just can't understand.

Mr. BYRNE. I agree with you about that.

Sometimes in some of this high-flown rhetoric, we forget about the real people that are out there. And I am telling you, I heard from a lot of people who said they did not like being reclassified. They took it very negatively themselves.

And I just want to applaud you, when you had the responsibility, for being responsible, for proposing a responsible rule based on responsible methodology. And I just wish that the previous Democratic administration and the subsequent Democratic administration would have done the same thing. Because if they had, the workers of America would have been a lot better off.

With that, I yield back.

Chairwoman ADAMS. Thank you very much.

I will yield now to Mr. Takano from California for 5 minutes.

Mr. TAKANO. Thank you, Chairwoman Adams, for this critical hearing on overtime standards established under the Fair Labor Standards Act.

Yesterday, I introduced—reintroduced the Restoring Overtime Pay Act, a bill that would strengthen worker protections by raising the overtime salary threshold under which most full-time salary workers are automatically eligible for overtime pay. It sets the salary threshold to the 40th percentile of earning of workers in the lowest wage census region.

In 2020, the salary level would be about $51,000 per year under my bill. In 2016, the Obama Administration finalized a rule that would have strengthened overtime for workers by setting the salary threshold to $47,476, with automatic updates every 3 years to remain in line with the economy.

Madam Chair, I have a signed letter by dozens of nonprofit organizations that have commented in support of the 2016 final rule. I have asked that this letter be entered into the record.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

Economic
Policy
Institute

Nonprofit organizations in support of the Department of Labor's new overtime regulations

June 8, 2016

We, the undersigned nonprofit organizations, write in support of the Department of Labor's new overtime regulations. The updated overtime rule is a great victory for working people across the United States.

In its recently announced final regulation, the Department of Labor raised the salary threshold below which most workers are eligible for overtime pay from $23,660 to $47,476. This change will create hundreds of thousands of jobs, extend overtime protections to millions of workers, reduce excessive hours of unpaid work by underpaid employees, and increase salaries for employees earning near the new threshold. In particular, this rule represents an important step toward fairer pay for women and people of color, who are overrepresented in lower-paying jobs and are often required to work additional hours without compensation.

We recognize that many nonprofit organizations will have to think through and solve interesting problems and will face challenges as we make the changes needed to comply with the new regulations. These important changes will not necessarily be easy. Nonetheless, we embrace this opportunity to restore the overtime pay that lower-paid workers toiling more than 40 hours a week are entitled to.

For many nonprofits, including those of us that provide human services or advocate for workers' rights, poverty reduction, or economic and social justice, this is a critical opportunity to improve the working conditions and the economic lives of the people we serve. At the same time, our own workers and the families they support also deserve fair compensation and greater economic security.

As nonprofit organizations more broadly, we are dedicated to improving the public good. It is time to revisit the idea that working for the public good should somehow mean requiring the lowest-paid among us to support these efforts by working long hours, many of which are unpaid.

All of the undersigned nonprofit organizations are committed to complying with the new overtime regulations. We commend the Department of Labor for this significant reform, which will create better jobs and working conditions for millions of working people throughout the country. We support this historic social justice reform.

Signed,

9to5, National Association of Working Women

9to5 California

9to5 Colorado

9to5 Georgia

9to5 Wisconsin

A Better Balance

ActBlue

Advocates for Youth

African American Ministers In Action

Agenda Project Action Fund

Alaska People's Action

American Association of University Women

American Family Voices

American Federation of State, County and Municipal Employees (AFSCME)

American Federation of Teachers

Americans for Democratic Action (ADA)

Anti-Poverty Network of New Jersey

Ariva

Asian Counseling and Referral Service

Atlanta Women for Equality

The Battle of Homestead Foundation

Benedictine Sisters of Baltimore

Bend the Arc Jewish Action

Black Children's Institute of Tennessee

Brevard NOW

Bus Federation

Campaign for America's Future

CASA

Catalyst Miami

Center for American Progress

Center for Community Change

Center for Economic and Policy Research

Center for Law and Social Policy (CLASP)

Center for Popular Democracy

Center for Women Policy Studies

Center for WorkLife Law

Center on Policy Initiatives

The Century Foundation

Children's Law Center (District of Columbia)

Clergy and Laity United for Economic Justice (CLUE)

Clerics of St. Viator (Viatorians)

ClimateTruth.org

Coalition on Human Needs

Community, Faith and Labor Coalition

Community Forum for Economic Justice

Connecticut Citizen Action Group (CCAG)

Courage Campaign

Delaware Alliance for Community Advancement

Democratic Socialists of America

Democratic Women's Club of Florida

Democracy for America

Economic Opportunity Institute

Economic Policy Institute

Elizabeth Coalition to House the Homeless

Emerge Colorado

End Hunger CT!

Fair Budget Coalition

Fair World Project

Family Values @ Work

First Shift Justice Project

FRESC: Good Jobs, Strong Communities

Generation Progress

God's Will In Action

Gospel Justice Committee

Greater New York Labor-Religion Coalition

Greater Orlando NOW

HEAL

Human Services Council of New York

Illinois Economic Policy Institute

Indiana Community Action Association

Indiana Institute for Working Families

Innovation Ohio Education Fund

Institute for Science and Human Values, Inc

Interfaith Worker Justice

Iowa Coalition Against Domestic Violence

Jobs With Justice

Keystone Research Center

Latino Commission on AIDS

Leadership Conference on Human and Civil Rights

Legal Aid Service of Broward County

Legal Aid Society of the District of Columbia

Los Angeles Alliance for a New Economy (LAANE)

Medical Mission Sisters

MomsRising

MoveOn.org

NAACP

National Association of Social Workers

National Black Justice Coalition

National Center for Lesbian Rights

National Center for Transgender Equality

National Council of La Raza (NCLR)

National Employment Law Project (NELP)

National Employment Lawyers Association

National Low Income Housing Coalition

National Partnership for Women & Families

National Resource Center on Domestic Violence

National Women's Law Center

NETWORK LOBBY

New Jersey Policy Perspective

New Jersey Work Environment Council

Noorvik Boys & Girls Club Alaska

North Carolina Justice Center

One Wisconsin Now

Organize Now

PathStone Corporation

PathWays PA

People's Action

Pennsylvania Council of Churches

Princeton Community Housing

ProgressOhio

Progressive Change Campaign Committee

Public Health Advocates

Public Justice Center

Sargent Shriver National Center on Poverty Law

Sisters of the Presentation

Social Security Works

Southeast Ministry DC

Teens, Training, & Taxes

Toledo Area Jobs with Justice & Interfaith Worker Justice Coalition

The Union of Concerned Scientists

UltraViolet

United Auto Workers (UAW)

United States Student Association

United Steelworkers

URGE: Unite for Reproductive & Gender Equity

Voices for Progress

Washington Community Action Network

Washington Lawyers' Committee for Civil Rights and Urban Affairs

Washington State Labor Council, AFL-CIO

Westland Ecumenical Community Food Pantry

West Virginia Center on Budget and Policy

Wisconsin Faith Voices for Justice Workers' Dignity Project

Women AdvaNCe

Women Employed

Women's Law Project

Working America

Working Partnerships USA

YWCA USA

Mr. TAKANO. Yes, without objection.

In March, the Trump administration proposed a new rule to set the salary threshold at $35,308 a year in 2020, without automatic indexing. This administration proposal is troubling as it does not go far enough to strengthen overtime protections for workers and would leave behind about 8.2 million workers, far from being a radical proposal.

The Obama Administration, you know, proposed what was adequate. The Trump administration falls far short of serving ordinary Americans.

Madame Chair, I have a report from the Economic Policy Institute that outlines how fewer workers will benefit from the Trump proposal compared to the Obama rule, and I ask that this report be entered into the record.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

Economic
Policy
Institute

More than eight million workers will be left behind by the Trump overtime proposal

Workers would receive $1.2 billion less than under the 2016 rule

Report • By Heidi Shierholz • April 8, 2019

This is an update to a report that was originally published on March 22, 2019. This updated version includes data on wages lost under the 2019 Trump administration overtime proposal that would have been received under the 2016 rule.

The backstory: Millions of working people are working overtime but not getting paid for it because business interests have successfully challenged a 2016 rule that would have protected them. Federal law requires that people working more than 40 hours a week be paid 1.5 times their pay rate for the extra hours, but allows employers to exempt salaried workers who make above a certain threshold and are deemed to have executive, administrative, or professional duties. Basically, the threshold is supposed to help protect workers with little bargaining power—for example, modestly compensated front-line supervisors at fast-food restaurants—from being forced to work unpaid overtime. But the overtime pay threshold has been so eroded by inflation that people earning as little as $455 per week (the equivalent of $23,660 per year) can be forced to work 60 or more hours a week for no more pay than if they worked 40 hours.

In 2016, the Obama Labor Department issued a rule that would have raised the overtime pay salary threshold to $47,476. But in November 2016—just before the rule was set to go into effect—a district court judge in Texas blocked the rule nationwide.

On March 22, 2019, the Department of Labor published a proposal to set the salary threshold under which almost all workers are entitled to overtime pay to $679 per week, or $35,308 for a full-year worker, in 2020.[1] The adoption of this proposal would leave behind millions of workers who would have gotten new or strengthened overtime protections under regulations finalized in 2016.[2] This analysis compares the economic impact of the Trump administration proposal to the 2016 rule. Key findings include:

- An estimated 8.2 million workers would be left behind by the Trump proposal.
- The 8.2 million workers left behind by the Trump proposal include 3.1 million workers who would have gotten new overtime protections under the 2016 rule and 5.1 million workers who would have gotten strengthened protections under the 2016 rule.
- The 8.2 million workers who would be left behind include 4.2 million women, 3.0 million people of color, 4.7 million workers without a college degree, and 2.7 million parents of children under the age of 18.
- Because the Trump proposal does not automatically index the threshold going forward, the number of workers left behind grows from 8.2 million in 2020 to an estimated 11.5 million over the first 10 years of implementation.
- The annual wage gains from workers who get new protections are $1.2 billion dollars *less* under the Trump proposal than under the 2016 rule. These annual earnings losses will grow from $1.2 billion to $1.6 billion (in inflation-adjusted terms) over the first 10 years of implementation due to the fact that the Trump administration proposal does not include automatic indexing.

The 2016 rule, which was held up in court[3] following a challenge by business trade associations and Republican-led states, would have increased the overtime salary threshold to $913 per week, or $47,476 for a full-year worker, from its current level of $455 per week, or $23,660 for a full-year worker. It would also have indexed the threshold to wage growth on a triennial basis; under the 2016 rule, the threshold would have increased to roughly $51,000 on January 1, 2020.

In publishing the new proposal with a lower threshold, the Department of Labor under the Trump administration is alleging that the 2016 rule set the threshold too high and needs to be corrected. This is not supported by the data. The 2016 rule was well within historical norms; in fact, it would have covered far fewer workers than the threshold had covered in the past. In 1975, more than 60 percent of full-time salaried workers earned below the threshold.[4] By 2016, the share of full-time salaried workers covered by the threshold had dropped to less than 7 percent. The 2016 rule would have just partially restored this coverage, to roughly 33 percent. The Trump proposal would cover less than half of the workers covered by the 2016 rule, just 15 percent.[5]

The 2016 rule did require a large increase in the threshold, *but only because the rule had not been appropriately updated since 1975.* If the 1975 rule had simply been updated for inflation, it would be roughly $58,000 in 2020—well above the projected 2020 threshold of the 2016 rule, $51,000. The new proposed rule, at $35,308 in 2020, is around $23,000 less than the inflation-adjusted 1975 level.

If the department finalizes its new proposal, millions of workers who should get overtime protections will fall through the cracks. In their proposal, the department provides estimates showing that 2.8 million fewer workers will be affected under their proposal than under the 2016 rule, but this is a vast underestimate, for two reasons. First, they use pooled 2015–2017 data, benchmarked to 2017 wage and employment levels, and state that these figures "are the Department's best approximation for impacts starting in 2020." This leads to an underestimate because it doesn't account for employment growth and other changes in the three years between 2017 and 2020. I correct for this issue to the extent possible by using more updated data—pooled 2016–2018 data, benchmarked to 2018 wage and employment levels—and inflating employment and wage levels based on Congressional Budget Office economic projections for 2018–2020.

Second, the department's estimate of those left behind leaves out an entire group of workers who would be affected by the rule—those who will no longer get *strengthened* protections. To understand what a large omission this is, it is useful to keep in mind that there are two groups of workers who would be affected by any update to the overtime threshold. One group consists of those workers who get *new* protections under a new threshold—namely salaried workers who are bona fide managers, supervisors, or learned professionals who earn above the old threshold but below the new threshold. These workers are not legally entitled to overtime protections under the old threshold but would be overtime-eligible under the new threshold. But there is another large group of workers who are affected by any increase in the threshold—workers who get *strengthened* protections. Workers who get strengthened protections are salaried workers who earn above the old threshold and below the new threshold but who are *not* bona fide managers, supervisors, or learned professionals. These workers *should* have overtime protections under the old threshold—but because they earn a salary and earn above the threshold, they are vulnerable to being misclassified by their employer as overtime-exempt. However, once the threshold rises above their earnings level, their status as overtime-eligible becomes very clear. In their estimate of how many workers get left behind by their proposal, the department ignores the millions of workers who will not get strengthened protections under their proposal but who would have gotten strengthened protections under the 2016 threshold.

Table 1 shows how many workers will be left behind by the Trump proposal, broken down by by demographic and by whether these workers would have gotten new or strengthened protections under the 2016 rule. For reference, the table also provides the underlying numbers of workers who would have gotten new or strengthened protections under the 2016 rule compared with the numbers who would get new or strengthened protections under the 2019 proposal. The table shows that the 8.2 million workers who would be left behind include 4.2 million women, 3.0 million people of color, 4.7 million workers without a college degree, and 2.7 million parents of children under the age of 18. The appendix tables provide further breakdowns by major industry and occupation (**Appendix Table A1**) and by state (**Appendix Table A2**).

The number of workers left behind by the Trump proposal grows over time because the proposal does not include automatic updating, whereas the 2016 rule would have automatically updated the threshold every three years. **Table 2** shows the increase in the number of workers that would be left behind during the first 10 years of implementation of the Trump proposal. While the department does not assume the threshold will be updated in future years in its own economic impact projections, it is worth noting that the department claims that it is "committing to evaluate" the threshold "more frequently" going forward, in particular mentioning a flexible commitment to notice and comment rule-making to increase the threshold every four years. Given that notice and comment rule-making is extremely time- and resource-intensive—the 2016 rule-making took more than two years—this is an enormously inefficient way for the government to operate (and is why huge stretches of time go by between rule-makings). It makes little sense to go through notice and comment rule-making just to *maintain* a standard—that process should be reserved for when policymakers want to change the *substance* of a rule, while automatic updating should be used to ensure that the standard does not erode in the meantime. Further, automatic updating provides crucial predictability for employers. With automatic updating, as opposed to a vague claim that updating will be considered every four years, employers know exactly what to expect and when to expect it.

The lower salary threshold of the Trump proposal will translate into lower earnings for workers. **Table 3** shows that the annual wage gains from workers who get new protections are $1.2 billion dollars *less* under the Trump proposal than under the 2016 rule. This calculation includes both wages lost by workers who would have gotten new protections under the 2016 rule but would not get new protections under the Trump proposal, and wages lost by workers who would get new protections under either the Trump proposal or the 2016 rule but who would have gotten a larger raise under the 2016 threshold than under the 2019 proposal. The calculation does *not* include earnings losses by those who would have gotten strengthened protections under the 2016 rule but would not get them under the Trump proposal. **Table 3** also shows that the annual earnings losses grow from $1.2 billion to $1.6 billion (in inflation-adjusted terms) over the first 10 years of implementation due to the fact that the Trump administration proposal does not include automatic indexing. **Appendix Table A3** in the appendix provides wage loss breakdowns by state.

Given the large number of workers who will be left behind under this proposal who would have been covered by the painstakingly justified 2016 rule, we encourage the department to drop this rule-making and instead defend the 2016 rule. Further, defending and then implementing the 2016 threshold would lead to better use of one of the most precious resources of working families in this country—their time—by providing an incentive for employers to balance the additional hours they ask of their workers with the costs of either overtime pay or of raising salaries to the new salary threshold. That incentive is consistent with a fundamental principle embodied in the Fair Labor Standards Act—that workers should receive a fair day's pay for a long day's work. The department's new proposed rule—which is based on the notion that someone struggling by on $35,000 a year is a highly paid executive who doesn't need or deserve overtime protections—flies in the face of those principles and should be abandoned.

Table 1

Number of salaried workers left behind by the Trump overtime proposal, by demographic group, projected for 2020

	Workers left behind by 2019 proposal			Under the 2016 rule			Under the 2019 proposal			
Group	Total workers left behind	Workers who would have gotten new protections under 2016 rule	Workers who would have gotten strengthened protections under 2016 rule	Total affected workers	Workers with new protections	Workers with strengthened protections	Total affected workers	Workers with new protections	Workers with strengthened protections	Total salaried workers in the U.S.
All	8,240,000	3,140,000	5,100,000	13,470,000	4,550,000	8,920,000	5,230,000	1,410,000	3,820,000	59,140,000
Gender										
Male	4,000,000	1,330,000	2,670,000	6,560,000	1,970,000	4,590,000	2,560,000	640,000	1,920,000	32,570,000
Female	4,240,000	1,810,000	2,440,000	6,910,000	2,580,000	4,340,000	2,670,000	770,000	1,900,000	26,570,000
Parenthood										
Not a parent	5,540,000	2,120,000	3,410,000	9,060,000	3,060,000	6,000,000	3,520,000	940,000	2,580,000	37,470,000
Father	1,320,000	420,000	900,000	2,130,000	630,000	1,510,000	810,000	210,000	600,000	12,210,000
Mother	1,390,000	600,000	790,000	2,280,000	860,000	1,420,000	890,000	260,000	630,000	9,460,000
Race/ethnicity										
White	5,250,000	2,160,000	3,090,000	8,220,000	3,120,000	5,100,000	2,970,000	950,000	2,010,000	40,680,000
Black	1,010,000	340,000	670,000	1,680,000	480,000	1,200,000	670,000	140,000	520,000	5,460,000
Hispanic	1,280,000	350,000	920,000	2,410,000	530,000	1,880,000	1,130,000	180,000	960,000	7,230,000
Asian	550,000	230,000	330,000	930,000	340,000	580,000	370,000	120,000	260,000	4,810,000
Others	150,000	50,000	90,000	230,000	70,000	160,000	90,000	20,000	70,000	960,000
Age group										
16–24	510,000	200,000	300,000	1,000,000	320,000	680,000	490,000	120,000	370,000	2,800,000
25–34	2,430,000	1,040,000	1,400,000	3,840,000	1,420,000	2,420,000	1,410,000	380,000	1,020,000	13,510,000
35–44	1,830,000	680,000	1,150,000	2,930,000	980,000	1,950,000	1,100,000	300,000	800,000	14,550,000
45–54	1,800,000	640,000	1,160,000	2,880,000	940,000	1,940,000	1,080,000	300,000	780,000	14,330,000
55–64	1,320,000	450,000	870,000	2,170,000	670,000	1,500,000	850,000	220,000	630,000	10,720,000
65+	350,000	130,000	220,000	660,000	220,000	440,000	310,000	90,000	210,000	3,220,000

Table 1 (cont.)

Group	Workers left behind by 2019 proposal: Total workers left behind	Workers left behind by 2019 proposal: Workers who would have gotten new protections under 2016 rule	Workers left behind by 2019 proposal: Workers who would have gotten strengthened protections under 2016 rule	Under the 2016 rule: Total affected workers	Under the 2016 rule: Workers with new protections	Under the 2016 rule: Workers with strengthened protections	Under the 2019 proposal: Total affected workers	Under the 2019 proposal: Workers with new protections	Under the 2019 proposal: Workers with strengthened protections	Total salaried workers in the U.S.
Educational attainment										
Less than high school	320,000	40,000	280,000	800,000	60,000	740,000	480,000	30,000	460,000	1,980,000
High school	1,940,000	450,000	1,490,000	3,470,000	680,000	2,780,000	1,520,000	230,000	1,290,000	9,240,000
Some college	2,440,000	830,000	1,610,000	4,040,000	1,210,000	2,830,000	1,600,000	380,000	1,220,000	12,080,000
College degree	2,620,000	1,280,000	1,340,000	3,800,000	1,790,000	2,000,000	1,180,000	520,000	660,000	20,810,000
Advanced degree	920,000	540,000	380,000	1,360,000	800,000	570,000	440,000	250,000	190,000	15,030,000

Note: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds.

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

Economic Policy Institute

Table 2

The number of workers left behind by the Trump overtime proposal will grow to 11.5 million in the first 10 years of implementation

Projected number of salaried workers left behind by the Trump overtime proposal in the first 10 years of implementation

			Workers left behind by 2019 proposal			Under the 2016 rule			Under the 2019 proposal			
	Projected standard threshold under the 2016 rule	Standard threshold under the 2019 proposal	Total workers left behind	Workers left behind who would have gotten new protections	Workers left behind who would have gotten strengthened protections	Total affected workers	Workers with new protections	Workers with strengthened protections	Total affected workers	Workers with new protections	Workers with strengthened protections	Total salaried workers
2020	$51,053	$35,308	8,240,000	3,140,000	5,100,000	13,470,000	4,550,000	8,920,000	5,230,000	1,410,000	3,820,000	59,140,000
2021	$51,053	$35,308	7,940,000	2,950,000	4,990,000	13,010,000	4,330,000	8,690,000	5,070,000	1,380,000	3,690,000	59,180,000
2022	$51,053	$35,308	7,540,000	2,720,000	4,830,000	12,610,000	4,070,000	8,540,000	5,070,000	1,350,000	3,710,000	59,220,000
2023	$55,055	$35,308	9,250,000	3,420,000	5,830,000	14,050,000	4,740,000	9,310,000	4,790,000	1,310,000	3,480,000	59,370,000
2024	$55,055	$35,308	9,350,000	3,320,000	6,020,000	13,990,000	4,570,000	9,420,000	4,650,000	1,250,000	3,400,000	59,630,000
2025	$55,055	$35,308	9,330,000	3,220,000	6,110,000	13,440,000	4,320,000	9,120,000	4,110,000	1,100,000	3,010,000	59,890,000
2026	$59,098	$35,308	10,900,000	3,890,000	7,000,000	15,170,000	5,050,000	10,110,000	4,270,000	1,160,000	3,110,000	60,080,000
2027	$59,098	$35,308	10,560,000	3,690,000	6,880,000	14,710,000	4,820,000	9,890,000	4,140,000	1,130,000	3,010,000	60,300,000
2028	$59,098	$35,308	10,070,000	3,430,000	6,640,000	14,280,000	4,600,000	9,680,000	4,210,000	1,170,000	3,040,000	60,560,000
2029	$63,346	$35,308	11,520,000	4,080,000	7,440,000	15,740,000	5,280,000	10,460,000	4,220,000	1,200,000	3,020,000	60,860,000

Note: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds.

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

Economic Policy Institute

Table 3

The total annual wages workers will lose under the Trump overtime proposal will grow to $1.6 billion in the first 10 years of implementation

Projected wages workers lose under the Trump overtime proposal relative to the 2016 rule in the first 10 years of implementation of the Trump proposal

	Projected standard threshold under the 2016 rule	Standard threshold under the 2019 proposal	Wages lost under the 2019 proposal relative to the 2016 rule	Total wage increase under the 2016 rule	Total wage increase under the 2019 proposal
2020	$51,053	$35,308	$1,214,000,000	$1,787,200,000	$573,100,000
2021	$51,053	$35,308	$1,072,300,000	$1,606,000,000	$533,700,000
2022	$51,053	$35,308	$978,200,000	$1,477,100,000	$498,900,000
2023	$55,055	$35,308	$1,321,000,000	$1,770,700,000	$449,700,000
2024	$55,055	$35,308	$1,208,200,000	$1,632,400,000	$424,200,000
2025	$55,055	$35,308	$1,126,100,000	$1,504,200,000	$378,200,000
2026	$59,098	$35,308	$1,440,600,000	$1,798,500,000	$357,900,000
2027	$59,098	$35,308	$1,348,200,000	$1,687,000,000	$338,900,000
2028	$59,098	$35,308	$1,268,900,000	$1,595,800,000	$327,000,000
2029	$63,346	$35,308	$1,632,500,000	$1,938,300,000	$305,800,000

Notes: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds. Calculations account only for wage increases of workers with new protections (i.e., they do not account for workers with strengthened protections).

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

Economic Policy Institute

Appendix Table A1

Number of salaried workers left behind by the Trump overtime proposal, by industry and occupation, projected for 2020

Group	Workers left behind by 2019 proposal: Total workers left behind	Workers left behind by 2019 proposal: Workers who would have gotten new protections under the 2016 rule	Workers left behind by 2019 proposal: Workers who would have gotten strengthened protections under 2016 rule	Under the 2016 rule: Total affected workers	Under the 2016 rule: Workers with new protections	Under the 2016 rule: Workers with strengthened protections	Under the 2019 proposal: Total affected workers	Under the 2019 proposal: Workers with new protections	Under the 2019 proposal: Workers with strengthened protections	Total salaried workers in the U.S.
All	8,240,000	3,140,000	5,100,000	13,470,000	4,550,000	8,920,000	5,230,000	1,410,000	3,820,000	59,140,000
Major industry										
Agriculture, forestry, fishing, and hunting	100,000	10,000	90,000	200,000	10,000	180,000	90,000	–	90,000	490,000
Mining	40,000	10,000	30,000	60,000	20,000	40,000	20,000	10,000	20,000	350,000
Construction	500,000	90,000	410,000	910,000	140,000	770,000	410,000	40,000	370,000	2,740,000
Manufacturing	700,000	250,000	450,000	1,080,000	350,000	720,000	380,000	110,000	270,000	5,660,000
Wholesale and retail trade	1,060,000	380,000	680,000	1,700,000	560,000	1,140,000	640,000	180,000	460,000	6,000,000
Transportation and utilities	400,000	100,000	310,000	670,000	140,000	530,000	270,000	50,000	220,000	3,060,000
Information	210,000	110,000	100,000	310,000	160,000	150,000	100,000	50,000	50,000	1,510,000
Financial services	870,000	410,000	450,000	1,330,000	610,000	730,000	470,000	190,000	270,000	5,750,000
Professional and business services	1,090,000	530,000	550,000	1,680,000	760,000	920,000	600,000	230,000	370,000	8,610,000
Educational and health services	1,730,000	780,000	950,000	2,860,000	1,130,000	1,730,000	1,140,000	350,000	780,000	15,600,000
Leisure and hospitality	560,000	180,000	380,000	1,010,000	270,000	740,000	450,000	90,000	360,000	2,830,000
Other services	440,000	120,000	320,000	830,000	180,000	660,000	390,000	60,000	340,000	2,800,000
Public administration	550,000	160,000	390,000	830,000	210,000	620,000	280,000	60,000	220,000	3,750,000
Major occupation										
Management, business, and financial occupations	1,740,000	1,290,000	450,000	2,480,000	1,810,000	660,000	740,000	530,000	210,000	15,800,000
Professional and related occupations	1,850,000	1,160,000	690,000	2,750,000	1,660,000	1,080,000	900,000	500,000	390,000	20,640,000

Appendix Table A1 (cont.)

Group	Workers left behind by 2019 proposal			Under the 2016 rule			Under the 2019 proposal			
	Total workers left behind	Workers who would have gotten new protections under the 2016 rule	Workers who would have gotten strengthened protections under 2016 rule	Total affected workers	Workers with new protections	Workers with strengthened protections	Total affected workers	Workers with new protections	Workers with strengthened protections	Total salaried workers in the U.S.
Service occupations	950,000	60,000	890,000	1,990,000	100,000	1,890,000	1,040,000	40,000	1,010,000	4,990,000
Sales and related occupations	970,000	360,000	610,000	1,580,000	560,000	1,010,000	610,000	210,000	400,000	5,830,000
Office and administrative support occupations	1,420,000	250,000	1,160,000	2,300,000	370,000	1,930,000	890,000	120,000	770,000	5,200,000
Farming, fishing, and forestry occupations	70,000	–	70,000	140,000	–	140,000	80,000	–	80,000	300,000
Construction and extraction occupations	360,000	–	360,000	690,000	–	690,000	330,000	–	330,000	1,580,000
Installation, maintenance, and repair occupations	260,000	–	260,000	420,000	10,000	410,000	160,000	–	160,000	1,190,000
Production occupations	290,000	10,000	280,000	480,000	10,000	470,000	190,000	–	190,000	1,330,000
Transportation and material moving occupations	340,000	10,000	330,000	630,000	10,000	630,000	300,000	–	290,000	2,270,000

Notes: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds. Values less than 5,000 are omitted from the table and are indicated with the "–" symbol.

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

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Appendix Table A2

Number of salaried workers left behind by the Trump overtime proposal, by state, projected for 2020

State	Workers left behind by 2019 proposal			Under the 2016 rule			Under the 2019 proposal			
	Total workers left behind	Workers who would have gotten new protections under 2016 rule	Workers who would have gotten strengthened protections under 2016 rule	Total affected workers	Workers with new protections	Workers with strengthened protections	Total affected workers	Workers with new protections	Workers with strengthened protections	Total salaried workers in the U.S.
All states	8,240,000	3,140,000	5,100,000	13,470,000	4,550,000	8,920,000	5,230,000	1,410,000	3,820,000	59,140,000
Alabama	111,000	44,000	68,000	182,000	68,000	114,000	71,000	24,000	47,000	716,000
Alaska	11,000	4,000	7,000	18,000	6,000	12,000	7,000	2,000	5,000	103,000
Arizona	151,000	65,000	86,000	243,000	92,000	151,000	92,000	27,000	65,000	1,129,000
Arkansas	77,000	33,000	44,000	128,000	45,000	82,000	50,000	12,000	38,000	454,000
California	774,000	281,000	493,000	1,292,000	426,000	866,000	518,000	145,000	373,000	6,644,000
Colorado	173,000	61,000	112,000	278,000	91,000	187,000	105,000	30,000	75,000	1,237,000
Connecticut	72,000	29,000	44,000	117,000	43,000	74,000	45,000	14,000	31,000	722,000
Delaware	27,000	11,000	16,000	42,000	15,000	27,000	15,000	4,000	11,000	177,000
Washington, D.C.	19,000	8,000	11,000	28,000	11,000	17,000	9,000	3,000	6,000	240,000
Florida	691,000	263,000	428,000	1,160,000	377,000	784,000	469,000	114,000	355,000	3,879,000
Georgia	342,000	124,000	218,000	565,000	175,000	390,000	224,000	51,000	172,000	2,101,000
Hawaii	38,000	11,000	27,000	63,000	17,000	46,000	25,000	6,000	19,000	246,000
Idaho	39,000	15,000	24,000	66,000	22,000	44,000	27,000	7,000	20,000	249,000
Illinois	324,000	133,000	191,000	513,000	183,000	330,000	189,000	50,000	139,000	2,502,000
Indiana	162,000	67,000	94,000	268,000	98,000	170,000	106,000	30,000	76,000	1,091,000
Iowa	78,000	35,000	43,000	120,000	48,000	72,000	42,000	13,000	29,000	515,000
Kansas	63,000	27,000	36,000	105,000	40,000	66,000	42,000	13,000	29,000	484,000
Kentucky	108,000	42,000	65,000	173,000	63,000	111,000	66,000	20,000	45,000	664,000
Louisiana	119,000	40,000	80,000	201,000	59,000	142,000	82,000	19,000	62,000	729,000
Maine	33,000	14,000	19,000	48,000	19,000	29,000	15,000	5,000	10,000	216,000
Maryland	154,000	59,000	94,000	248,000	88,000	160,000	95,000	29,000	66,000	1,399,000
Massachusetts	180,000	71,000	109,000	299,000	109,000	190,000	119,000	39,000	81,000	1,672,000
Michigan	192,000	83,000	109,000	296,000	117,000	180,000	104,000	34,000	71,000	1,532,000
Minnesota	126,000	49,000	76,000	181,000	67,000	114,000	56,000	18,000	38,000	1,058,000
Mississippi	67,000	23,000	43,000	117,000	34,000	83,000	50,000	11,000	39,000	413,000
Missouri	163,000	75,000	87,000	258,000	100,000	158,000	96,000	25,000	71,000	1,030,000

Appendix Table A2 (cont.)

State	Workers left behind by 2019 proposal: Total workers left behind	Workers who would have gotten new protections under 2016 rule	Workers who would have gotten strengthened protections under 2016 rule	Under the 2016 rule: Total affected workers	Workers with new protections	Workers with strengthened protections	Under the 2019 proposal: Total affected workers	Workers with new protections	Workers with strengthened protections	Total salaried workers in the U.S.
Montana	20,000	9,000	11,000	31,000	13,000	18,000	11,000	4,000	8,000	131,000
Nebraska	50,000	19,000	31,000	80,000	28,000	52,000	30,000	9,000	22,000	328,000
Nevada	71,000	25,000	46,000	115,000	36,000	80,000	45,000	11,000	33,000	428,000
New Hampshire	34,000	15,000	19,000	52,000	21,000	31,000	18,000	6,000	12,000	276,000
New Jersey	285,000	93,000	192,000	454,000	137,000	316,000	169,000	45,000	125,000	2,197,000
New Mexico	39,000	15,000	24,000	69,000	22,000	47,000	30,000	7,000	23,000	282,000
New York	601,000	204,000	397,000	996,000	290,000	705,000	395,000	86,000	308,000	4,253,000
North Carolina	278,000	103,000	175,000	443,000	149,000	294,000	165,000	46,000	119,000	1,821,000
North Dakota	20,000	8,000	12,000	29,000	10,000	19,000	9,000	2,000	7,000	123,000
Ohio	226,000	100,000	127,000	371,000	152,000	220,000	145,000	52,000	93,000	1,771,000
Oklahoma	103,000	38,000	65,000	167,000	54,000	113,000	65,000	16,000	48,000	641,000
Oregon	93,000	38,000	56,000	147,000	55,000	93,000	54,000	17,000	37,000	669,000
Pennsylvania	304,000	125,000	180,000	494,000	185,000	309,000	189,000	61,000	129,000	2,218,000
Rhode Island	24,000	10,000	14,000	37,000	15,000	22,000	13,000	5,000	8,000	188,000
South Carolina	152,000	61,000	91,000	235,000	83,000	152,000	83,000	22,000	60,000	874,000
South Dakota	19,000	8,000	11,000	29,000	10,000	19,000	10,000	3,000	8,000	121,000
Tennessee	177,000	77,000	100,000	283,000	105,000	179,000	106,000	28,000	78,000	1,087,000
Texas	832,000	292,000	540,000	1,428,000	429,000	999,000	596,000	137,000	460,000	5,476,000
Utah	65,000	28,000	37,000	102,000	38,000	63,000	36,000	10,000	26,000	499,000
Vermont	18,000	8,000	10,000	26,000	11,000	16,000	9,000	3,000	6,000	115,000
Virginia	221,000	76,000	145,000	377,000	120,000	257,000	156,000	44,000	112,000	1,893,000
Washington	150,000	52,000	97,000	233,000	77,000	156,000	83,000	24,000	59,000	1,301,000
West Virginia	37,000	14,000	23,000	64,000	21,000	43,000	27,000	7,000	20,000	237,000
Wisconsin	120,000	50,000	70,000	177,000	67,000	110,000	58,000	17,000	40,000	929,000
Wyoming	12,000	4,000	8,000	19,000	6,000	13,000	7,000	2,000	5,000	82,000

Note: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds.

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

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Appendix Table A3

Wages lost under the 2019 proposal relative to the 2016 rule, by state, projected for 2020

States	Wages lost under the 2019 proposal relative to the 2016 rule	Total wage increase under the 2016 rule	Total wage increase under the 2019 proposal
All states	$1,214,000,000	$1,787,200,000	$573,100,000
Alabama	$16,200,000	$23,700,000	$7,500,000
Alaska	$2,200,000	$3,100,000	$1,000,000
Arizona	$24,500,000	$35,900,000	$11,400,000
Arkansas	$10,300,000	$14,600,000	$4,300,000
California	$106,800,000	$167,100,000	$60,300,000
Colorado	$27,700,000	$44,600,000	$16,900,000
Connecticut	$8,600,000	$15,800,000	$7,200,000
Delaware	$2,700,000	$4,000,000	$1,300,000
Washington, D.C.	$3,500,000	$6,000,000	$2,500,000
Florida	$84,800,000	$117,500,000	$32,700,000
Georgia	$36,500,000	$53,200,000	$16,700,000
Hawaii	$3,700,000	$5,200,000	$1,600,000
Idaho	$5,500,000	$8,300,000	$2,800,000
Illinois	$58,200,000	$81,000,000	$22,800,000
Indiana	$30,200,000	$40,300,000	$10,100,000
Iowa	$18,000,000	$23,700,000	$5,700,000
Kansas	$13,400,000	$17,900,000	$4,500,000
Kentucky	$18,900,000	$28,800,000	$9,800,000
Louisiana	$18,500,000	$25,100,000	$6,600,000
Maine	$7,800,000	$9,900,000	$2,100,000
Maryland	$27,200,000	$42,100,000	$14,900,000
Massachusetts	$30,000,000	$51,500,000	$21,500,000
Michigan	$43,200,000	$64,100,000	$20,900,000
Minnesota	$22,300,000	$34,100,000	$11,800,000
Mississippi	$9,000,000	$12,400,000	$3,400,000
Missouri	$30,700,000	$39,700,000	$9,000,000
Montana	$4,100,000	$5,300,000	$1,300,000
Nebraska	$8,700,000	$12,500,000	$3,800,000
Nevada	$8,800,000	$12,200,000	$3,300,000

Appendix Table A3 (cont.)

States	Wages lost under the 2019 proposal relative to the 2016 rule	Total wage increase under the 2016 rule	Total wage increase under the 2019 proposal
New Hampshire	$5,300,000	$8,800,000	$3,600,000
New Jersey	$28,200,000	$44,300,000	$16,100,000
New Mexico	$4,800,000	$6,800,000	$2,000,000
New York	$64,600,000	$99,300,000	$34,700,000
North Carolina	$38,300,000	$55,100,000	$16,800,000
North Dakota	$2,800,000	$3,900,000	$1,100,000
Ohio	$36,800,000	$60,900,000	$24,100,000
Oklahoma	$13,400,000	$19,900,000	$6,500,000
Oregon	$16,800,000	$26,500,000	$9,700,000
Pennsylvania	$41,900,000	$67,600,000	$25,800,000
Rhode Island	$4,000,000	$6,700,000	$2,700,000
South Carolina	$17,600,000	$23,700,000	$6,100,000
South Dakota	$2,900,000	$3,600,000	$700,000
Tennessee	$29,100,000	$42,000,000	$13,000,000
Texas	$123,100,000	$173,100,000	$50,000,000
Utah	$14,600,000	$19,900,000	$5,300,000
Vermont	$3,700,000	$4,700,000	$1,100,000
Virginia	$22,800,000	$35,300,000	$12,500,000
Washington	$35,100,000	$44,800,000	$9,700,000
West Virginia	$4,600,000	$6,400,000	$1,700,000
Wisconsin	$19,400,000	$31,200,000	$11,800,000
Wyoming	$2,300,000	$3,200,000	$900,000

Notes: Subtotals may not add up to totals due to rounding. Following the methodology used by the U.S. Department of Labor, the estimates include all workers affected by the *federal* salary threshold increase, and do not account for higher state salary thresholds. Calculations account only for wage increases of workers with new protections (i.e., they do not account for workers with strengthened protections).

Source: EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 29 CFR Part 541 (published March 22, 2019).

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Endnotes

1. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10900–10969 (March 22, 2019).

2. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32391–32552 (May 23, 2016).

3. See Celine McNicholas, *Overtime Ruling Rests on Flawed Logic and Undermines the Rights of Working People to Get Paid for Their Time on the Job*, Economic Policy Institute statement, August 31, 2017.

4. See Celine McNicholas, Samantha Sanders, and Heidi Shierholz, *What's at Stake in the States if the 2016 Federal Raise to the Overtime Pay Threshold Is Not Preserved—and What States Can Do about It: State Action to Modernize Overtime Rules (Research Report)*, Economic Policy Institute, November 2017.

5. EPI analysis of pooled Current Population Survey Outgoing Rotation Group microdata, 2016–2018, following the methodology used in the U.S. Department of Labor's 2019 proposed rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [proposed rule], 84 Fed. Reg. 10900–10969 (March 22, 2019).

Mr. TAKANO. My first question is for Dr. Shierholz. As was mentioned, a Texas district court concluded that the 2016 salary threshold was too high because the number of newly overtime eligible workers was high. Can you respond—can you respond to this flawed reasoning, Dr. Shierholz?

Ms. SHIERHOLZ. Yes, that is a really good point. So the number of workers affected by any increase in the salary threshold is an absurd measure to use to determine whether that threshold is appropriate or not, because the number of workers affected by any threshold is that—that measure is affected by things that have nothing to do with the appropriateness of the threshold, like how long it has been since the last update and whether the prior update was appropriate.

The reason the 2016 rule had affected a lot of workers was because the rule had not been appropriately updated for over 40 years. That is the reason why.

Mr. TAKANO. Atrophy—the law that was meant to protect workers, abuses—I mean, the reason why they put this threshold in and protect salaried workers is because employers found clever ways to get around the overtime rule for hourly workers.

And I find it a very specious argument that because we had neglected at the Federal Government to set a new threshold level, suddenly a rule which would have caught them up—ordinary workers up, the judge then said, oh, there is too many people that would be eligible. It really angers me that such specious arguments are being used in this committee room to leave these workers vulnerable.

Because the Trump administration's refusal to defend the salary level in the 2016 final rule, American workers are losing wages every day. In 2020, workers stand to lose about $1.2 billion in wages.

Dr. Shierholz, my bill is based on provisions from the 2016 Obama-era rule. How would the Restoring the Overtime Pay strengthen the overtime protections for workers?

Ms. SHIERHOLZ. It would get—so workers who would get new protection—it would be 4.6 million workers who would get new protections under the Restoring Overtime Pay Act, or would get a bump up to the new salary, and there would be 8.9 million workers who earn between the old salary and the salary in this act who would get strengthened protection.

Mr. TAKANO. Only one more question. Dr.—Mr. Winebrake, it really angered me, the model you illustrated. Does the Department of Labor have the authority to include automatic increase provisions in its rulemaking?

Mr. WINEBRAKE. Sure. Remember, in section 13(b) of the—

Mr. TAKANO. Turn your microphone on, please.

Mr. WINEBRAKE. Sorry about that.

In section 13(b) of the Fair Labor Standards Act, Congress explicitly gave the Department of Labor the authority to, quote, define and delimit the white collar exemption. And under that authority, that is an extremely broad grant of authority. The Department of Labor can implement a salary threshold, could determine what that threshold should be, and can index. There is nothing—no reason why it can't.

Mr. TAKANO. Thank you.

Madame Chair, my time has run out. But before I yield back, let me just say that this court ruling—I don't know that it would have taken years and years for this litigation to go through. Such a laughable ruling. Any appeals court would have to look at what the law explicitly says in statute, where they have the authority—this was no overreach here. And this is—the current overtime threshold of overtime pay is out of date and does not support working families.

Chairwoman ADAMS. The gentleman is out of time.

Mr. TAKANO. I yield back.

Chairwoman ADAMS. Thank you.

I will recognize Dr. Foxx for 5 minutes.

Dr. FOXX.

Ms. FOXX. Thank you, Dr. Adams.

Ms. McCutchen, as you indicated, salaries vary from region to region and industry to industry, and the cost of living varies across the country. Despite this reality, your testimony indicates that the discredited Obama DOL's overtime rule implemented a salary threshold at the 40th percentile of all full-time salaried workers nationwide, while in the past, DOL used the 10th and 20th percentile of salaries in the lowest wage regions and the industry sector with the lowest wages to determine the proposed threshold.

Which approach is more appropriate, given the alarmingly negative impact the Obama rule would have had on small businesses? Is the current proposed salary threshold fair to small businesses and employees alike?

Ms. McCUTCHEN. Well, I was at DOL, we set the threshold—I was at DOL in 2004 when we chose the 20th percentile. So, it probably will not surprise you that I think that is the most appropriate level. Now, we doubled the 10th percentile that was used in 1958 because of the changes that we made in the duties test in 2004, just accounting for all that mismatch argument that we keep hearing about.

In 2016—and nobody explained why that—that 20th percentile was not appropriate or was insufficient to avoid that mismatch or why doubling to the 40th percentile in 2016 was necessary or—necessary at all, since we had already adjusted.

Now, since 1940, DOL stated that the only purpose of the salary level is to screen out those obviously nonexempt employees. No one has presented any evidence at all that employees paid below the 40th percentile are obviously nonexempt, all of them, so that it is a reasonable proxy.

So, it may be true in San Francisco, but it is certainly not true in rural communities in your own district that everybody below the 40th percentile is obviously nonexempt. I think the 20th percentile is the appropriate line to protect employees adequately in all States, in all regions, in all industries.

Ms. FOXX. Thank you.

Ms. McCutchen, the invalidated Obama Labor Department's overtime rule included a provision that indexed the salary threshold for exempt workers, which would likely have increased the threshold every 3 years without fulfilling all the procedural requirements designed to produce sound rules.

How would this discredited approach have impacted business owners and, in particular, small businesses? And does the current DOL overtime proposal balance the need for timely updates to the salary threshold with the need for public input regarding potential impacts on stakeholders, including small businesses?

Ms. MCCUTCHEN. With automatic increasing, which, by the way, doesn't occur anywhere else in the FLSA, would have really adversely impacted small business and local governments and universities because you would have changes that occurred automatically, regardless of the economic conditions, right? And so, the small businesses would be given increases, even if economic conditions didn't justify it, as our numbers, as you know, always are not fully up-to-date. They follow our major economic indicators. And so, it would be very—very precedential for that.

I think DOL has struck a good balance, committing to review the salary levels every 4 years but not make increases until it goes through the notice and comment rulemaking required by the Administrative Procedures Act. And that is what the FLSA text requires.

So, we set in 2004 rulemaking that Congress did not grant DOL the authority to make those automatic increases, and that has not changed. Congress has not passed an automatic inflationary increases to the minimum wage, as we have seen States do. So, if the minimum wage is not indexed based on inflation, how can anybody argue that it is appropriate to index by inflation an exemption from the minimum wage? I just don't think how that argument can possibly be true.

Ms. FOXX. Well, thank you for that. You basically answered my third question. But I will make one quick comment.

What you indicate is we could be in the midst of a recession and that automatic increase be written into the statute and have to go into effect, even if we were in the midst of a recession, right?

Let me say, you have mentioned this—I don't know if you want to say anything else about your feeling that the Department does not have the authority by statute.

Is there anything else you would like to add to that?

Ms. MCCUTCHEN. I would like to add to that, speaking on my own behalf, because this is not the view of the Chamber, and I am probably an outlier.

I do not believe the Department of Labor has the authority to set any minimum salary level for three reasons. First, the text of the statute does not include compensation at all. It is just duties. Second, other exemptions in the FLSA do include compensation requirements, like the section 7(i) exemption for commissioned employees, like the hourly rate for exempt computer employees. So, when Congress wanted to put in a compensation requirement, they knew how to do that.

And, third, remember, these white-collar exemptions are exemptions from both the minimum wage and overtime. And I personally just don't see how Congress could have authorized the Department of Labor to set a minimum wage—for an exemption for minimum wage which is higher than minimum wage.

Ms. FOXX. Thank you, Madam Chairwoman. Thank you for your indulgence.

Chairwoman ADAMS. Thank you very much.

I will recognize now the gentlelady from Pennsylvania, Ms. Wild.

Ms. WILD. Thank you, Madam Chairwoman.

Before I start, I would ask recognition and unanimous consent to introduce into the record a letter from the Pennsylvania Department of Labor and Industry. It is a letter supportive of an increase in the overtime exemption salary threshold for executive, administrative, professional, computer, and outside sales.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
THE SECRETARY

The Pennsylvania Department of Labor & Industry is supportive of an increase in the overtime exemption salary threshold for executive, administrative, professional, computer, and outside sales employees.

The overtime exemption salary threshold has failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers. Many of the individuals that the Fair Labor Standards Act was intended to protect are no longer covered under the current exemption. When the Ford Administration raised the salary threshold in 1975, more than 60 percent of full-time salaried workers' earnings were below the threshold, providing these individuals with overtime pay for work beyond 40 hours a week. The current threshold of $455 per week, or $23,660 annually, was set in 2004 and only 7 percent of full-time salaried workers currently fall within this threshold.

Pennsylvania has proposed an increase in the salary threshold to $47,892 for salaried employees in the commonwealth. Pennsylvania's proposal is a result of feedback from the Governor's Middle Class Task Force, which held meetings throughout the commonwealth in the fall of 2017. At these meetings, workers expressed concern about their inability to join the ranks of the middle class or to maintain their middle-class status, despite working 40 hours or more each week and in some cases holding multiple jobs.

The commonwealth submitted proposed regulations which would raise the salary threshold incrementally over two years. The initial increase to $31,720 would occur on the date of publication in the *Pennsylvania Bulletin* to qualify for the executive, administrative, and professional exemptions. The threshold would increase to $39,832 effective one year after the date of publication and would reach $47,892 effective two years after the date of publication. The Pennsylvania Department of Labor & Industry is currently gathering stakeholder feedback from both business and labor stakeholders to determine the economic implications of this proposal. If enacted, this increase would ultimately benefit up to 460,000 Pennsylvanians. The commonwealth urges the United States Department of Labor to propose a salary threshold that is based on a living wage and that will benefit a majority, not a minority, of individuals working 40 hours a week or more.

Sincerely,

W. Gerard Oleksiak

W. Gerard Oleksiak
Secretary
Pennsylvania Department of Labor & Industry

Department of Labor & Industry
651 Boas Street, Room 1700 | Harrisburg, PA 17121-0750 | T 717.705.2630 | F 717.787.8826 | www.dli.pa.gov

Ms. WILD. Thank you.

Ms. McCutchen, you have made it perfectly clear that you are opposed to automatic indexing. You are aware, are you not, that the Secretary of Labor, Mr. Acosta, publicly stated that the Department of Labor should consider automatic indexing to make updates more efficient than the time and resources intensive rulemaking process?

Ms. MCCUTCHEN. Yes, I am aware of that.

Ms. WILD. So, you disagree with him about that?

Ms. MCCUTCHEN. Yes.

Ms. WILD. Would you agree that automatic indexing would be more efficient on a time and resource basis than engaging in formal rulemaking?

And I am just asking you whether you believe it to be more efficient on a time and resource basis, not whether you agree with it.

Ms. MCCUTCHEN. I do not know. I mean, it is certainly against the law.

Ms. WILD. It is certainly—I am sorry?

Ms. MCCUTCHEN. It is against the Administrative Procedures Act, right. So, the Administrative Procedures Act was enacted to make regulations hard. So, the fact that it is hard to regulate is not a sufficient reason to ignore the requirements of the Administrative Procedures Act.

Ms. WILD. Well, you are not disagreeing that including automatic indexing would be a legal aspect, would you?

Ms. MCCUTCHEN. If Congress changes the statute to allow automatic—

Ms. WILD. That could be done.

Ms. MCCUTCHEN [continuing]. indexing, then it would be fine.

Ms. WILD. And that would be in accordance with the Secretary of Labor's recommendations, right?

Ms. MCCUTCHEN. I don't know if that is his most recent view. He did say that about 2 years ago in a Chamber of Commerce speech, which, of course, tells you he doesn't do everything the Chamber of Commerce wants, by the way.

Ms. WILD. And in February of 2019, you were quoted in a Bloomberg article as saying that if the Department of Labor tries—and that was just in February of this year—tries to automatically index that, quote, we will bring suit in Texas again, end quote. Is that a correct statement of your quote?

Ms. MCCUTCHEN. That is—as far as I remember, yes.

Ms. WILD. Am I not correct that automatic updates would grant employers a degree of certainty and predictability, at least more so than whether proposed rules might be finalized?

Ms. MCCUTCHEN. It is tough—predictability is tough because the method that the Department of Labor used in 2006 to set that salary level is not easily repeatable. In fact, Ron Bird, the economist for the Chamber and a former DOL Chief Economist, himself had trouble duplicating and replicating the analysis that got the Department of Labor to its current proposal. It took him months to do so. So, I doubt it would provide any predictability for a small business who is not a Ph.D. economist.

Ms. WILD. Certainly, more predictable than a formal rulemaking process, is it not? You don't need to answer that.

Let me switch over to Dr. Shierholz, I believe. You have heard this line of questioning. Can you tell us why your written testimony indicates that automatic indexing is crucial?

Ms. SHIERHOLZ. Yes, and I will just make one correction. The 2016 rule, that was based on a series that was published on a quarterly basis by the Bureau of Labor Statistics. They could—anyone could look at that at any time and know exactly what to expect going forward.

And the automatic indexing is absolutely crucial, because when something isn't indexed, that means that the threshold immediately erodes over time as a standard and it provides fewer and fewer and fewer protections—

Ms. WILD. Exactly as we have seen happen, correct?

Ms. SHIERHOLZ. Yep, that is exactly right.

Ms. WILD. Let me switch to Mr. Winebrake. It's good to see you. Your testimony talks about employers who misclassify employees as management to fit that EAP exemption. And I know you have litigated a lot of these cases. You give a number of examples of fast-food people being classified as assistant managers, when in reality all they are doing is working cash registers and making burgers.

Could you tell us, please, what, if any, impact would enactment of the Obama-era salary level have on the number of lawsuits that allege employer misclassification?

Mr. WINEBRAKE. It would have a huge impact. I have estimated, when I have looked at my law firm's inventory of white-collar misclassification cases, that if the salary threshold was $47,000 a year, we probably would have filed 70 percent less lawsuits over the course of the last 5 years.

Ms. WILD. Thank you very much. I yield back.

Chairwoman ADAMS. Thank you.

We will yield now to the gentleman from North Carolina, Mr. Walker, 5 minutes.

Mr. WALKER. Thank you, Madame Chair. And thank you to our panel for being here today.

Our friends and colleagues claim that the Department of Labor proposed overtime rule hurts workers the most, when in reality the Obama Administration's Department of Labor overtime rule would have resulted in millions of employees who perform exempt duties being reclassified from salaried to hourly workers.

Ms. McCutchen, I believe this negatively impacts their opportunities for career advancement, which poses detrimental effects on our local businesses and workers. Can you expand on some of the negative impacts on the 2016 Obama overtime rule that would have on small business workers? We are not talking abstract here, we are talking about the reality of it. Would you address that, please?

Ms. MCCUTCHEN. Certainly. And thank you for asking me that question. Employees who have been exempt view being reclassified as nonexempt as a demotion. And you are nonexempt, you have to track your time. These employees hate having to punch a time clock. When you are an exempt employee, you can leave work early on Friday. You can take time off to go to your children's sporting event, and you do not get docked any pay.

Employees who are reclassified, in particular—in addition to the opportunities, they do not like having their time closely watched and monitored and losing pay when they decide to take a half day off.

Mr. WALKER. Sure. A lot of that is just a relationship on a good employee that earns some of those privileges because the amount of work and some of the things they are getting accomplished, and it really does put them in a negative situation. The rules around overtime pay are also complex.

Many American small businesses such as franchises do not have the extensive legal teams and accounting departments to help navigate through these laws. Very complicated. Yet, many franchisors and other prime companies are ready to provide guidance to their franchisees and business partners to help them implement the Department's new rule requirements. But concerns over triggering joint employer liability, as you know, causes hesitation to provide such guidance. With over 24,000 franchisees just in my home state of North Carolina, this kind of guidance would have a significant impact.

So, would it be beneficial, Ms. McCutchen, for the Department of Labor's proposed rule to include a safe harbor provision similar to the language included in the Department's associated health plan rule to ensure employers are protected from unnecessary joint employer liability when promoting overtime pay in the workplace? Long question, but would you speak to that?

Ms. MCCUTCHEN. I think it would be incredibly beneficial. And I don't see any downside or any barrier to the Department of Labor for doing so. As you know, most franchisees are small businesses, they do not have lawyers, they do not have H.R. staff. So, they need to get the guidance. They need to learn and educate themselves about the FLSA in some way in order to comply.

And the Department of Labor and the Small Business administration, they just don't have enough resources to do that. Now, the Department of Labor has done great this year in enforcement. They collected a record number of back wages this year, $305 million, $33 million more than in 2017, with fewer investigators. But enforcement is not enough. You will never have enough investigators to go into every business, particularly small businesses. So, the only way to improve compliance and to help these franchisees to comply is an idea like yours.

Mr. WALKER. Just the facts, Ms. McCutchen. The DOL's methodology in calculating the updated salary threshold is based off the 2004 method used when you were serving as Administrator of the Wage and Hours Division. Can you please explain how the 2004 methodology avoided the damaging consequences of the 2016 rule and would still do so today?

Ms. MCCUTCHEN. Well, it is the difference in the percentile, right. The 20th percentile and the 40th, which basically doubles the salary level threshold, and that is what happened in 2016, but it is also the data that they use. We looked at lower wage industries and lower wage regions. The methodology in 2006, and frankly, the methodology proposed in this proposal, includes, for example, salary data from Virginia, Maryland, and the District of Columbia, which are three of the 10 highest wage areas in the country. So, you got to look at the data, too.

Mr. WALKER. Sure. Well, we thank you for being a witness. We thank you for your expertise in this area.

With that, I yield back, Madame Chair.

Chairwoman ADAMS. Thank you.

I will yield now to the gentlelady from Michigan, Ms. Stevens.

Ms. STEVENS. Thank you, Madame Chair.

I would like to submit, by unanimous consent, two letters for the record, one from the Governor of my State of Michigan, Governor Gretchen Witmer, and the other from the AARP. These comments were submitted to the Wage and Hour Division at the Department of Labor regarding the Department's proposal to narrow the scope of workers eligible for overtime protections.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

May 17, 2019

Director Melissa Smith
Division of Regulations, Legislation,
and Interpretation, Wage and Hour Division
U.S. Department of Labor, Room S-3502,
200 Constitution Avenue, NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; RIN 1235-AA20

Dear Director Smith:

As Governor of the State of Michigan, I write to oppose the United States Department of Labor's proposed revision to the overtime rule because it is far too weak to provide Michigan's workers with the overtime pay protections that they need and deserve.

The proposed rule would strip guaranteed overtime pay away from salaried workers earning more than $35,308 a year, which was guaranteed under the far stronger Obama era protections for workers earning up to $47,476 by 2016, and would have been automatically updated every three years thereafter – for example it is projected to be $55,068 in 2023.

In Michigan, approximately 192,000 working people would lose overtime protections under the department's weak proposal. Our state is already feeling the adverse effects from the decision to abandon the previous overtime rule altogether. As a result, Michigan workers have lost more than $56 million in overtime pay — a pay cut that is hurting our state's working families and our economy – and this new proposal is more of the same.

I firmly believe that the weaker proposal put forth by the administration would hurt efforts to protect Michigan's middle-class workers and fails to ensure that workers who must work long hours away from their families are paid fairly for their time and dedication.

The new overtime proposal misses the mark in three crucial areas by not providing: (1) adequate salary protections; (2) increased duties test protections; or (3) guaranteed indexing protections.

First, the proposal substantially cuts the salary threshold for workers to receive overtime pay by nearly $20,000. At a time when many workers are still living paycheck to paycheck, the proposed rule provides the least protection to workers in low wage industries who need these protections the most. The salary threshold should be raised to a level more comparable to the previous 2016 proposal, which would go a long way towards remedying this concern.

Second, the proposal fails to set a proper duties test for workers to receive overtime pay. The proposed rule treats workers who have limited professional or managerial duties in a similar fashion to executives, administrators and professionals, which leads to workers being inappropriately classified as exempt and underpaid. Strengthening the duties test would promote the proper classification of workers and guarantee overtime pay to those who meet this criteria.

Lastly, the proposal would not be indexed to increase in future years to keep pace with rising wages and living costs, and instead would remain frozen at just $35,308. Many workers are struggling to make ends meet as costs have risen dramatically, but paychecks have remained stagnant. The department should propose a substantive method for updating the salary level regularly by indexing the overtime pay protections to inflation.

The proposed rule departs from decades of historical precedent and undercuts the purposes of the Fair Labor Standards Act's overtime provisions. The department's overtime proposal simply does not do enough to restore overtime pay for workers in Michigan or establish the type of strong national standard that the department's overtime rules set in decades past.

For these reasons, I strongly oppose any attempt by this administration to gut overtime protections or reduce the paychecks of working people in Michigan.

I respectfully urge the department to reconsider its proposal and substitute it for a more adequate salary level comparable to the Obama era proposal, or in the alternative, strengthen the duties test and include the addition of a clear proposal for indexing.

Sincerely,

Gretchen Whitmer

Gretchen Whitmer
Governor of Michigan

AARP
Real Possibilities

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May 21, 2019

Ms. Amy DeBisschop, Acting Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

RE: RIN 1235–AA20, Proposed Rule; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. DeBisschop:

Introduction

The Fair Labor Standards Act provides workers with a fundamental protection: a 40-hour work week, or the right to time-and-a-half for more than 40 hours of work. Overbroad federal exemptions from the requirement to pay overtime wages for overtime work mean that millions of workers – many of whom are older workers – are denied this fundamental protection, producing not only lower levels of economic security for workers and their families, but also lower levels of retirement savings and income security when those workers retire. Because workers with low or modest salaries can be required to work many extra hours without any pay at all, inadequate overtime protections also deprive workers of time, including time to spend with and care for loved ones.

AARP has participated in the Department of Labor's actions on these regulations because of the importance of overtime protections to older workers. AARP supported[1] the Department of Labor's 2016 changes to the overtime rules. AARP also filed

[1] Comments of AARP, re: RIN 1235–AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Sept. 4, 2015), *available at* https://www.regulations.gov/document?D=WHD-2015-0001-5327.

comments in response to the Department's 2017 Request for Information,[2] and participated in the agency's listening session on October 17, 2018. We appreciate this opportunity to once again offer our comments. On behalf of our nearly 38 million members and older Americans nationwide, AARP urges the Department to withdraw or substantially modify its proposals to significantly narrow the scope of workers eligible for overtime protections (2019 Proposal)[3] relative to the Department of Labor's 2016 changes to the overtime rules (2016 Rule).[4]

Strong Overtime Protections Are Critical for Older Workers

Wage stagnation has been a real problem for all workers since 1973.[5] The salary thresholds that determine eligibility for overtime pay under the Fair Labor Standards Act have been increased only once since then, in 2004.[6] This failure to maintain appropriate salary thresholds, combined with the shift in 2004 from a longer, more rigorous duties test for exemption from overtime to a weaker duties test (now called the "standard" duties test) has significantly eroded overtime protections[7] and contributed to the wage stagnation and growing income inequality that has worsened in recent years.

A new report finds that, at least recently, older workers have been particularly hard hit by wage stagnation. The New School's Retirement Equity Lab reported that "older workers have experienced almost no real wage growth since 2007,"[8] with wages growing only .8% for workers 55-64 between 2007 and 2019, compared to growing 4.7% for workers 35-54 during that same time.[9] Moreover, an increasing number of older workers are working in unstable and low-wage jobs.[10] This is perhaps due, in part,

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[2] Comments of AARP, re: RIN 1235–AA11, Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Sept. 25, 2017), *available at* https://www.regulations.gov/document?D=WHD-2017-0002-140509. We incorporate by reference both sets of our prior comments in these comments.

[3] U.S. Dept. of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, 84 Fed. Reg. 10900 (Mar. 22, 2019) [hereinafter *2019 Proposal*].

[4] U.S. Dept. of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 81 Fed. Reg. 32391 (May 23, 2016) [hereinafter *2016 Overtime Rule*].

[5] *See* L. Mishel, E. Gould, *et al.*, Wage Stagnation in Nine Charts, Fig. 2 (2015) *at* https://www.epi.org/publication/charting-wage-stagnation/.

[6] *2016 Overtime Rule*, *supra* n. 4, at 32391.

[7] Testimony of Ross Eisenbrey, Vice President, Economic Policy Institute, *Examining the Costs and Consequences of the Administration's Overtime Proposal* 6-9, before the United States House of Representatives, Education and Workforce Committee, Subcommittee on Workforce Protections (July 23, 2015), *available at* http://s4.epi.org/files/2015/ross-eisenbrey-testimony-07-23-15-final.pdf ("None of these changes to the duties tests strengthened overtime protection for workers, and virtually all of them weakened overtime protection").

[8] New School, SCEPA, *10+ Years of No Wage Growth: The Role of Alternative Jobs and Gig Work* 1 (May 1, 2019), at https://www.economicpolicyresearch.org/jobs-report/download/296_3e479b2efa45c88c99f6cf70fbbf362c.

[9] *Id.*

[10] *Id.*, at 3. *See also*, New School, SCEPA, *The Growth of Unstable and Low-Wage Work among Older Workers at* https://www.economicpolicyresearch.org/jobs-report/download/282_641f7a452e544f13e02355676ed431d2.

to the fact that so many (56%) older workers are "pushed out of longtime jobs before they choose to retire" and "only one in 10 of these workers ever again earns as much as they did before" their involuntary separation."[11]

Whatever the causes of wage stagnation, there can be no doubt that the 2016 Overtime Rule would have made a concrete, positive difference for millions of older workers. By 2020, there will be nearly 21 million full-time, salaried workers ages 50 and older, and they will constitute 37% of the salaried workforce.[12] One-fifth (20%) of this group, or 4.21 million older workers, would have benefitted from the 2016 increase in the salary threshold.[13] Put another way, older workers constitute nearly one-third (32%) of all the full-time salaried workers who would have gained overtime rights under the 2016 rule.[14]

Unfortunately, older workers will also constitute about one-third of all workers who get left behind by Department's 2019 proposal. More than 2.5 million older workers 50+ will lose overtime protections under the 2019 proposal: 900,000 of them are managers who would have been newly eligible for overtime under the higher salary level test, plus 1,660,000 non-managers who had likely been misclassified as exempt and would have gained strengthened protections.[15] In addition, had the 2016 Overtime Rule gone into effect, a substantial number of older workers would have stood to benefit indirectly. To the extent that employers raise the salary of some of their employees who are close to the threshold in order to keep them exempt from overtime eligibility, many more employees may get raises to keep their wages in line with the employer's wage structure.

The labor force participation rate for older workers has been rising. In fact, workers 55 and older are the only age group whose employment rates have increased since the 1970s.[16] Moreover, "retirement-age" workers 65+ are now the fastest growing age group in the workforce. While workers ages 45 and older report many reasons for why they are working, current financial need – "need the money" – is by far the most predominant factor.[17] For those age 50+ workers who work more than 40 hours per week, expanded eligibility for overtime under the 2016 Rule would have ensured they were fairly paid for those hours and would have helped them to save for retirement. For those age 50+ workers who cannot or do not want to work more than 40 hours per week, the updated overtime rules would have discouraged employers from requiring

[11] P. Gosselin, "If You're Over 50, Chances Are the Decision to Leave a Job Won't be Yours," *ProPublica* (Dec. 28, 2018), *at* https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement.

[12] Unpublished pooled Current Population Survey Outgoing Rotation Group microdata (CPS MORG), 2016-2018, provided by the Economic Policy Institute to AARP (on file with AARP).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] M. Toossi & E. Torpey, *Older workers: Labor force trends and career options*, Chart 1 (BLS, May 2017), *at* https://www.bls.gov/careeroutlook/2017/article/older-workers.htm.

[17] AARP, *Value of Experience study* R. Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists* 18 (AARP, 2018), *at* https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-chartbook.doi.10.26419-2Fres.00177.003.pdf.

them to work tens of extra hours for no additional pay,[18] and would have enabled them to have more time for family obligations and other pursuits.

The 2019 Proposal Is Fatally Flawed

Historically, the two criteria for exemption from overtime pay, the salary level threshold and the duties test, were designed to work in tandem: a long test paired a lower salary threshold for automatic overtime coverage with a more stringent duties test – one that imposed "a 20 percent cap on the amount of time most exempt employees could spend on nonexempt duties, while the short test paired a higher salary requirement with a less stringent duties test."[19] Until 2004, the combined salary thresholds and duties tests served as a balanced proxy "for distinguishing between overtime eligible and overtime exempt white collar workers."[20]

The 2004 rules disrupted this balance and substantially eroded overtime protections by instituting a single, weak, "standard" duties test and one low "standard" salary threshold of $23,660. Under the new, standard duties test, there was no longer an objective, numerical amount of time that could be spent on nonexempt activities. Instead, the test was a more subjective one: whether the employee's "primary duty" was managerial.

The fundamental flaw with the 2019 Proposal is that it accepts the 2004 framework – its unreasonably low threshold and its weak duties test – and applies that same, problematic methodology to current[21] data. As AARP stated in our RFI comments, the 2004 framework represents the worst of all worlds from a worker-protection point of view, combining a weak, subjective duties test with an artificially and unreasonably low salary level. The result is a test that minimizes protection and maximizes the potential for wage abuse and wage stagnation. DOL's 2019 rule just perpetuates those flaws.

AARP thus takes issue with the DOL's claim[22] that the higher salary level adopted in the 2016 created a new mismatch. The 2016 salary threshold did not substitute for or eclipse the role of the duties test – the exemption was retained above the salary threshold, still exempting about 60% of the white collar salaried workforce. We cannot say for sure at what level the salary level test no longer fulfills its historical role to screen out "obviously nonexempt employees,"[23] but $47,660 was *not* it. According to EPI:

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[18] *See e.g.*, a segment on the *PBS Newshour* covering the overtime issue that highlighted an older worker who works 75-80 hours week. PBS, "Are bosses cheating workers out of overtime?," *PBS Newshour* (June 18, 2015) *at* http://www.pbs.org/newshour/bb/bosses-cheating-workers-overtime/.
[19] *2016 Overtime Rule, supra* n. 4, at 32392.
[20] *Id.*, at 32404.
[21] The data being used by DOL to calculate the new threshold isn't really "current." It is from 2015-2017, and DOL says it will use 2018 data in the final rule. *2019 Proposal, supra* n. 3, at 10901. But as EPI aptly points out, this puts the threshold further behind right out of the gate. H. Shierholz, *More than eight million workers will be left behind by the Trump overtime proposal* 3 (EPI, Apr. 8, 2019), at https://www.epi.org/files/pdf/165984.pdf [hereinafter *EPI Paper*].
[22] *2019 Proposal, supra* n. 3, at 10908.
[23] *Id.*

> The 2016 rule was well within historical norms; in fact, it would have covered far fewer workers than the threshold had covered in the past. In 1975, more than 60 percent of full-time salaried workers earned below the threshold. By 2016, the share of full-time salaried workers covered by the threshold had dropped to less than 7 percent. The 2016 rule would have just partially restored this coverage, to roughly 33 percent. The Trump proposal would cover less than half of the workers covered by the 2016 rule, just 15 percent.[24]

DOL's proposed lower salary threshold of $35,308, covering a small fraction of the workforce, demands a rigorous, objective duties test. If DOL believes that the exemption should turn on an analysis of actual functions, then it should reinstate a test that demands a rigorous analysis of duties, such as the long duties test – including its 20% time limit on nonexempt activities – with which it was historically paired.

The 2019 Proposal Inexcusably Fails to Provide for Indexing

The proposed rule contains no requirement or mechanism for updating the threshold. Instead, the preamble contains language evincing an "intent" to update the threshold every four years, using a notice-and-comment rulemaking process.

An "intent" to index is no index all. Indeed, in promulgating the 2004 rule, the Department rule rejected the idea of automatic indexing, instead expressing "*its intent* 'in the future to update the salary levels on a more regular basis.'"[25] The next update came 14 years later. An intent to update certainly does not provide "predictability and certainty" to employees waiting for fair pay practices. What would be certain is that DOL would be under no obligation to act, and any future NPRM would take months if not years to complete.

Once set at a reasonable level, salary thresholds should be automatically updated to keep up with wage growth. As we indicated in the comments we filed on the 2016 rule,[26] AARP supports an indexing methodology that will best keep pace with workers' wages and best protect salaried workers. A three-year schedule is probably the longest the agency should set for automatic updating. DOL should incorporate both the 2016 Rule's requirement and methodology for updating the threshold.

Conclusion

Ultimately, this 2019 proposal will ensure that overworked workers will be underpaid and fall further behind. Millions of these workers are older workers, trying to support their families, put something aside for retirement, and care for aging loved ones. The 2019 proposal doesn't fix what was wrong with the 2004 framework, it just extends it.

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[24] *EPI Paper, supra* n. 21 at 2 (footnotes omitted).
[25] *2019 Proposal, supra* n. 3, at 10914 (quoting 69 Fed. Reg. 22171-72) (emphasis added).
[26] *See* Comments of AARP, re: RIN 1235–AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees 3, n. 10 (Sept. 4, 2015), *available at* https://www.regulations.gov/document?D=WHD-2015-0001-5327.

While our first preference for a fix would be to reinstate the 2016 Rule, at a minimum, DOL should raise the salary level threshold even further, it should restore the long, more objective duties test, and it should include a clear requirement for automatic indexing. Thank you for the opportunity to comment on this important issue. If you have any questions about our comments, please feel free to contact Deborah Chalfie in our Government Affairs Department at 202-434-3723.

Sincerely,

David Certner

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs

Ms. STEVENS. Thank you all for joining for today's hearing. And thank you to our remarkable chair for holding this hearing on the restoring the value of work, evaluating the Department of Labor's efforts to undermine strong overtime protections.

This is an important part of our committee's work as we evaluate what the American worker is experiencing as we have proposed and sought to put through our committee legislation that will raise the minimum wage, and as we engage in this conversation around what it actually means to put in a full day's work and seek to get ahead. And it is a point of irony as we, you know, often have grand conversations within this body around regulatory burdens, and yet we are looking to unleash or remove some of those burdens for our workers and help them get ahead as we tackle this topic.

But my questions are going to start with Dr. Shierholz. Strong work force protections and overtime protections, in particular, are critical to older Americans in the work force. With older adults continuing to get pushed out of the workplace, 56 percent to be exact, before they decide to retire, it is more important than ever that our laws protect and incentivize living wages for older adults, especially in the midst of a retirement savings crisis.

So, Dr. Shierholz, what are some segments of the work force that are most impacted by weak overtime protections?

Ms. SHIERHOLZ. Uh-huh. So, one of the things I can do is look at the workers who would be left behind by the current proposal relative to the workers that would have gotten protections under the 2016 rule. And I have some things in front of me, but 1.7 million workers over the age of 55 would be left behind by the current proposal relative to the 2016 rule. So, you are right, we would see a lot of workers—older workers affected, along with women, along with people of color, along with parents. It really hits the broad middle class.

Ms. STEVENS. And additionally, weak overtime protections for all Americans greatly impacts how much time and resources family caregivers are able to allocate to their loved ones, especially as workers with lower salaries are, in many cases, required to work many extra hours without any pay at all.

And I was wondering, Mr. Winebrake, in your experience representing workers, how does a low salary level test and thus weak overtime protections impact employees' work life balances?

Mr. WINEBRAKE. Sure. Well, as I said in my testimony, there's this business incentive to shift all of the work onto the salaried employee because the company doesn't have to pay anything extra for that extra work. It's—I have represented many clients who have worked, on a regular basis, 60, 65, 70 hours a week. I have also—many of my clients have been referred to me by workers' compensation lawyers. And the reason for that is because when you are working 65, 70 hours a week hauling inventory at a dollar store, or on your feet all day in a kitchen, you get hurt. You know, you get hurt at work.

And so even though these individuals are called executives for purposes of the law, they are not executives, they are blue collar workers, and they are getting hurt. This is also taking time away from their families, and they very much resent that, that they are working extra hours for free and not being able to be home with their kids or their spouse.

Ms. STEVENS. Thank you.

And with the remaining time I have, Ms. Babcock, I wanted to recognize you for your leadership being an H.R. representative and testifying here today, particularly given the work that you do—the paperwork that you have to do, the regulations that you need to comply with. And, you know, if there is any other points here particularly along the lines of the—on that paperwork front that you could shed light on from your experience, we would love to hear from you.

Ms. BABCOCK-STINER. Absolutely. Thank you. One of the things that comes with the automatic updates, employers do like regulatory predictability and stability. And so, when we have these drastic and sporadic changes in the threshold that, you know, range in these dollar amounts, in these increments of time, it is very hard for us to implement and kind of play catch-up. So, we actually do prefer regulatory predictability.

And as far as paperwork that is—certainly, what we seem to be making a living of in the H.R. world, but we really do want to reduce it, and one of the things about that salary—

Chairwoman ADAMS. The gentlelady is out of time.

Ms. STEVENS. All right. Thank you. I yield back.

Chairwoman ADAMS. All right. Thank you.

I will recognize the gentleman from Virginia, Mr. Cline.

Mr. CLINE. Thank you, Madame Chair. Thank you for holding this hearing.

It is amazing to me that we are holding a hearing that considers going backward when the economy is doing so well. We should be focused on reducing regulations so that businesses have more flexibility to provide the best options to their employees.

The Department of Labor has rolled back more regulations than any other Federal agency in the last 2 years, and I commend them for that. And there are tangible results that all of our constituents are benefiting from no matter where you are. The economy is booming. We have the lowest unemployment rate in 49 years, 3.6 percent jobless rate, including part time is the lowest in 19 years.

GDP, the last two quarters, 2.2 and 3.1 percent in the first quarter. 238,000 new jobs created at the start of the year. 151,000 in the past 3 months. But only 75,000 new jobs created in May. There is a danger, there is a real danger of this economy slowing. And to even consider additional regulations that would take this economy in the wrong direction, quite frankly, it is very distressing that we are even talking about them.

So, I will ask Ms. McCutchen. Many workers place a high value on workplace flexibility, which allows them to maintain certain aspects of their personal life that are important to them. This economy is definitely focused on workers having choices because unemployment is so low. So how would this Obama Department of Labor overtime rule, which we are lucky that it did not go into effect because, quite frankly, it would have started us behind the eight ball before this economic recovery even began, and the current boom would have been slowed by so much more.

How would this rule have undermined the flexibility that so many workers value? And can you elaborate on the differences between salaried workers and hourly workers when it comes to workplace flexibility?

Ms. McCUTCHEN. Let me take your last question first. A salary—an exempt employee has a guaranteed salary. That means regardless of the hours they work, whether under 40 or over 40 or even an hour, they get their full salary in any week in which they perform any work. A nonexempt employee is paid for the hours they actually work, and that really comes into play with flexibility.

It means that if you are reclassified as nonexempt, your hours are going to be closely watched, because although we can force an increase to the minimum salary level, we can't force employers to provide overtime hours. And so, the hours that they work are forced to be under 40 because of the cost, and I think that is even in Ms. Babcock-Stiner's testimony. That is one of the options.

And a lot of employees prefer to work more. They prefer to work different times, especially millennials. So, less opportunity for putting in the extra hours in order to advance up the chain in a corporation, more control of the hours you work and when you work because your employer needs to know when you are working. So there goes all the teleworking opportunities for, especially millennials, who prefer to work at home and don't want the nine to five job.

Mr. CLINE. And with all the disruption that this rule caused or was in the process of causing by more than doubling the salary threshold, can you speak to the impact that it had on small businesses? You spoke to it earlier. But small businesses are a major part of my district and just about everybody's district. But, in particular, in this gig economy that we have, and you spoke to that, small businesses are being created and changing and shifting at even faster rates.

Ms. McCUTCHEN. Well, the money—the extra money for the overtime pay just doesn't come down from the air. My mom used to tell me, money doesn't grow on trees, right? So, for small businesses, they have to find that extra money that the government is requiring them to pay from somewhere. It has to come from increased consumer prices. It has to come from reduced number of jobs or hours. And in this day where we are all concerned about the impact of artificial intelligence, it can often come from automating jobs completely, when the price of—the cost of providing that labor and that overtime exceeds the cost of actually automating.

Mr. CLINE. Thank you.

And, Madame Chair, I yield back the balance of my time.

Chairwoman ADAMS. Thank you.

I will recognize the gentlelady from Minnesota, Ms. Omar.

Ms. OMAR. Thank you, Chairwoman. I would like to ask unanimous consent to submit for the record a letter from the AFL–CIO, which emphasizes the need for strong overtime regulations.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

May 21, 2019

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

Submitted via: http://www.regulations.gov

Re: RIN 1235-AA20
COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

Dear Ms. DeBisschop:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully submits the following comments, on behalf of itself and its affiliated unions, in response to the Wage and Hour Division's proposed rule RIN 1235-AA20 ("Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees).

INTRODUCTION

The AFL-CIO and its 55 national and international union affiliates collectively represent 12.5 million working men and women who have a deep interest in maintaining and strengthening the overtime protections afforded by the Fair Labor Standards Act (FLSA) and its implementing regulations.

The FLSA's overtime guarantee sets a floor for all workers covered by the Act, whether or not they are protected by a collective bargaining agreement. Any changes in overtime protection under the FLSA affect collective bargaining rates for union workers. FLSA overtime protections also affect union employees whose wages and working conditions are covered by other statutes, such as federal sector employees and private employees hired to perform work for the federal government.

More generally, the labor movement attaches great importance to the overtime protections of the FLSA. Over a period of decades, millions of working people marched, protested, went on strike, and made enormous sacrifices to combat the evil of overwork and to guarantee working people the opportunity to realize our full potential as human beings and participate meaningfully in the process of self-government, separate and apart from the relentless demands of the workplace. Countless union and non-union working people were fired, beaten, imprisoned, and killed in the struggle for our right to "eight hours of work, eight hours of rest, and eight hours for what we will." The AFL-CIO places the highest priority on the restoration and preservation of these hard-won rights.

SUMMARY OF ARGUMENT

On March 22, 2019, the Department of Labor (DOL) published a proposal to revise the overtime eligibility regulations of 29 CFR Part 541. The proposed rule would replace the overtime regulation promulgated by the Obama administration on May 23, 2016, which the U.S. District Court for the Eastern District of Texas found invalid on August 31, 2017. *See* Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Texas 2016)(enjoining implementation) and *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017), *appeal docketed*, No. 17-41130 (5th Cir. Nov. 2, 2017) (addressing merits).

The proposed rule rescinds the overtime regulation promulgated by the Obama administration in 2016 (hereafter referred to as the "2016 Overtime Rule") and *inter alia*; sets the standard overtime salary threshold at $679 per week (or $35,308 on an annual basis) by 2020; specifically rescinds the provision for automatic indexing of salary thresholds, while stating the Department's intention to adjust the thresholds on a quadrennial basis unless "economic or other factors" indicate otherwise; allows employers to count non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary threshold; and sets the salary threshold for highly compensated employees (HCEs) at $147,714 on an annual basis. The proposed rule makes no changes to the current duties tests that help determine overtime eligibility (the standard duties tests put in place in 2004).

The proposed overtime rule is inconsistent with the legislative intent of the FLSA that overtime coverage be broad and exceptions to coverage be limited. The proposed rule would return to the methodology of DOL's overtime rulemaking of 2004, which the Department itself found to be in error in the 2016 Overtime Rule. The Department justifies its return to the "methodological error" of its 2004 rulemaking by relying heavily on the reasoning of the district court decision which invalidated the 2016 Rule, reasoning which is flawed.

DOL must avoid repeating the "methodological error" of its 2004 rulemaking. To do so, the Department should set the standard overtime threshold at a level no lower than that of the 2016 Overtime Rule and should strengthen the overtime "duties tests." We also urge the Department to promulgate a procedure for automatic updates of the overtime salary thresholds, and not to count bonuses, incentive payments, or commissions towards the standard salary threshold.

THE 2016 OVERTIME RULE

The Obama Labor Department issued a proposed overtime rule on July 6, 2015 and a final overtime rule on May 23, 2016. The 2016 Overtime Rule was to become effective on December 1, 2016.[1] Before issuing that rule, DOL solicited extensive input from stakeholders, met with over 200 organizations, engaged in a full notice and comment period, and considered over 293,000 comments on the proposed rule, the largest number of comments ever received on a DOL regulation. The Department conducted an extraordinarily thorough analysis in that rulemaking. A key point in the Department's explanation of the 2016 Overtime Rule was its determination that prior rulemaking in 2004 by the Bush administration was seriously flawed. The AFL-CIO generally supported the final rule setting the overtime salary threshold at $913 per week (or $47,476 on an annual basis), which was lower than the level suggested by the AFL-CIO at the time.

In 2016, DOL Recognized That the Methodology of its 2004 Rule Was in Error and Flawed

DOL explained in 2016 that its 2004 methodology was not an appropriate basis for setting the standard salary threshold. In 2004, the Department set the standard threshold level by using the salary level for the stringent "long duties test" of the overtime rules that were previously in effect, but paired this low salary level with a less stringent duties test comparable to the old "short duties test." As the Department explained in its 2016 final rule:

> "Historically, the Department used two different salary tests that were paired with different duties tests. The long test salary level set at the low end of salaries paid to exempt employees imposed a cap on the amount of nonexempt work that an exempt employee could perform. This aspect of the long duties test made it effective in distinguishing lower-paid exempt EAP employees from overtime-eligible employees. In effect, the long duties test ensured that employers could not avoid paying overtime by assigning lower-paid employees a minimal amount of exempt work. The short test salary level, which was historically set at a level between 130 and 180 percent of the long test salary level, did not impose any specific limit on the amount of non-exempt work *since that distinction was not considered necessary to aid in classifying higher-paid exempt EAP [executive, administrative, or professional] employees*. In eliminating the two salary tests in 2004, the Department instead set the single standard salary level equivalent to the historic levels of the former long test salary, but paired it with a standard duties test based on the short duties test, which did not include a limit on nonexempt work. *The effect of this mismatch was to exempt from overtime many lower-wage workers who performed little EAP work and whose work was otherwise indistinguishable from their*

[1] U.S. District Court for the Eastern District of Texas enjoined the rule on November 22, 2016 and found it invalid on August 31, 2017. See Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Texas 2016)(enjoining implementation) and Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017), *appeal docketed*, No. 17-41130 (5th Cir. Nov. 2, 2017) (addressing merits).

overtime-eligible colleagues. The Department has now concluded that the standard salary level we set in 2004 [the first increase since 1975] did not account for the absence of the more rigorous long duties test and thus has been less effective in distinguishing between EAP employees who are exempt from overtime and overtime-eligible employees." [81 Fed. Reg. 32400] [emphasis added]

As the Department concluded in 2016, this mismatch between a low salary level corresponding to the former stringent long duties test and a weak duties test comparable to the former short duties test was a *methodological error*:

> "The Department set the standard salary level using a methodology that yielded a result consistent with the methodology we had historically used to set the salary level paired with the long duties test, even though the new standard duties test was based on the short duties test. *This was a methodological error*." [81. Fed. Reg. 32412] [emphasis added]

DOL argued in 2016 that absent reinstating the more stringent long duties test with strict time limits on the amount of non-exempt work that could be performed by exempt employees, "a significant increase from the 2004 threshold is therefore necessary, not only to account for the declining real value of the salary threshold, but also to correct for the fact that the Department set the standard salary level in 2004 without adjusting for the elimination of the more rigorous long duties test." [81 Fed. Reg. 32406].[2] This was the justification for setting the threshold at $913 per week (or $47,476 on an annual basis) in the 2016 Overtime Rule.

PROPOSED RULE: THE DEPARTMENT MUST NOT REPEAT THE "METHODOLOGICAL ERROR" OF ITS 2004 RULEMAKING

DOL explains that the current rulemaking uses the same methodology as its overtime rulemaking of 2004. The Department "proposes to apply the same method used to calculate the salary threshold in 2004 to current data." 84 Fed. Reg. 10901, 10903 (March 22, 2019)(NPRM)

Using this methodology, DOL is now proposing a rule setting the standard salary threshold at $679 per week (or $35,308 on an annual basis) by 2020

The Department erroneously claims that its 2004 methodology is appropriate. "The Department believes that the earnings thresholds and methodology established in the 2004 final rule ... were appropriate at the time they were adopted. Those thresholds have never been challenged in court, and their use promotes familiarity and stability." [84 Fed. Reg. 10925]

However, DOL ignores the fact that in 2016 the Department itself explained at great length why its 2004 methodology constituted "methodological error." This 2016 analysis and conclusion by the Department is still valid today, and has not been addressed or refuted in this newest round of rulemaking. In its proposed rule, the Department relies heavily on the reasoning of the district court decision as a basis for ignoring its own 2016 analysis, but the district court decision is erroneous.

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[2] The Department initially instituted a 20 percent cap on non-exempt work for executive and professional employees in 1940. *See*, Stein Report commissioned by the Labor Department in 1940 at 14-15,40.

The District Court Incorrectly Invalidated the 2016 Rule

The Department now justifies its current proposed rule, which provides a substantially lower standard salary threshold as compared to the 2016 final rule ($679 per week as compared to $913 per week), by contending too many employees would become newly entitled to overtime, without regard to review of their duties, if the salary level was higher. Essentially the argument is that if the standard salary threshold were set higher, too many people would be newly classified as non-exempt, but there is no clear definition as to what number is "too many," and in any event the focus should not be on how many employees would be non-exempt but rather on what the appropriate basis is for defining the exemptions.

Thus, the Department is mistakenly buying into the district court's rationale in its rulings in the case filed in the Eastern District of Texas. There the court focused on the magnitude of the 2016] Overtime Rule's increase in the standard salary threshold level, noting that it "more than doubled" the previous threshold level and extended overtime eligibility to 4.2 million workers automatically "without a change to their duties." "This significant increase," the district court argued, "would essentially make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. As a result, entire categories previously exempt employees who perform 'bona fide executive, administrative, or professional capacity' duties would no[t] qualify for the EAP exemption based on salary alone." "By raising the salary level in this manner," the court explained, "the Department effectively eliminates a consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties," and 'Congress was clear that the determination should involve at least a consideration of an employee's duties." "Because the final rule would exclude so many employees who perform exempt duties," the court concluded, "the Department fails to carry out Congress's unambiguous intent". *Nevada v. United States DOL,* 275 F. Supp. 3d 795.at 896-807.

The flaws in the district court's reasoning are readily apparent if we apply the same arguments to the present rulemaking. "The Department estimates that in 2020, 1.1 million currently exempt employees" will "gain overtime eligibility" (84 Fed. Reg. 10901) under the proposed rule. The Economic Policy Institute (EPI) estimates that the figure is actually 1.4 million, not 1.1 million. These 1.1 to 1.4 million workers would likewise become "automatically eligible" for overtime "without a change in their duties." Their "duties, functions, and tasks" would likewise be "irrelevant because their salary would fall below the new minimum salary level," and they likewise "would not qualify for exemption based on their salary alone." In other words, the proposed rule would "effectively eliminate" consideration of whether these 1.1 to 1.4 million employees perform "executive, administrative, or professional capacity duties."
The reasoning of the district court would seem to argue that the Trump administration has exceeded its statutory authority with the proposed rule. It is not clear why the proposed rule would pass muster under the district court's test, while the 2016 final rule would not. Obviously, 4.2 million workers is more than 1.4 million workers, but the district court offers no discernible principle or legal standard to distinguish the two rules. Neither does the Department in its discussion of its new rule.

It cannot be the case that the dispositive factor in determining whether the Secretary of Labor has exceeded his or her statutory authority is the size of the threshold increase or the number of newly created overtime-eligible workers. The number of workers who gain overtime eligibility will depend on factors such as the length of time that has elapsed since the preceding increase, and whether the Department has had to correct for errors made in previous rulemakings, as is the case here.

If we were to accept that the magnitude of the threshold increase is a dispositive consideration, this would mean that the threshold established by the 2016 final rule would be valid if implemented in stages between 2004 and 2016, but not if implemented in a single rulemaking. Earnings levels in the current labor market and the amount of time elapsed between adjustments would be irrelevant to such a determination. This approach would be contrary to the Department's practice since 1938 and would find no support in the FLSA.

The district court's reasoning apparently depends on a mistaken assumption that "bona fide executive, administrative, or professional capacity" can be determined solely by application of the current duties tests. This would be an incorrect assumption for two reasons. First, both the salary level and the duties tests (in conjunction with the salary basis requirement) are necessary to make such a determination. According the Stein Report commissioned by the Labor Department in 1940, the salary level is "a valuable and easily applied index to the **bona fide** character of the employment" and "the best single test of the employer's **good faith**" in classifying the worker as an executive or professional employee. [Stein Report at 19, 42]

Second, the district court, and now the Department, both fail to address the problem identified by the DOL itself in 2016, which is that the current duties tests are inappropriately weak when coupled with the low overtime threshold levels now in effect (and those proposed in this rule). This conclusion is even more relevant today, as the thresholds have been further devalued by inflation since 2016.

If we applied the more stringent "long duties tests" that formerly accompanied the lower salary threshold, far fewer than 4.2 million workers would be newly eligible for overtime under the Obama administration's 2016 Overtime Rule. Many of those 4.2 million employees would have already been overtime-eligible (and therefore not newly eligible) because they fail the more stringent long duties test by spending more than 20 percent of their time on non-exempt duties.

The salary threshold level set by the 2016 final rule -- $913 per week ($47,476 on an annual basis) – is commensurate with salary levels that DOL has set over the past 80 years and is fully consistent with the FLSA. The Secretary did not exceed his authority by promulgating the 2016 Overtime Rule, and the district court should never have enjoined or invalidated this rule.

The Department Ignores Its Own Analysis from 2016 and Fails to Correct Its "Methodological Error"

Whatever the merits of the standard threshold level set by the Department in its 2016 final rule, DOL's conclusion that the 2004 methodology was a "methodological error" remains valid. In its proposed rule, the Department essentially argues that correcting the mismatch identified by DOL in 2016 would require a more stringent duties test, which the Department is not inclined to reinstate, and in any event, people have grown accustomed to the new standard duties test. [84 Fed. Reg. 10908][3] This is not an adequate justification for disregarding the Department's own reasoned analysis in 2016.

The District Court Decision Is Not a Sufficient Basis for Failing to Correct DOL's "Methodological Error"

In its proposed rule, DOL relies heavily on the reasoning of the district court decision that invalidated the 2016 final rule. The proposed rule says "the Department has reconsidered by $913 per week standard salary level set in the 2016 final rule in the light of the district court's decisions" and public comments. [84 Fed. Reg. 10901] However, the district court decision is plainly erroneous and is not a sufficient basis for ignoring the Department's own conclusion that the 2004 methodology constitutes a "methodological error."

Any Increase in the Overtime Threshold Will Extend Overtime Eligibility to More Workers

The Department itself recognizes that any increase in the standard salary threshold will automatically extend overtime eligibility to more workers. The proposed rule says, "Any salary level set by the Department will exclude from exemption some employees who pass the duties test." [84 Fed. Reg. 10908] "The Department recognizes that any increase to the standard salary level would increase the number of workers who pass the duties test but are paid below the standard salary level." [84 Fed. Reg. 10911]

The Department therefore concedes that any increase in the salary thresholds will make some number of workers automatically eligible for overtime, eliminating any consideration of their job duties. In other words, any increase in the thresholds will raise the same concerns that so troubled the district court. Yet there is no doubt that the use of overtime salary thresholds is statutorily permissible. *See Wirtz v. Mississippi Publishers Corp.*, 364 F. 2d 603 (5th Cir. 1966)

Extending Overtime Eligibility to a Large Number of Workers Does Not Necessarily Exceed the Secretary's Authority

In its proposed rule, the Department repeats the error of the district court in treating the size of the threshold increase and the number of newly eligible employees as dispositive of whether the Department has exceeded its authority under the FLSA. "The Department now believes that increasing the standard salary level to $913 per week was inappropriate. The increase excluded from exemption 4.2 million employees whose duties would have otherwise qualified them from exemption, a result in significant tension with the text of Section 13(a) (1)." [84 Fed. Reg. 10901]

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[3] It should be noted that this new standard duties test has only been in effect from 2004 to the present, while the prior scheme of two salary thresholds paired with two duties test, long and short, had been in effect for a much longer period of time.

The Department explains that, "in proposing a new salary level, the Department considered the district court's conclusion that the salary level set in the 2016 final rule exceeded the Department's authority by 'excluding *so many* employees who perform exempt duties' thereby making 'salary rather than an employee's duties determinative' of the applicability of the EAP exemption." [84 Fed. Reg. 10901, 10908] [emphasis added]

The Department further explains that it "proposes to address this problem by setting a salary level that would not ... include *too great a proportion* of employees who would otherwise be exempt." [84 Fed. Reg. 10909] DOL claims that "The appropriateness of the proposed salary level is further supported by *the number of* workers it would affect—i.e., the number of employees who ... would become non-exempt absent some intervening action by their employers." [84 Fed. Reg. 10909] [emphasis added]

The Department fails to offer any discernible principle or standard to determine the permissible number of workers who can permissibly gain overtime eligibility from a salary threshold adjustment. DOL interprets the district court to say that "a salary level that excludes from exemption *an unusually high number of employees* who pass the duties test stands in tension with Congress's command to exempt bona fide EAP employees." [84 Fed. Reg. 10903] The Department then adopts this reasoning as its own: "Any salary level set by the Department will exclude from exemption some employees who pass the duties test. But a salary level that exempts an *unusually high number of those employees* — as occurred with the 2016 final rule — stands in tension with Congress's command to exempt bona fide EAP employees." [84 Fed. Reg. 10908] DOL fails to define "*an unusually high number*."

The Department claims that its proposed rule would not "disqualify any *substantial number* of 'bona fide executive, administrative, and professional employees from exemption." [84 Fed. Reg. 10911] However, the Department's proposal would extend overtime eligibility to 1.1 to 1.4 million workers, as discussed above. Apparently, the Department believes that 4.2 million is "an unusually high number" and a "substantial number," but 1.1 million is neither "unusually high" nor "substantial." The Department offers no reasoned explanation for this distinction.

The Department does note that the 2004 final rule extended overtime eligibility to 1.3 million workers:

> "Additionally, the 1.1 million workers likely to be affected by this rule's proposed increase to the standard salary level is close to the 1.3 million workers who were affected by the 2004 final rule's salary level increase." [84 Fed. Reg. 10911]

Perhaps the Department is relying on the 2004 precedent to define an "unusually high number" as anything more than 1.3 million, but it does not make this argument explicitly, and this would not be a defensible position.

In short, DOL fails to offer a discernible, much less defensible, reasoned principle or standard to distinguish a rule that extends overtime eligibility to 4.2 million workers, and one the

Department assumes to be invalid, from one that extends overtime eligibility to 1.1 to 1.4 million workers, which the Department assumes to be valid.

Any Increase in the Overtime Threshold Will Extend Overtime Eligibility to More Workers the More Time Has Passed Since the Previous Increase

The more time that elapses between periodic adjustments of the salary threshold levels, the more workers will become newly eligible for overtime when the salary threshold is finally adjusted. If a long period of time elapses, the number of newly-eligible workers can be substantial. This is in fact what happened between 1975 and 2004 and between 2004 and 2019. The number of workers who gained overtime eligibility in 2004 would have been much larger if the Department had not made the "methodological error" of mismatching a weak duties test with a low salary threshold.

Any Overtime Rulemaking That Corrects for "Methodological Error" Will Extend Overtime Eligibility to Even More Workers

The Department had an obligation to correct the "methodological error" identified in 2016, and the same obligation obtains today. DOL can correct this error by reinstating the long duties test, with its 20 percent cap on non-exempt work, or by increasing the standard salary threshold to a level corresponding to the less stringent short duties test. Either approach would extend overtime eligibility to a large number of workers. The number of workers who would gain overtime eligibility is therefore not an indication that the Secretary has exceeded his authority, but rather an indication that the Secretary took seriously his or her obligation to correct the "methodological error" of 2004 and give effect to the purposes of the FLSA.

The Department Fails to Recognize that the Current Duties Test Are Inappropriately Weak

Like the district court, the proposed rule seems to assume that the only way to determine whether a worker is "employed in a bona fide executive, administrative, or professional capacity" is by applying the current duties test. This assumption is incorrect for two reasons, as argued above. First, the duties test must be applied in conjunction with the salary test, and the salary test is critical in determining the "bona fide" nature of the employer's designation of an employee as an executive, administrative, or professional ("EAP") employee. Second, the current duties tests are inappropriately weak when coupled with the current standard threshold levels, as the Department explained at length in 2016. In short, application of the current duties tests by itself cannot determine who is a bona fide EAP employee.

To insist on correcting the "methodological error" involved in applying the current duties tests is no mere quibble. The current standard duties tests are roughly equivalent to the old "short duties tests," which were applicable only to employees at relatively high levels of compensation. The understanding behind the old short duties test was that stringent inquiry into the duties of such highly compensated employees was not necessary because highly compensated employees were very likely to be exempt. Obviously, many employees who would pass the less stringent short (now "standard") duties test would not pass the more stringent long duties test.

Failure to pair the less stringent short (standard) duties test with a higher threshold that is appropriate only for more highly compensated employees who are assumed to be exempt results in the denial of overtime protection to a large number of employees who should be protected.

The Department Suggests an Erroneous Standard for Setting the Standard Salary Threshold Level

The proposed rule, relying on the district court decision, states repeatedly that the appropriate level for setting the standard threshold should be a level no higher than necessary to screen out "obviously non-exempt" employees from exemption. "The salary test's primary and modest purpose is to identify potentially exempt employees by screening out obviously non-exempt employees." [84 Fed. Reg. 10908]

For this proposition, the Department and the district court cite two reports commissioned by the Department: the Weiss Report of 1949 and the Kantor Report of 1958. The Weiss Report defended the salary tests against criticism as follows: "The experience of the Division since 1940 supports the soundness of the salary criteria in the regulations…the salary tests...even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of *obviously nonexempt employees*." [Weiss Report at 8] The Kantor Report similarly defended the tests against criticism: "the salary tests…simplify enforcement by providing a ready method of screening out *obviously nonexempt employees*." [Kantor Report at 2-3] [emphasis added]

First, it should be noted that when DOL published the Weiss Report and the Kantor Report, the salary tests in question were accompanied by duties tests that contained a strict 20 percent cap on non-exempt work. Under these circumstances, a salary threshold level comparable to the current standard threshold level was appropriate for the long duties tests.

Second, the statements quoted here from the Weiss Report and the Kantor Report were not proposals for setting the long duties salary threshold. Rather, the Weiss and Kantor Reports were defending the salary tests against criticism. The Weiss Report did, however, recommend a standard for setting the salary threshold for the administrative and profession exemptions: the thresholds must be high enough to cover the "great bulk" of overtime-eligible workers "if it is to be effective." [Weiss Report at 18]

The Department acknowledges that it has made other statements about the "traditional purpose" of the salary threshold that are in conflict with its current interpretation, but argues that the Department is "not bound" by these conflicting statements. [84 Fed. Reg. 10907] The Department nevertheless suggests that it is bound by the language quoted from the Weiss Report and the Kantor Report defending the salary tests against criticism.

The Department Fails to Address the Danger of Misclassification

As the Department explained in 2016, setting any salary threshold level involves weighing competing concerns about, on the one hand, denying exemption to employees below the threshold who may satisfy the duties tests (even if the duties are appropriately set, which the current duties tests are not) and, on the other hand, exposing overtime-eligible employees above the threshold to the risk of misclassification. We believe the risk of misclassification should be minimized, given that Congress intended for the overtime protections of the FLSA to be broadly applicable.

The Department Fails to Recognize that Congress Intended Overtime Protections to be Broadly Applicable and Exceptions to Be Narrowly Drawn

Congress and President Roosevelt intended the FLSA's overtime guarantee to be the rule rather than the exception. As Jared Bernstein and Ross Eisenbrey pointed out in a paper that inspired the 2016 rulemaking: "President Franklin D. Roosevelt and key members of Congress began with an assumption that every worker falling within Congress's power to regulate interstate commerce should eventually have a workweek of 40 hours, with the exception of agricultural workers."

The Supreme Court has recognized that broad coverage of the FLSA's overtime protections is essential to carry out the purposes of the Act. "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality.....Where exceptions were made, they were narrow and specific." [4]

DOL laid out the purposes of the FLSA's overtime provisions in 2015:

> It is widely recognized that the general requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives. The first is to spread employment by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours, thereby reducing involuntary unemployment. The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers. [80 Fed. Reg. 38546 (July 6, 2015)]

Both these policy objectives would be frustrated if too many workers were denied overtime protection. The FLSA's overtime guarantee cannot spread work and reduce unemployment throughout the economy if it applies to only a fraction of workers and workplaces. Nor can the FLSA protect against "the evil of overwork" and improve the health and well-being of the American workforce if too many employees are left unprotected.

The Department Should Prioritize Broad Overtime Coverage Over Stability

In its proposed rulemaking, the Department places an unusual emphasis on the need for stability and avoiding disruption. "After so many years, workers and employers are familiar with a single standard weekly salary level and a single standard duties test...Using the 2004 salary level methodology as the basis for determining an updated salary level thus promotes familiarity and stability for the workplaces." [84 Fed. Reg. 10909] The Department explains, "this approach has withstood the test of time, is familiar to employees and employers, and can be used

[4] *Powell v. United States Cartridge Co.*, 339 U.S. 447, 516 (1950).

without causing significant hardship or disruption to employers or the economy." [84 Fed. 19093] The Department is pleased that the proposed rule "seeks to update the standard salary level in a manner that does not unduly disrupt employers' operations; dramatically shift employee salaries, hours, or morale; or result in adverse economic effects." [84 Fed. Reg. 10909]

DOL's priorities appear to be misplaced. The Department of Labor should not prioritize stability, employer familiarity, and the need to avoid "a dramatic shift in employees salaries" over the need to correct the "methodological error" of the 2004 rulemaking and give effect to the purposes of the FLSA, including broad overtime coverage.

The Department Exhaustively Addressed the Arguments of the District Court and the Proposed Rulemaking in 2016

When DOL proposed its overtime rule in 2015, commenters used the exact same language to make the exact same criticisms that the district court and the Department itself now make. The Department summarized these criticisms as follows:

> "Several commenters representing employers stated that the salary level has historically been set at a level such that "employees below it would clearly not meet any duties test," or would be very unlikely to satisfy the duties requirements. NRA; see also HR Policy Association; Jackson Lewis; SHRM. SHRM and others asserted that the proposal would for the first time set the salary level such that a *large number of employees who satisfy the duties test would be excluded from the exemption*, which would therefore make them overtime eligible. These commenters pointed to the Department's statement, when setting the long test salary thresholds in 1949 and 1958, that the thresholds should not defeat the exemption for "*any substantial number of individuals* who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees," and should provide a "ready method of screening out the *obviously exempt employees*." Weiss Report at 8-9; Kantor Report at 2-3. Commenters asserted that because only those who are "very likely to satisfy" the duties tests earn salaries above the Department's proposed threshold, see Jackson Lewis (emphasis in comment), the Department has turned the historical purpose of the salary level "on its head." See PPWO. PPWO, SHRM, and others further commented that the Department's proposal improperly *renders the duties test superfluous and makes the salary level test the "sole" determinant of exempt status*. ...
>
> IFA asserted that because the Department's proposal makes nonexempt what IFA characterized as a *significant number of employees* who would clearly meet the duties test, the proposal "expands the number of employees eligible for overtime beyond what Congress envisioned." [81 Fed. Reg. 31412-32413] [emphasis added]

Only three years ago, the very same Department of Labor rejected these criticisms with the following detailed and fully reasoned explanation:

"The Department *does not believe that the methodology adopted in this Final Rule would defeat the exemption for too many employees who pass the standard duties test, or render the standard duties test superfluous*. *There will always be some employees performing EAP duties who are paid below the salary threshold*, as well as overtime-eligible employees who are paid above the salary threshold (and thus whose status turns on the application of the duties test). See 80 FR 38527. *Under the Final Rule, 6.5 million white collar workers who earn above the required salary level do not satisfy the standard duties test, representing 47 percent of the total number of white collar workers who fail the duties test. For these overtime-eligible salaried workers, the standard duties test rather than the salary test will dictate their exemption status*. For example, 48 percent of secretaries and administrative assistants in banking nationwide earn at or above the $913 per week salary level adopted in this Final Rule, although at most 10 percent of such workers are likely to pass the standard duties test. Likewise, 71 percent of first-line supervisors of mechanics, installers, and repairers in the utilities industry nationwide earn at least $913 per week, even though only 10 to 50 percent of such workers are likely to pass the standard duties test.

"By contrast, of salaried white collar workers who currently meet the standard duties test, 5.0 million (22.0 percent) earn less than $913 per week, and will thus be eligible for overtime under this Final Rule. *Whenever the Department increases the salary level, it is inevitable that "some employees who have been classified as exempt under the present salary tests will no longer be within the exemption under any new tests adopted." Kantor Report at 5*. As we have explained, such employees include "some whose status in management or the professions is questionable in view of their low salaries," and some "whose exempt status, on the basis of their duties and responsibilities, is questionable." Id. Moreover, *as we have long been aware, if too low a salary level is paired with a duties test that does not specifically limit nonexempt work, employers may inappropriately classify as exempt workers who perform large amounts of nonexempt work*. See 40 FR 7092. *The Department believes that many of the workers who will no longer be exempt as a result of this rulemaking would have failed the long duties test and are currently inappropriately classified because of the mismatch between the current standard duties test and the standard salary level*. To the extent that commenters expressed concerns that the proposal would exclude from exemption too many bona fide EAP employees in certain areas and industries, the Department has recalibrated the methodology in this Final Rule to better take into account salaries in low-wage regions and industries, as discussed earlier, while remaining cognizant of the corresponding but opposite impact on high-wage regions and industries.

"*Commenters asserting that the Department's proposal turned the purpose of the salary level test "on its head" misconstrue the relationship between the salary level test and the duties test as it has existed throughout most of the history of the part 541 regulations*. *The fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee*. *The salary level test and duties test have always worked in tandem to distinguish those who Congress intended the FLSA to protect from those who are "bona fide" EAP employees*. *The Department has long recognized, moreover, that* *"salary is the best single indicator of the degree of importance involved in a particular employee's job," Weiss Report at 9, and "the best single test of the employer's good faith in characterizing the employment as of a professional nature." Stein Report at 42*. Thus, the Department acknowledged shortly after we first promulgated the part 541 regulations that, *in the absence of a clause "barring an employee from the exemption if he performs a substantial amount of nonexempt work," it becomes "all the more important" to set the salary level "high enough to prevent abuse." Stein Report at 26*. This inverse correlation between the salary level and the duties requirements was the basis of the separate short and long tests, which co-existed until 2004.

"As reflected in many comments favoring a lower salary level, the Department historically paired the long duties test—which limited that amount of nonexempt work an exempt employee could perform—with a salary level designed to minimize the number of employees satisfying that test who would be deemed overtime-eligible based on their salaries. Even then, *the Department noted that the long test salary level should exclude the "great bulk" of nonexempt employees from the EAP exemption. Weiss Report at 18*. When the Department enacted the short test in 1949, however, we recognized that this more permissive "short-cut test" for determining exempt status—which did not specifically limit the amount of time an exempt employee could spend on nonexempt duties—must be paired with a "considerably higher" salary level. Id. at 23. *This salary level, the Department explained, "must be high enough" to qualify for the EAP exemption "only those persons about whose exemption there is normally no question*." Id. Accordingly, the Department set the short test threshold such that those who earned above this level would meet the requirements of the long duties test—including the limit on performing nonexempt work—"with only minor or insignificant exceptions." Id. In other words, *the short test salary threshold was sufficiently high that an employee earning above this level was not only "very likely," but nearly certain, to satisfy the long duties test, as well as the short duties test*. Between 1949 and 1975, the Department adhered to these principles by enacting short test salary levels at approximately 130 to 180 percent of the long test salary levels. [81 Fed. Reg. 31413-32414] [emphasis added]

THE PROPOSED SALARY THRESHOLD IS TOO LOW TO PROTECT WORKERS

In the AFL-CIO's comments on the Obama administration's overtime rulemaking in 2015, we marshalled a wide variety of relevant benchmarks that argue for a threshold level higher than that of the 2016 final rule, which was $913 per week (or $47,476 on an annual basis) in 2016. Obviously, the same analysis argues for a 2020 threshold that is much higher than that proposed by the Trump administration, which is $679 per week (or $35,308 on an annual basis). Setting an appropriate threshold level to give effect to the purposes of the FLSA makes an enormous difference in the lives of working people.

The Proposed Rule Would Protect Millions Fewer Workers than the 2016 Rule

According to the Labor Department, 1.1 million workers who are not currently eligible for overtime would gain overtime eligibility under the proposed rule. DOL further calculates that another 3.6 million overtime-eligible workers would benefit from the proposed threshold. These 3.6 million workers are already eligible for overtime, but they are vulnerable to misclassification because their earnings are higher than the current salary threshold. They would be less vulnerable to misclassification under the proposed rule because their earnings would now be lower than the increased proposed threshold. [84 Fed. Reg. 10901, 10911]

However, the Economic Policy Institute (EPI) has produced higher estimates for the proposed rule. According to EPI, 1.4 million workers would be newly eligible for overtime, and another 3.8 million overtime-eligible workers would be less vulnerable to misclassification.

The 2016 final rule promulgated by the Obama administration would protect significantly more workers than the Trump administration's proposal. According to EPI, 4.6 million workers would gain overtime eligibility under the Obama rule by 2020, while another 8.9 million overtime-eligible workers would be less vulnerable to misclassification. In other words, by replacing the 2016 final rule with the proposed 2019 rule, the Labor Department would extend overtime eligibility to 3.1 million fewer workers, and 5.1 million more workers would be more vulnerable to misclassification. Furthermore, EPI calculates that workers would lose $1.2 billion dollars in earnings each year as compared to the 2016 final rule.

The Salary Threshold Is Too Low As Compared to Benchmarks DOL Has Used Previously

In our comments on the Obama administration's overtime proposal in 2015, we cited a wide variety of relevant benchmarks that argue for salary threshold higher than that of the final 2016 rule, and therefore obviously for a level higher than what the Department now proposes.

We will not repeat all those arguments in their entirety, but the following are some relevant figures. The Department has recognized that measures of inflation provide helpful background for setting the salary level, and an inflation adjustment of the 1975 salary threshold would yield a level of $58,000 by 2020. Applying the Labor Department's traditional Kantor methodology to the salary threshold for the short duties test, which is comparable to current duties tests, would yield a weekly salary threshold of $979 per week ($50,908 on an annual basis) in 2013. Calculating a threshold level in relation to the earnings of bookkeepers and accountants, as the Department has done in the past, would yield figures of $56,470 and $65,940, respectively, in 2014. Calculating a threshold level in relation to the wages of non-supervisory workers, as the Department has done in the past, would yield a figure of $1,050 per week (or $54,536 on an annual basis) in 2013. Calculating a threshold level in relation to entry wages of recent college graduates, as DOL has done in the past, would yield as figure of $1,000 per week (or $52,000 on an annual basis) in 2013.

The Department Should Reject Various Alternative Methodologies Discussed in the Proposed Rule

The Department seeks comments on various alternative methodologies for setting the standard salary threshold level that it discusses in the proposed rule. [84 Fed. Reg. 10901] However, all these methodologies involve an adjustment to the standard salary threshold set by the 2004 rulemaking. As discussed above, the Department itself has determined that the threshold level set in 2004 constituted "methodological error." All of the alternative methodologies for which the Department seeks comment would therefore also constitute "methodological error."

THE DEPARTMENT SHOULD CORRECT ITS "METHODOLOGICAL ERROR" BY SETTING HIGHER THRESHOLDS AND STRENGTHENING THE DUTIES TESTS

To correct the "methodological error" of its 2004 rulemaking, the Department must account for the mismatch of a less stringent short duties test with a salary threshold that corresponds to the more stringent long duties test. This requires the Department to set the standard salary threshold at least as high as the 2016 rule and strengthen the duties tests.

According to the Department's own reasoning in 2016, any significant lowering of the standard salary threshold below the level set in the final rule ($913 per week) would require a more rigorous duties test. As the Department explained:

> "A standard salary threshold significantly below the 40th percentile [$913 per week in 2016] would require a more rigorous duties test than the current standard duties test in order to effectively distinguish between white collar employees who are overtime protected and those who may be bona fide EAP employees." [81 Fed. Reg. 32404]

Specifically, according to DOL's reasoning, setting a standard salary threshold below the historic range of the short test threshold – between $889 and $1231 per week [81 Fed. Reg. 32405] -- would require a duties test at least as rigorous as the former long duties test, including reinstatement of clear percentage limits on the amount of time that exempt employees can spend on non-exempt work.

> "The key difference between the old short test and the old long test was that the long test imposed a bright-line 20 percent cap on the amount of time an exempt employee could spend on nonexempt duties (40 percent for employees of retail or service industries). The short duties test, in contrast, did not impose a specific limitation on nonexempt work because the short test was intended to apply only to workers who earned salaries high enough that such a limitation was unnecessary. The standard duties test developed in 2004 takes the short test approach and does not specifically limit nonexempt work." [81 Fed. Reg. 32411]

In 2015, the AFL-CIO argued for a standard salary threshold higher than that proposed by the Obama administration -- $913 per week (or $47,476 per year) -- along with a 50% cap on non-exempt work. The current "duties tests" allow employers to deny overtime protection improperly to far too many workers. In particular, employers should not be allowed to deny overtime protection to employees who spend most of their time performing the same work as their overtime-eligible co-workers simply by misclassifying those employees as "executives." The pretense that these workers are the kind of "bona fide" executives Congress intended to deny overtime protection in 1938 is absurd. We agree with the Weiss Report that denying overtime protection to workers who perform "substantial" amounts of non-exempt work is "contrary to the objectives of the Fair Labor Standards Act." We noted in our 2015 comments that it is not enough to require that "bona fide" EAP employees spend 50 percent of their time doing exempt work: they must spend 50 percent of their time exclusively on exempt work. This amounts to a 50% limit on non-exempt work, which has been the rule in California.

THE DEPARTMENT SHOULD PROVIDE FOR AUTOMATIC UPDATES OF SALARY THRESHOLDS

The Department proposes to delete the provision of the 2016 final rule that provides for automatic triennial updates of the standard salary threshold, and instead offers its intention to engage in overtime rulemaking every four years unless "economic or other factors" indicate otherwise. Given the Department's opposition to large increases of the salary threshold, and given its argument that such large increases exceed the authority of the Secretary of Labor, it is somewhat surprising that the Department would now reject the automatic indexing mechanism it proposed just three years ago. The AFL-CIO continues to support automatic regular updates of the salary thresholds to prevent erosion of overtime protections by inflation and to obviate the need for large threshold increases in the future. We also note there are inherent savings of both time and money with an automatic update, as opposed to multiple rounds of time consuming rulemaking.

While the Department's commitment to repealing the automatic indexing mechanism of the 2016 final rule is clear, its intention to engage in future rulemaking is less concrete: "The Department proposes to delete the current (though not enforced) Section 541.607, while affirming its intention to propose increasing the earnings thresholds every four years." [84 Fed. Reg. 10915]

We note that the Bush administration Labor Department made a similar commitment in 2004 to update the thresholds "on a more regular basis." However, our experience since 2004 only reinforces our conviction that an automatic indexing mechanism is necessary.

The Department suggests that if its intention to propose threshold increases every four years were to be "codified" in the final rule, it could require the same methodology that the Department itself determined to be "methodological error" in 2016. [84 Fed. Reg. 10915, fn. 140] The AFL-CIO opposes "codifying" this "methodological error."

The Department further suggests that the final rule "could provide that the Secretary may, *in his or her sole discretion*, decline to publish" a salary threshold increase rulemaking "*due to economic or other factors*." [84 Fed. Reg. 10915, fn. 140] If this language were to be included in the final rule, it would amount to nothing more than a statement of good intentions, coupled with rescission of the automatic indexing provision of the 2016 final rule. Not surprisingly, we prefer the automatic indexing provision of the 2016 final rule.

THE DEPARTMENT SHOULD NOT COUNT NON-DISCRETIONARY BONUSES OR INCENTIVE PAYMENTS TOWARDS THE SALARY THRESHOLDS

In its proposed rule, the Department says, "In an attempt to align the regulations better with modern pay practices, the Department also proposes to allow employers to count nondiscretionary bonuses and incentive payments to satisfy up to 10% of the standard salary level test, provided such bonuses are paid annually or more frequently." [84 Fed. Reg. 10901]

The AFL-CIO strongly believes that non-discretionary bonuses should not be used in calculating employees' salaries for purposes of the salary threshold test. As noted in the 2016 rulemaking, DOL has consistently assessed compliance with the salary level test by looking only at actual salary or fee payments made to employees and, with the exception of the highly compensated employees test, has not included bonus payments of any kind in this calculation. Including bonuses in the calculation could create confusion as to whether employees meet the salary threshold test and are overtime eligible.

Since non-discretionary bonuses may be paid for a variety of circumstances such as longevity, attendance, additional training or certification, inclusion of such bonuses in the determination of whether or not an employee meets the salary threshold could lead to anomalous results, where employees working side by side performing the same job would be exempt and non-exempt, simply because inclusion of the bonus would raise one employee over the salary threshold.In addition, allowing employers to include bonuses in the calculation of employees' compensation will provide a means for employers to manipulate employees' salaries to avoid paying overtime, to those who would otherwise be overtime eligible. We urge the DOL to continue to calculate workers' salaries based on annual guaranteed salary alone, and not to include bonuses in the calculation.

The Labor Department Should Not Rescind the 2016 Rule

In the proposed rulemaking, the Department "proposes to rescind formally the 2016 final rule, replacing it with a new rule." [84 Fed. Reg. 10905] The AFL-CIO opposes the Department's rescission of the 2016 final rule and urges the administration to defend and implement that rule, except as to the inclusion of non-discretionary bonuses and commissions in the calculation of regular salary rate.

The 2016 Rule Should Go Into Effect If the Current Proposed Rule Is Invalidated

In its proposed rule, DOL announces that it intends for its proposed rescission "to be severable from the substantive proposal for revising" the overtime eligibility rules.

> "A final rule based on this proposal would formally rescind the 2016 final rule. That rescission would operate independently of the new content in the final rule, as the Department intends it to be severable from the substantive proposal for revising Part 541. As explained more fully below, the Department believes that rescission of the 2016 final rule is appropriate regardless of the new content proposed for its replacement. Thus, even if the substantive provisions of a new final rule revising Part 541 were invalidated, enjoined, or otherwise not put into effect, the Department would intend the 2004 final rule to remain operative, not the enjoined 2016 final rule that it now proposes to rescind." [84 Fed. Reg. 10905]

We disagree. We believe rescission of the 2016 final rule is not appropriate, it should not be severable, and that the Department has not given adequate justification for rescission. Nor should rescission operate independently of the new content of the final rule. If the substantive provisions of the proposed rule are enjoined, invalidated or otherwise not put into effect, the 2016 final rule should go into effect. The Department's proposal which anticipates return to the 2004 threshold should the new rule be enjoined or invalidated, would almost certainly guarantee that employees would be stuck with the 2004 threshold for a number of years to come. Because of the combined effect of inflation and the methodological error discussed above, many workers clearly performing non-exempt work would continue to be denied overtime while being misclassified as exempt.

CONCLUSION

The Department should continue to pursue its appeal in the Fifth Circuit so that Judge Mazzant's ruling does not remain in effect, and should implement the final rule promulgated by the Obama administration in 2016, absent the provision to include non-discretionary bonuses and commissions in the calculation of the regular salary rate. While we oppose rescission of the 2016 final rule, if that rule is rescinded, we would urge the Department to set the standard overtime salary threshold by correcting the "methodological error" of its 2004 rulemaking, by increasing the standard salary threshold to take into account inflation since 2004 and providing for automatic regular updates of the salary threshold, and providing that non-discretionary bonuses cannot be counted towards the salary thresholds.

Respectfully submitted,

By: /s/ Kelly Ross
Kelly Ross, Deputy Policy Director, AFL-CIO

By: /s/ Yona Rozen
Yona Rozen, Associate General Counsel, AFL-CIO

Ms. OMAR. Dr. Shierholz, in your testimony, you describe overtime protection as an essential part of ensuring a thriving middle class. I couldn't agree more with that assessment. If an employer expects their workers to put in time beyond the standard 40-hour workweek, then that work should be compensated. If workers are going the extra mile, why shouldn't employers be expected to do the same? But after seeing the latest overtime proposal, I am afraid this protection is being eroded, just like so many others have been in the past few years. I am concerned that the current administration's only goal is to make sure that we have an economy that only benefits the wealth.

With that in mind, Dr. Shierholz, can you tell us how many workers would be left behind by the Trump administration's proposal?

Ms. SHIERHOLZ. Yep. I calculated this using the exact methodology that DOL uses and found that the workers who would have gotten protections under the 2016 rule but will not get protections under the Trump proposal, if it is implemented, number at 8.2 million workers.

Ms. OMAR. And which workers would be hurt the most?

Ms. SHIERHOLZ. It is a real cross section of the middle class, but I find that we have these numbers, 4.2 million will be women, 3 million people of color, 2.7 million parents of children under the age of 18. It really will hit the middle class very hard.

Ms. OMAR. And this isn't just a problem for today's workers. This proposal will have a long-term impact. By not providing automatic adjust in the future, the Department of Labor would likely be short-changing workers for many years to come.

Dr. Shierholz, could you share more details about how working people would be hurt when the salary threshold remains unchanged for a long period of time?

Ms. SHIERHOLZ. Yep. Again, using the exact same methodology for calculating the impact that DOL used, I found that workers—if the 2019 proposal is implemented, workers will get $1.2 billion less than they would have under the 2016 rule. And due to the lack of automated -automated—automatic updating in the proposal, that would grow to $1.6 billion over the first 10 years of implementation.

Ms. OMAR. And these are—this is real money in their paychecks. This will affect their ability to buy groceries, to be able to pay their bills, rent, possibly move to a new district with better schools. But as we have heard today, a lot of these workers would be denied that extra income under the current proposal.

Could you please tell us how this proposal will cost workers in terms of lost earnings compared to the 2016 final rule?

Ms. SHIERHOLZ. Yep. So, it will—workers will get $1.2 billion less. And I think another thing is they will work more for that less money, because we know that when we implement overtime protections, the people will work less hours for free. So, it hits both on you get less money and you work more, so it really is a hit to middle-class workers.

Ms. OMAR. So essentially, we are asking people to work for less money.

Ms. SHIERHOLZ. Uh-huh.

Ms. OMAR. And society will eventually supplement these people because their children will probably need food, so they will go on SNAP programs. They will probably need housing assistance, and we will try to supplement that. They will probably need to go to college, and we will supplement that. And so, by not making sure that they are being compensated for the work and that we are not paying unlivable wage, we will ultimately be costing all of us more money.

Ms. SHIERHOLZ. I couldn't agree more.

Ms. OMAR. Thank you so much. I yield back.

Chairwoman ADAMS. The gentlelady from Georgia, Mrs. McBath, is recognized for 5 minutes.

Mrs. MCBATH. Thank you, Madame Chair.

I want to thank each and every one of you for your testimony today. Thank you for bearing with us. And I know that this question—or this has been discussed moments earlier, however, I would like to get a different perspective. So, Ms. Babcock-Stiner, I will probably be asking you most of the questions.

I would like to know, from your perspective, how does the failure to regularly update the salary level impact employees? And are automatic updates beneficial for employers?

Ms. BABCOCK-STINER. So, from an employer perspective, again, we do like regulatory predictability and to know what is coming and when it is coming. In the past, there have been large periods of time between the updates to the salary threshold, and then updates themselves have been widely varied as well.

So, from an employer perspective, it does make our life a little bit easier to know what is coming, as far as the automatic updates.

Mrs. MCBATH. Okay, thank you. Also, to Ms. Babcock-Stiner, how can nonprofits, institutes of higher education, and other employers with budget constraints respond to increases in salary thresholds?

Ms. BABCOCK-STINER. So, first of all, we have heard a lot about nonprofits today and people saying that, you know, they will be amongst the biggest victims here. And the reality is we do operate under a mission, so we think a little bit bigger than just one single bottom line. And so, the other thing to keep in mind is the pressures that are put on nonprofits, the solution here is not to take away worker protections; the solution is to increase the funding for nonprofits. And so, short of that, which doesn't seem to be happening, we do have a lot of options for shifting around job duties.

Shifting around job duties does not necessarily mean that the people who are exempt are going to be working significantly more hours. Shifting around job duties, you know, it gives us an opportunity to maybe give somebody a pay increase to maintain their exemption status, and they have some additional job duties now that go with it.

From an H.R. perspective, we don't like increasing salaries for the sole purpose of, you know, regulation basically, but when we can tie it to a small increase in job duties, it becomes a very effective tool, from our perspective.

Mrs. MCBATH. Thank you. One more question. When a salary level is too low, what practical effect does it have on the ability of employers to determine whether their workers are not eligible for overtime under the EAP exemptions?

Ms. BABCOCK-STINER. So, the salary threshold or anybody who is below that is automatically basically disqualified for the exempt status. And it is the number of people who are above the salary threshold that are really relevant from an H.R. perspective, because those are the people who I now have to examine each and every one of their job duties to figure out whether they are exempt or not.

So, when the threshold is so low, it becomes, you know, basically worthless as a tool to make those nonexempt determinations. And so now we have constantly shifting job duties every time job duties change, every time direct reports change. Even if a manager is not performing well, you actually have to reexamine their exemption status to see if they still qualify for it.

So, the lower the threshold, the more numbers there are people above it, which means I have to do a lot more work on the duties test.

Mrs. MCBATH. Thank you so much. I reserve the balance of my time to my colleague, Ms. Jayapal, from Washington.

Chairwoman ADAMS. Yes. Ms. Jayapal is recognized.

Ms. JAYAPAL. Thank you so much for yielding, Congresswoman McBath. I do have a full statement for my 5 minutes, but I have one question that I wanted to follow-up on.

Dr. Shierholz, Ms. McCutchen stated that the 2004 DOL doubled the percentile from 10 to 20 percent to respond to change in the test. Is this the full story?

Ms. SHIERHOLZ. No. In fact, in that rule, they are very clear that change from the 10 to 20 percentile was actually accounting for other changes in the data set that was used. There were technical changes in the data set. So that increase in the threshold accounted for that. It did not account for the change in the duties test. In fact, there is many places in there where they actually talk about how this is a test that is consistent with the weaker duties test.

Ms. JAYAPAL. Thank you. I thought that was important to clarify, Madame Chair.

Chairwoman ADAMS. Thank you. Ms. Jayapal, you are recognized for 5 minutes.

Ms. JAYAPAL. Great. Thank you.

Thank you all to our witnesses for being here today. Your time is really precious, and actually, that is what this hearing is about, whether we think people's time is precious. Whether this administration thinks that the time of middle-class people who work for a salary is precious enough to be protected. So, I appreciate you choosing to spend your time with us.

I want to share two stories with you from constituents in my district. Heather, who was a kitchen manager, says, I worked 60 to 90 hours every single week. They wanted me there at 10 a.m. every day for receiving and ordering and through our busiest kitchen hours, which lasted right up until closing at 1 a.m. After 9 months at that job, my body completely rebelled, and I had a full-on nervous breakdown.

Here is Annie's story who works in retail. I am often asked to stay later than my scheduled shift time, regardless of my state of health or my scheduled shift. I am told that I need to stay until the job is done, even if that means sleeping at the store.

These are two of the 8.2 million workers who would have had their precious time protected by the Obama Administration's carefully tailored overtime protections. Of those workers who would have gotten protections, 2.7 million are parents of children under 18. Anyone who is a parent can understand, and I am one myself, anyone who is a parent can understand how important and precious your time is and how important it is to protect and value that time.

Today, we know that the Trump DOL has refused to vigorously defend carefully reasoned overtime protections in court, instead, coming up with this weak, new overtime salaried threshold with no inflation adjustments that would leave many workers behind. And I am proud to say that, by contrast, my home state of Washington has just proposed very thoughtful salary overtime protections.

Under these State protections, by 2026, salaried workers won't be left out of overtime protections, unless they earn 2–1/2 times the minimum—the State minimum wage. As my Governor, Governor Inslee, put it, we know a strong economy goes hand in hand with a strong and well-supported work force. My State knows that people's time is precious and that they should be compensated fairly when they work so hard. And I don't understand why the Trump Department of Labor doesn't understand that.

Dr. Shierholz, you were the Chief Economist for the Department of Labor under President Obama. You contributed to the worker protections that the Trump DOL failed to defend. Under those protections, workers would have had to earn a higher salary of $47,476 before they could be considered to be even possibly exempt from overtime pay, and that salary level would be updated automatically every 3 years.

Why is it important to you, as the Chief Economist of the Department of Labor, to ensure that there would be those automatic adjustments?

Ms. SHIERHOLZ. When you don't have an automatic adjustment, the standard just immediately starts eroding the second it goes into effect. And as time passes, you get more and more—it erodes more and more. And if you look, between 1938 and 2004, the threshold was updated, on average, every 11 years. That is the kind of—those are the kind of gaps that are going passed over and over again where workers are just left behind.

Ms. JAYAPAL. And the Trump administration's proposal fails to include automatic updates, but it instead includes this weak sort of statement of intention to propose updates every 4 years. What would be the impact of that failure, the administration's failure, to include automatic increases in that final rule?

Ms. SHIERHOLZ. Yes. An unenforceable sort of vague commitment to notice and comment rulemaking every 4 years is just a tried and true recipe for huge stretches to go by without any update.

Ms. JAYAPAL. So, workers would just continue to be hurt. And even if the Department of Labor does adhere to its commitment, would it be enough to protect workers in the future?

Ms. SHIERHOLZ. Even if—In the very unlikely event they were able to up—

Ms. JAYAPAL. I always want to give the benefit of the doubt.

Ms. SHIERHOLZ. Okay. So, in that event, I still think that is too long. The Obama threshold, by doing it every 3 years, that pushed the boundaries of what is okay to let that erode over time. I mean, I wished it were a year—we did it every year. So, going 4 years is just pushing it too far.

Ms. JAYAPAL. And, Mr. Winebrake, Secretary Acosta publicly stated that the Department should consider automatic indexing, but Ms. McCutchen made it clear that management lawyers would sue the administration if indexing or cost of living adjustments were included.

Do you think that the Trump Department of Labor bowed to the threats of labor management side lawyers and lobbyists when it failed to include that automatic increase mechanism in its proposal?

Mr. WINEBRAKE. Well, I don't know what the motivation was behind the administration's conduct, but I will say that at the Fifth Circuit Court of Appeals in the appeal to the district court's decision, the Department of Labor totally changed its litigation position. In the opening appellate brief, it said that indexing was legal. And then in the reply brief filed by the Trump administration, it dropped that argument.

It is very troubling as a lawyer, and I think we should all be troubled, those of who us just care about the government as an institution, when in the middle of a litigation, a governmental agency literally switches its litigation position in the middle of a case. So, I don't know the motivation behind that switch, but I know that as a lawyer, I am troubled by the kind of instability that is created when we can't rely on our government to take a consistent litigation position and carry it through. That is what is troubling to me.

Ms. JAYAPAL. Thank you for that.

And, Madam Chair, before I yield back, could I have unanimous consent to introduce into the record Governor Inslee's comment letter on the 2019 NPRM, and also a Bloomberg News article that quotes Ms. McCutchen to the effect of management lawyers suing the administration?

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

May 21, 2019

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

Dear Secretary Acosta:

On behalf of the state of Washington, I write to express my opposition to the U.S. Department of Labor's proposed overtime rules ("Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees").

While I wholeheartedly support increasing the salary threshold level for the Executive, Administrative, Professional (EAP) exemption, thereby extending overtime protections to millions of American workers, the Trump Administration's proposal is grossly insufficient to protect workers' overtime rights and risks undermining the purpose of the Fair Labor Standards Act (FLSA). On behalf of the more than 3.5 million total workers in Washington State, I cannot support the erosion of workers' fundamental right to overtime. I urge you to withdraw these rules and adopt a salary threshold that is sufficiently protective of workers who face potential misclassification and exploitation in the workforce. Additionally, I have serious concerns with the proposal's failure to provide for automatic updates to adjust the salary threshold to maintain its effectiveness, and urge you to ensure any final rule includes such a process to prevent future erosion of overtime protections.

By almost any measure, Americans are working harder and longer than ever before. Even though worker productivity is much higher than in the 1970s, workers in similar positions today are likely earning less than they were 50 years ago, when adjusted for inflation. Millions of workers put in more than 40 hours every week but do not see a penny of overtime in their paychecks.

Federal overtime protections must ensure that workers are fairly compensated when they work more than 40 hours in a given week — time they could otherwise be spending with their families and in their communities. This basic concept is at the heart of Congress's intent when it enacted the FLSA. The law was explicitly designed to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[1] Overtime protections under the FLSA apply to most workers, but certain "white-collar workers" are exempt.

The exemption from wage and hour protections was intended only for workers employed in a bona fide EAP capacity, recognizing that white-collar workers are set apart from non-exempt workers because they earn salaries well above minimum wage, receive fringe benefits, and have greater job security and opportunities for advancement.[2] The importance of this distinction cannot be overstated. These workers are exempt because they are deemed to have the bargaining power to protect themselves from insufficient compensation for hours worked. The salary threshold, which has not been updated in nearly 15 years, fails to adequately identify legitimately exempt EAP workers. As a result, millions of American workers are subject to potential misclassification as EAP and unfairly denied the overtime protections they deserve.

Under the proposed rules, only those workers earning less than $35,308 annually are guaranteed overtime protections. This low level only serves to perpetuate stagnant wages in America and fails to prevent worker misclassification. For states like Washington with higher incomes and a robust economy, this is especially concerning. A simple and effective solution is to adopt a salary threshold high enough to protect workers who are most likely to face this type of misclassification.

As you know, the determination of EAP status has historically been based on three test criteria: (1) the "salary basis test," meaning the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in their work; (2) the "salary level test," meaning the amount of salary paid must meet a minimum specified amount; and (3) the "duties test," meaning the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations. Although salary level has long been regarded as the best measure for distinguishing bona fide EAP employees from workers who should be covered by FLSA protections, essentially "drawing a line" between exempt and non-exempt employees, the Department has historically recognized the salary level works in tandem with the duties tests.

These rules have not been successfully updated since 2004, when the Department moved to a single test for all salary ranges, modified the duties test, adopted a flawed methodology, and set the salary threshold too low. Like the rules being considered today, the 2004 update also failed to provide for regular adjustments to the salary threshold to maintain its effectiveness — exacerbating the erosion of overtime protections over time and leaving millions without the pay they deserve. In 2016, the Department recognized the inadequacy of those rules and took meaningful action to mitigate the consequences, issuing rules that would have guaranteed overtime pay for all workers earning less than $47,476 and providing for automatic updates to the salary threshold. Importantly, the 2016 update would have simplified the process for determining a worker's EAP status by ensuring anyone working under the salary threshold is

[1] 29 U.S.C. § 202(a).
[2] 81 Fed. Reg. 32,391, 32,392 (May 23, 2016).

eligible for overtime, regardless of the duties they perform. Unfortunately, these rules were blocked from taking effect.

The Trump Administration's proposal falls far short of the 2016 rules and the overtime protections our workers need. By establishing a salary threshold well below the 2016 rules without modifications to the duties test, it fails to guard against abuse of the very workers that FLSA was enacted to protect. Additionally, it does not adequately protect against misclassification for millions of salaried white-collar workers who should be entitled to overtime, regardless of salary, because they do not meet the duties test. This misclassification, whether intentional wage theft or not, denies these workers the compensation they are owed for hours worked above the 40-hour workweek, harming their families and our economy.

Modernizing our federal overtime rules is essential. However, this proposal is woefully inadequate and misses the mark for our nation's workers. It leaves behind more than 3 million employees who would have been entitled to overtime pay under the Obama Administration's rules, depriving them and their families of the labor protections and fair compensation they deserve. It also fails to ensure that the rules are updated automatically to prevent erosion and maintain protections for future generations. As a nation, we can and must do better.

I urge you to withdraw this flawed proposal and adopt overtime rules that truly reflect and honor the dignity of American workers.

Very truly yours,

Jay Inslee
Governor

CC: Melissa Smith, Director of Regulations, Wage and Hour Division
The Hon. Patty Murray, Ranking Member, Senate HELP Committee
The Hon. Pramila Jayapal, U.S. Representative, House Education and Labor Committee
The Hon. Kim Schrier, U.S. Representative, House Education and Labor Committee

Bloomberg Law · Daily Labor Report®

Punching In: Legal Drama for Labor Department

By Chris Opfer and Jaclyn Diaz Posted Feb. 11, 2019, 6:00 AM

Monday morning musings for workplace watchers

Lone Star State Overtime Showdown | Oracle War of Words | New NLRB Name Surfaces

Chris Opfer: Jaclyn and I didn't set out to be crime reporters, but the new Epstein-Acosta investigation had us going behind the scenes at the Justice Department last week. The probe into what some call a "sweetheart deal" for accused pedophile Jeffrey Epstein means questions about Labor Secretary Alex Acosta's role as lead prosecutor in the 10-year-old case aren't going away anytime soon. There's no indication, however, that the inquiry is immediately threatening Acosta's Cabinet seat.

Meanwhile, there **could be some new legal drama for the Labor Department when it rolls out a much-anticipated rule to update federal overtime pay** requirements. The DOL is widely expected to bump the OT threshold to somewhere in the $33,000 range from the current $24,000. This threshold is the salary level under which workers are automatically entitled to time-and-a-half pay for all hours after 40 per week. Business advocates are once again saying they're ready to sue if the department also decides to include a provision to automatically increase the threshold every few years or staggers it based on regional cost of living differences.

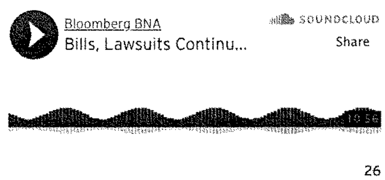
"I can tell you here today that if the DOL somehow ignores us, they will be sued again by the business community to challenge their authority to do that," **Littler Mendelson attorney Tammy McCutchen** told a group of management lawyers last week about possible indexing and cost of living tweaks. "And guess what? We'll bring it in Texas again."

The Chamber of Commerce, the National Federation of Independent Business, and other groups sued the Labor Department in a Texas federal court two years ago to stop an Obama administration rule that would have kicked the overtime threshold to nearly $48,000. The groups were mostly concerned about the broad expansion of time-and-a-half pay liability, but also none too happy with an auto-indexing provision that would have occasionally increased the threshold to track inflation.

Acosta has said publicly that the department should at least consider indexing as a form of regulatory efficiency that would allow for overtime updates without having to go through the extensive rulemaking process. He has also signaled that he's at least aware of the argument that regional threshold differences could address concerns about the impact of new requirements on businesses in areas with lower living costs.

The DOL probably isn't going to include either feature in its proposed overtime rule, but the department may ask the public to weigh in on whether those provisions should be part of the final regulation.

Hassan Kanu sat down with Adam Klein from Outten & Golden to talk about another closely watched employment issue—bans on asking job applicants about salary history—in this week's Punching In podcast.



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Jaclyn Diaz: Speaking of lawsuits and DOL: The continuing **legal fight between the department and Oracle** is showing no sign of slowing down, and another problem is coming down the pike for the tech giant. On Friday, New York City Comptroller Scott Stringer called for the Securities and Exchange Commission to investigate whether Oracle misled investors about alleged pay bias.

In case you need a refresher on where this all started: The DOL's Office of Federal Contract Compliance Programs is claiming Oracle paid women and minority workers less than other employees, steering them into lower-level jobs and imposing an "extreme preference" for immigrant visa holders. The OFCCP alleges the discrimination resulted in a loss of about $400 million in wages for these workers, according to Paige Smith's dogged reporting on the issue. This all stems from a 2014 audit the OFCCP did on Oracle's pay data.

The legal dispute recently descended into a war of words with a snippy filing by the company. It alleged that the DOL engaged in secret, improper agreements with private plaintiffs' attorneys to bring hiring and pay discrimination claims against the company. Oracle then asked an administrative law judge to reject the department's request to file an amended complaint in a case stemming from the 2014 pay data audit. Now we must await the DOL's brief in response, which should be coming sometime this week.

I wonder if **this Oracle case will serve as the canary in the coal mine for other tech companies** facing OFCCP pay and hiring bias complaints. The federal contractor watchdog has filed complaints against major names like Google, Microsoft, and Dell. Is it possible that we'll see this kind of yearslong controversy involving other contractors?

Chris Opfer: Now that former **National Labor Relations Board Member Mark Pearce** has removed himself from consideration for the board's open Democratic seat, the question is who will take his place.

Discussions are in the very early stages and there's no sign that the White House is ready to announce a nomination anytime soon. Still, one person said to be in the mix is **SEIU 32BJ General Counsel David Prouty.** The former UNITE HERE lawyer recently joined the SEIU local after a stint with the Major League Baseball Players Association.

Prouty has one thing going for him in terms of potentially getting enough Senate Republican support to be confirmed: His name isn't Mark Pearce. The business community has been in an all-out blitz in recent months to try to keep Pearce from returning to the board. They're likely to continue to urge the White House and Senate to keep the seat open until around the time Lauren McFerran's (D) term ends in December, when both Democrat seats could be filled at the same time as potentially part of a larger deal.

We're punching out. *Daily Labor Report* subscribers can check in during the week for updates. In the meantime, feel free to reach out to us on any and all labor and employment news: copfer@bloomberglaw.com, and jdiaz@bloomberglaw.com or on Twitter: @ChrisOpfer and @JaclynmDiaz.

See you back here next Monday.

To contact the reporter on this story: Chris Opfer in New York at copfer@bloomberglaw.com

Ms. JAYAPAL. Thank you.

Chairwoman ADAMS. I want to recognize the Chair of the Education and—oh, I am sorry, Mr. DeSaulnier.

Mr. DeSaulnier, you are recognized for 5 minutes. I apologize to the Chair.

Mr. DESAULNIER. That is quite all right. I would have taken second place to the Chair.

Well, I want to thank you all for being here.

I also wanted to ask unanimous consent to submit for the record a letter from State attorney generals opposing the Trump administration's—

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
LETITIA JAMES
ATTORNEY GENERAL

STATE OF PENNSYLVANIA
OFFICE OF THE ATTORNEY GENERAL
JOSH SHAPIRO
ATTORNEY GENERAL

May 21, 2019

By Electronic Filing (http://www.regulations.gov)
The Honorable Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Melissa Smith
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking (RIN: 1235-AA20)
Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of New York, Pennsylvania, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Rhode Island, Virginia, Washington and the District of Columbia in opposition to the proposed rulemaking by the U.S. Department of Labor ("DOL" or the "Department") that would weaken significantly the overtime protections for American workers by expanding the provisions exempting certain executive, administrative, and professional ("EAP") employees from the protections of the Fair Labor Standards Act (the "FLSA"). *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10,900 (Mar. 22, 2019) (the "NPRM" or "Proposed Rule").

Based on our collective experience, the Proposed Rule will leave millions of workers in our states without the federal overtime protections that Congress intended to extend to them under the FLSA. These workers will be vulnerable to EAP misclassification, which remains a pernicious and growing problem in our states. The Proposed Rule's weakening of the bright-line salary level test will make labor law enforcement in our states significantly more difficult and result in an increase in unchecked violations of the FLSA by employers who misclassify workers as EAP employees.

The DOL recognized each of these issues when it last revised the EAP exemptions in 2016, specifically rejecting the approach taken by the Proposed Rule and instead setting a higher salary level that would automatically update every three years. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,393 (May 23, 2016) (the "2016 Final Rule"). As discussed further below, by disregarding its own previous findings and adopting without any reasoned explanation an approach that it specifically rejected in a prior rulemaking, the DOL's adoption of the Proposed Rule would raise serious concerns under the Administrative Procedure Act.

I. The EAP Exemption's Regulatory History

Congress enacted the FLSA in 1938 to "correct and as rapidly as practicable to eliminate . . . conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Fair Labor Standards Act, 29 U.S.C. § 202 (1938). Workers in our states rely on the FLSA's protections, including the right to overtime pay, to discourage employers from requiring them to work extremely long workweeks, compensate them for the burden of such workweeks, and encourage employers to hire more workers and spread employment throughout the workforce. *See* 81 Fed. Reg. at 32,391; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942).

Congress exempted from the FLSA's overtime protections, among others, those in "bona fide executive, administrative, or professional" positions only because it viewed such "white collar" employees to be well-compensated enough and to exert sufficient bargaining power to render the FLSA's protections unnecessary. *See* 81 Fed. Reg. at 32,406; 29 U.S.C. § 213(a)(1). Unlike non-exempt employees, bona fide white collar employees generally have the ability to decide how to get their work done in whatever hours or time is required, and have elevated status due to their relatively high salaries, fringe benefits, job security, and opportunities for advancement. *See* 81 Fed. Reg. at 32,449.

Historically, DOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive, administrative, or professional in nature (the "duties test"). *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 C.F.R. Part 541. The Department "has always recognized that the salary level test works in tandem with the duties tests to identify bona fide EAP employees." 81 Fed. Reg. at 32,400. Since 1949, the Department's longstanding view has been that "the salary paid to an employee is the 'best single test' of exempt status" and that setting the salary level "too low" would prevent the salary test from being effective. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,165 (Apr. 23,

2004) (the "2004 Final Rule"). Despite this view, DOL has updated the salary level infrequently—only eight times since it was first set in 1938.

A. The 2004 Regulations

In 2004, DOL issued regulations updating the salary level to $455 per week (or $23,660 for a full-year worker), which corresponded to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region. *See* 69 Fed. Reg. at 22,126. The 2004 Final Rule also weakened the duties test, making the salary level test even more important for protecting workers against misclassification. *Id.* at 22,122-23. While DOL acknowledged that it had allowed too much time to elapse since the last update of the salary level—nearly three decades prior—the 2004 Final Rule did not provide for automatic updating, instead resolving only to perform updates "on a more regular basis." *Id.* at 22,171-72.

B. The 2016 Regulations and Subsequent Litigation

In 2016, DOL revisited the salary level, conducting an exhaustive review of the impacts of the 2004 Final Rule and considering detailed economic research as well as over 270,000 public comments. Based on this voluminous administrative record, DOL concluded that the 2004 Final Rule had set the salary level so low that it was inconsistent with the Department's historical practice and the goals of the FLSA. *See* 81 Fed. Reg. at 32,392, 32,410. The Department found significant the RAND Corporation's 2015 survey, which determined that EAP misclassification improperly deprived approximately 11.5 percent of salaried workers of overtime protection. *See* 81 Fed. Reg. 32,405, 32,484 (citing S. Rohwedder & J.B. Wenger, *The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage*, RAND Labor and Population (2015)). Accordingly, DOL found that 1.8 million salaried workers were misclassified as exempt. 81 Fed. Reg. at 32,464.

DOL determined that the low salary level, combined with the elimination of the more rigorous duties test, had exposed millions of workers that Congress had intended the FLSA to protect to potential EAP misclassification. *See* 81 Fed. Reg. at 32,403-04. DOL concluded that "[l]owering the salary threshold below the amount set in this Final Rule would result in a salary level that is inappropriate for traditionally nonexempt workers in high wage areas, especially when paired with the less rigorous standard duties test." *Id.* at 32,410.

In order to remedy the problems with the 2004 salary level, DOL set the standard salary level for exempt EAP employees at the 40th percentile of weekly earnings of full-time salaried workers from the lowest-wage census region ($913 per week, or $47,476 annually for a full-year worker). 81 Fed. Reg. at 32,393. This threshold addressed the concerns of many stakeholders by restraining misclassification, while still accounting for regional variation in wages. *Id.* at 32,408, 32,411-12. By raising the salary level from the 20th percentile to the 40th percentile, the 2016 Final Rule reduced the risk of EAP misclassification for over 8 million workers. *See* 81 Fed. Reg. at 32,405.

In addition to changing the salary level, DOL also found that it had failed to follow through on its resolution in 2004 to perform updates on a more regular basis. *See* 81 Fed. Reg. at 32,435. Since 1975, the salary level had only been updated once. *See* 81 Fed. Reg. at 32,395. By 2014, the overtime threshold had eroded by 57.5 percent from its peak value in 1970, which was $1,071 per week or $55,692 per year in real 2013 dollars. *See* Hilary Wething & Ross Eisenbrey, *The Overtime Threshold Has Eroded 57.5 Percent from Its Peak Value*, Economic Policy Institute (Mar. 19, 2014), https://www.epi.org/publication/overtime-threshold-eroded-57-5-percent-peak/. The 2016 Final Rule thus created a mechanism for updating the salary level automatically every three years. *See* 81 Fed. Reg. at 32,438.

Before the 2016 Final Rule went into effect, it was challenged in a federal district court, resulting in a nationwide injunction based on the court's finding, discussed below, that the 2016 Final Rule was not consistent with congressional intent. *See Nevada v. DOL*, 218 F. Supp. 3d 520, 531-34 (E.D. Tex. 2016); *Nevada v. DOL*, 275 F. Supp. 3d 795, 804-07 (E.D. Tex. 2017). The appeal of the decision is currently being held in abeyance pending the conclusion of the instant rulemaking process. *See* 84 Fed. Reg. at 10,901. Because the 2016 update never went into effect, the erosion of the overtime threshold continues.

C. The Proposed Rulemaking

In light of the *Nevada* court's decision, DOL issued a Request for Information ("RFI") seeking input on potential revisions to the 2016 Final Rule. *See* Request for Information, 82 Fed. Reg. 34,616 (July 26, 2017). Over 200,000 public comments were submitted in response to the RFI, including one by the states of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington. (*See* Exhibit A attached.) The states' comment letter explained that a meaningful salary level test is essential to effective state labor law enforcement against EAP misclassification. (Ex. A at 5-6, 8-9.) The states' comment letter further explained why the *Nevada* court's decision was erroneous, the concerns raised by the district court were without merit, and the 2016 Final Rule was consistent with congressional intent. (*Id.* at 7-8.)

Now, in apparent disregard of the concerns raised in the states' comment letter and of its own prior findings and historical practice, DOL has issued this NPRM proposing to rescind the 2016 Final Rule and instead to set the salary level at $679 per week (or $35,308 for a full-year worker). In other words, the NPRM would revert the salary level to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region—a standard specifically rejected by the 2016 Final Rule. In addition, the NPRM proposes to eliminate automatic updating of the salary level, instead reverting to a non-binding commitment to update the salary level more frequently than it has done in the past—the same commitment DOL has failed to meet for decades. *See* 84 Fed. Reg. at 10,953 (expressing the intent to update the salary level every four years).

As discussed below, if DOL implements the regulations proposed in the NPRM, it will significantly weaken federal overtime protections and cause immediate harm to workers in our states. The Proposed Rule would expose millions of workers in our states—including minimum-wage and median-wage workers who lack anything resembling the bargaining power and compensation typical of "white collar" workers—to EAP misclassification, a practice that remains as pervasive in our states, if not more so, as it was in 2016.

II. The Proposed Rule Will Harm Workers in Our States

A. The Proposed Rule Disregards the Continuing Danger of Misclassification in Our States

The undersigned attorneys general have an interest in protecting the workers in our states, advising state labor enforcement agencies, and ensuring that labor laws are enforced. Many signatories have extensive experience ensuring proper payment of wages, including minimum wage and overtime. We all have a shared interest in the well-being of workers nationwide, and multiple signatory state attorneys general have authority to enforce both state labor laws and the FLSA. Based on our collective experience, DOL's proposed expansion of the EAP exemption beyond the scope that was set by the 2016 Final Rule will result in more workers in our states being subjected to EAP misclassification and unlawful exclusion from minimum wage and overtime protections under the FLSA.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. Under the salary test proposed by the NPRM, many of these workers will be subject to misclassification as EAP exempt. From experience, we know that large categories of employees can be misclassified as EAP exempt, such as crew leaders and supervisors who work alongside janitorial, car wash, retail, construction, and fast-food workers (executive); clerical and office workers (administrative); and medical and dental technicians, film and television production assistants, and mid-level information technology employees (professional).

DOL statistics are consistent with our experience, indicating high rates of misclassification of first-line supervisors in food preparation and service (41%), sales (34%), landscaping (26%), construction and extraction (19%), and other occupational categories. *See* 81 Fed. Reg. at 32,464 tbl. 10. This is particularly true in large cities, where higher median wage rates result in higher wages for these non-EAP employees than suburban and rural workers performing the same jobs. *See id.* at 32,409.

More generally, state attorneys general see workers who make weekly wages above $679—including workers in the janitorial, waste processing, transportation and delivery, elder care, and food service occupations—filing complaints at high rates alleging exploitative labor practices, including failure to pay overtime. The fact that these workers are paid above minimum wage does not mean they are free from exploitation; to the contrary, such workers often come to our offices precisely because they lack the financial resources and bargaining power that are hallmarks of bona fide white-collar employees.

A salary level of $679 per week would make it more difficult to enforce labor laws in our states than the threshold provided by the 2016 Final Rule. As a result, misclassification would be even more pervasive, due to employer and employee uncertainty, as well as intentional abuse by employers. In the absence of a meaningful salary level test, labor law enforcers must rely solely on the multifactorial duties test that is more susceptible to exploitation. The fact-specific determination required by the duties test forces labor law enforcers to spend valuable resources gathering facts—interviewing workers, analyzing documents, and taking testimony—in order to assess whether employees were properly classified. If labor law enforcers determine that a worker should not have been EAP exempt, they then often must engage in a resource-intensive litigation in which these issues of fact will need to be determined and proven, even in clear-cut cases of misclassification.

Since its adoption, workers in many of our states have relied on the FLSA as their primary guarantee for receiving overtime pay. When the salary level is set too low, workers in our states suffer from lower incomes and longer hours. States have a limited ability to remedy this issue for our constituents due to resource constraints and reliance on federal authorities to set a guiding example, as discussed below. This is why the federal government must provide the level of protection contemplated by Congress in the FLSA.

B. The Proposed Rule's Salary Level Exempts Far More Than "White Collar" Employees

As discussed above, unlike the workers that the overtime laws seek to protect, the relatively high status, compensation, and bargaining power of bona fide white collar employees enables them to decide how to get their work done in whatever hours or time is required. *See* 81 Fed. Reg. at 32,400 (citing 1940 DOL Report by Harold Stein on EAP exemption); Nat'l Emp. Law Project, *The Case for Reforming Federal Overtime Rules* (Dec. 2014), *available at* http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf. The danger of defining the EAP exemption too broadly is that, in addition to applying to bona fide EAP employees, it will sweep up workers who are misclassified as EAP—whether inadvertently or in an attempt to evade labor laws—depriving them of the FLSA's protections.

Nineteen states, including many of the signatories of this comment, do not have any overtime laws, leaving workers in those states entirely reliant on the federal standards. *See* National Conference of State Legislatures, Overtime, Breaks & Wage and Hour Violations (March 21, 2019), http://www.ncsl.org/research/labor-and-employment/overtime-breaks-wage-and-hour-violations.aspx. Other states among us have their own overtime regulations but either cite to the FLSA definitions for EAP exemptions[1] or have lower salary levels than the federal standard.[2] For

[1] States that have explicitly tied their EAP exemptions to the FLSA include Alaska, Arkansas, Illinois, Maryland, Massachusetts, Nevada, New Jersey, and Ohio. *See, e.g.*, AS § 23.10.055(c); A.C.A. § 11-4-211(d); 820 Ill. Comp. Stat. § 105/4a(2)(E); COMAR 09.12.41.01, 09.12.41.05, and 09.12.41.17; 454 CMR 27.03(3); NAC 608; N.J.A.C. 12:56-7.2 (adopting the federal definitions for the EAP exemption in New Jersey); Ohio R.C. § 4111.03(A).

[2] Many states have set their own salary threshold, including Connecticut, Hawaii, Indiana, Kansas, Kentucky, Michigan, Minnesota, Pennsylvania, Rhode Island, and Washington, but have set it lower than or at the current federal standard of $455 per week. *See, e.g.*, Regs. Con. State Agencies

these states, the federal definitions in this Proposed Rule would become either the definition incorporated by the state or the strictest overtime standard and, therefore, the primary protection for workers. Only a few states have enacted salary levels above the federal standards.[3]

States risk creating uneven standards for employment and competition with neighboring states if the federal government does not level the playing field with a sufficiently high salary level that all must follow. Therefore, the inadequate federal overtime threshold currently controls in all but very few of our states, and workers in our states rely on an increase to avert a nationwide race to the bottom.

Some states have faced significant resistance to the idea of raising the salary level above the federal standard to avoid such competition. In Pennsylvania, for example, the Department of Labor and Industry attempted to align its duties test with the 2016 Final Rule and raise its overtime thresholds above the federal level in 2018. *See* Department of Labor & Industry, Proposed Amendment to 34 Pa. Code Chapter 231, IRRC No. 3202, 2 (June 12, 2018), http://www.irrc.state.pa.us/docs/3202/AGENCY/3202PRO.pdf. Many suggested that the Department should avoid updating the regulation until this federal rulemaking on the EAP exemption threshold was finalized over concerns that the "state regulations and the federal regulations will once again be misaligned." IRRC, Comments on Department of Labor & Industry Regulation No. 12-106, IRRC No. 3202, 5, 7 (Sept. 21, 2018), http://www.irrc.state.pa.us/docs/3202/IRRC/3202%2009-21-18%20 COMMENTS.pdf. Some commenters suggested legislation requiring alignment between the federal and state overtime definition to avoid interstate competition. *Id.* at 2.

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§ 31-60-14 (setting the lowest threshold at $400 per week); Haw. Admin. Rules §§ 12-20-2, 12-20-03, and 12-20-05 (setting the threshold at not less than $210 per week); Ind. Code § 22-2-2-3 (stating the threshold as $150 per week); Kan. Admin. Reg. § 49-30-1(i)-(k) (including thresholds of $155 per week and $170 per week); 803 Ky. Admin. Regs. 1:070 (setting the threshold at $455 weekly); Mich. Admin. Code R 408.701 (setting the threshold at $250 per week); Minnesota Rules 5200.0190-5200.0210 (setting lower thresholds at $155 and $170 weekly and the higher salary threshold set at $250 weekly); 34 Pa. Code §§ 231.82-231.84 (setting thresholds at $155 per week and $170 per week); R.I. Gen. Laws § 28-12-4.3(a)(4) (stating the threshold is $200 per week); WAC § 296-128-510 to § 296-128-530 (setting lowest thresholds at $155 per week and $170 per week).

[3] *See, e.g.,* Cal. Lab. Code § 515(a) (defining EAP employees in California with a salary threshold of "no less than two times the state minimum wage for full-time employment," which would currently amount to an annual threshold of $45,760); 25 M.R.S. § 663(3)(K) (defining EAP workers in Maine as anyone who has regular compensation that exceeds 3,000 times the State's minimum hourly wage, which is currently $11 per hour or $33,000 per year, or the federal rate, whichever is higher); and 12 NYCRR 142-2.14 (setting rates for the overtime threshold at varying levels throughout the State of New York for executive and administrative employees, but with none lower than $885 per week ($46,020 annually)).

An ongoing Washington State rulemaking to update its state salary level has similarly faced resistance. The current effective federal salary level is less than the minimum wage for full time Washington workers, and Washington's own 40-year old state salary levels are even lower. The Washington State Department of Labor and Industries has nonetheless been urged for the past several years not to engage in a rulemaking updating its state threshold to meet current economic realities for Washington workers, but rather to wait for the federal DOL to update its own levels. Since the Department initiated the rulemaking, stakeholders have continued to resist, arguing that differing from the federal salary level increases confusion and burden for employees and employers. Other states likely face similar opposition.

Additionally, the NPRM sets the salary level far lower than is justified based on the statutory purpose for overtime and the EAP exemptions. The Department's proposed weekly salary level of $679, which corresponds to an annual salary of $35,308, is dramatically below what general earnings data suggest would be appropriate—not to mention more specialized employment law and labor economics analyses—for typical executive, administrator, or professional compensation. For perspective, a household income of $35,308 would put a household in approximately the bottom 30 percent of all U.S. household incomes. *See* 2013-2017 American Community Survey 5-Year Estimates, 2017, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

The salary level proposed in the NPRM equates to an hourly wage of only $14 for a worker who performs 50 hours of work per week, a modest amount of overtime in most of our states for many of the workers at risk of misclassification. Indeed, several states among us will have *minimum wages* that are higher than $14 per hour before the proposed overtime threshold would be adjusted again. *See* National Conference of State Legislatures, State Minimum Wages | 2019 Minimum Wage by State (Jan. 7, 2019) (showing states including California, D.C., Illinois, Maryland, Massachusetts, New Jersey, and New York with plans for the minimum wage to be $14 per hour or more in the next four years), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.[4]

In those states, the salary level will be meaningless because all full-time, salaried workers will earn more. Bona fide exempt employees should have "*[h]igher base pay*, greater fringe benefits, improved promotion potential and greater job security . . . which set them apart from non-EAP employees." Report of the Minimum Wage Study Commission, v.4, p. 236 (June 1981) (emphasis added). Workers who earn the local minimum wage, or even the median wage, are certainly not so highly compensated that Congress contemplated exempting them from overtime protections. *See id.* at 240 ("EAP salaries are usually well above the minimum wage . . . ."). In

[4] While Pennsylvania's minimum wage is the same as the federal minimum wage, the median hourly wage in Pennsylvania was $15.00 in 2018. *See* Analysis of the Pennsylvania Minimum Wage, Minimum Wage Advisory Board, Pennsylvania Department of Labor & Industry, 3 (March 2019), https://www.workstats.dli.pa.gov/Documents/Minimum%20Wage%20Reports/Minimum%20Wage%20Report%202019.pdf.

fact, from 1950-1975, the salary level roughly corresponded to twice the minimum wage. *Id.* at 236.

The salary level proposed in the NPRM is merely $10,000 over the poverty line for a family of four. *See* Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1167 (Feb. 1, 2019). It is also about $11,750 below the annual median earnings of full-time workers in the United States, or approximately $220 less per week. *See* Bureau of Labor Statistics, Usual Weekly Earnings of Wage and Salary Workers: First Quarter 2019 (April 16, 2019), https://www.bls.gov/news.release/pdf/wkyeng.pdf. For workers that hold at least a bachelor's degree—which many consider to be a requirement for a "professional" employee—the national median weekly earnings are $1,350, approximately twice the proposed salary threshold. *Id.*; *see also* 29 C.F.R. § 541.300 (stating that a professional requires "knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction.").[5]

Workers in our states who earn only the proposed salary threshold struggle to afford basic housing, and cannot be considered "white collar." For instance, to afford a modest two-bedroom apartment in a non-urban area, a Pennsylvania worker would need to earn a salary of $40,616 per year, which is higher than the threshold proposed by the DOL. *See* Out of Reach: The High Cost of Housing, National Low Income Housing Coalition 2018, 201, https://reports.nlihc.org/sites/default/files/ oor/OOR_2018.pdf. According to its proposal, the Department believes workers in our states who can barely afford decent housing and other necessities could be "white collar," which is inconsistent with the economic realities of working and living in the United States.

Moreover, in the experience of the signatory states, the duties test has proven woefully inadequate for protecting workers that earn more than the salary threshold from EAP misclassification. This fact-intensive inquiry requires significant investigative resources and case-by-case adjudication. Our enforcement efforts focus on curbing wage theft, including its two most common forms: failure to pay overtime and misclassification. *See* Philip Mattera and Adam Shah, Grand Theft Paycheck: the Large Corporations Shortchanging Their Workers' Wages, 15 (Good Jobs First and Jobs with Justice Education Fund, June 2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf. But the proposed threshold is low enough to encompass many non-exempt workers, as discussed above, thwarting its purpose as a bright line rule that creates a presumption of bona fide exemption.

Understanding the limitations of our respective state enforcement efforts, businesses may choose to pay workers slightly more than the salary threshold, and assign minimal exempt duties,

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[5] Approximately one in six workers in Pennsylvania are classified as "Office and Administrative Support," and earn even less; their mean annual wage is $38,190 or about $734 per week. May 2018 State Occupational Employment and Wage Estimates Pennsylvania, Bureau of Labor Statistics, https://www.bls.gov/oes/current/oes_pa.htm. In contrast, the average income in "management occupations" is $125,800. *Id.* The mean annual wage is $50,030, well above the proposed threshold. *Id.*

in order to pass a superficial inquiry. *Id.* at 6. We have seen these practices firsthand, and litigation has been on the rise in our states to ensure compliance with the law and to level the field for law-abiding companies. *Id.* at 17, 27-43. These evasive tactics rob workers of their earned overtime, and impose significant costs on workers and our states in order to enforce the law. Such a low threshold also disadvantages employers who comply with the FLSA. With a salary level that more closely corresponds to salaries of bona fide EAP workers, businesses are less likely to try to skirt the regulations because it is easier to identify violations.

C. The Proposed Rule's Abandonment of Automatic Updating Will Increase Misclassification

The NPRM proposes eliminating the automatic updating mechanism that the 2016 Final Rule incorporated. Automatic updating ensures the salary threshold is tied to relevant economic indicators so that it continues to serve as a bright line between presumptively exempt and nonexempt employees for businesses and workers. Eliminating this mechanism would harm workers by increasing the risk of misclassification as the value of the threshold erodes over time, and require labor law enforcers to engage in more invasive and fact-intensive duties inquiries. As evidenced by the states' experience over the past 50 years, the salary threshold must account for changing employment and compensation conditions, as well as inflation, and the Department has failed to credibly commit itself to regular reevaluations without automatic updating.

The Department's failure to update the threshold sufficiently often to keep the value from eroding has had a negative effect on the ability of our states to protect workers. States enforcing overtime protections must expend significant resources to determine the duties of workers above the threshold as its value drops. As outlined above, many states either explicitly base their definitions of EAP workers on the federal regulations, or they have adopted separate thresholds that are similarly outdated and lower than the current federal standard. For states that will not raise their own salary levels, automatic updating of the federal salary level would ameliorate the problem of outdated state-law thresholds that do not adequately protect workers.

Our experience indicates, and DOL recognizes, that misclassification of workers occurs more often when states enforce under a regime with a threshold that is outdated. *See* 81 Fed. Reg. at 32,402 (citing a 1958 report where DOL recognized the same correlation). An estimated 8.2 million fewer workers will receive overtime or "strengthened protections" against misclassification from the Proposed Rule as compared with the 2016 Final Rule and, because of the elimination of the indexing provision, that number will grow to 11.5 million by 2029. *See* Heidi Shierholz, *More than Eight Million Workers Will be Left Behind by the Trump Overtime Proposal*, Economic Policy Institute (Apr. 8, 2019), https://www.epi.org/publication/trump-overtime-proposal-april-update/. This uptick in misclassification between updates will require expending significant resources to combat.

Without the automatic updating provision, the proposed threshold will quickly lose value and become less effective as a presumptive division between exempt and non-exempt workers. Because the majority of states tie their overtime provisions to the federal standards or have lower thresholds, they will continue to enforce a threshold that is inadequate. A threshold that remains unchanged for nearly 30 years loses much of its value. Automatic updating would conserve

Department and state resources, and the Department could continue to revisit periodically the effectiveness of the salary level. The signatory states find a promise to consider updates every four years insufficient protection for workers who are at risk of misclassification in lieu of automatic updating, especially in light of the Department's historical failure to fulfill that promise.

III. The Proposed Rule Would Violate the Administrative Procedure Act.

When a challenge to an agency action is brought under the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The APA requires an agency to engage in "reasoned decisionmaking" that rests on a "logical and rational" "consideration of the relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). DOL has not done so here, and the Proposed Rule would be arbitrary and capricious because it irrationally restores excessively low salary levels, relies on flawed legal analysis, and improperly removes automatic updating.

A. Restoring Excessively Low Salary Levels Is Arbitrary and Capricious

The proposal to return to the 20th percentile minimum salary level is not based on any rational connection to the facts before the agency as described in the Proposed Rule. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (when an "agency has failed to offer the rational connection between facts and judgment," its actions do not "pass muster under the arbitrary and capricious standard"). Although DOL continues to acknowledge, as it did in 2016, that misclassification under the EAP exemption remains a significant problem, it has nonetheless proposed to set the salary threshold back at the 20th percentile level.

In 2016, the Department raised the salary level to the 40th percentile to address the misclassification that resulted from the changes in the 2004 Final Rule, which both eliminated the more protective duties test and set a salary level so low that it was inconsistent with historical practice. *See supra* at 4-5. Setting a higher salary level allowed DOL to provide employers and employees a "bright-line test for EAP exemption" that effectively differentiated between exempt and non-exempt workers. 81 Fed. Reg. at 32,464. DOL further recognized the 40th percentile level was consistent with the salary minimums from prior decades. *See id.* at 32,409 (the 40th percentile salary level "is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels").

The NPRM recognizes the value of having a robust salary test to decrease the incidence of misclassification. It concludes that:

> A lower or outdated salary level would result in a less effective bright-line test for separating workers who may be exempt from those nonexempt workers intended to be within the Act's protection. A low salary level would also increase the burden on the employer to apply the duties test to more employees in determining whether an employee is exempt, which would inherently increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive

> overtime and minimum wage protections under the FLSA are denied those protections.

84 Fed. Reg. at 10,967.

Without explaining why DOL's 2016 findings about the magnitude of misclassification were incorrect, the Department instead proposes a salary test that again increases the risk of misclassification by pairing a low minimum salary level with a less rigorous duties test. Moreover, DOL could not have based this proposal on evidence from observing the effects of the 2016 Final Rule, because that salary level was enjoined before it ever took effect. In contrast, in 2016, DOL had over a decade of evidence demonstrating that, in conjunction with the standard duties test, the 20th percentile level was too low to act as a meaningful screen against misclassification. *See supra* 3-4.

That the Department proposes to restore the 20th percentile level in the face of recent data revealing that level to be ineffective would, if finalized, be arbitrary and capricious. *See State Farm*, 463 U.S. at 56 (agency's rescission of protective standard requiring seatbelts and airbags was arbitrary and capricious where agency failed to adequately explain why protective standard was no longer necessary to protect car passengers); *ANR Storage Co. v. Fed. Energy Regulatory Comm'n*, 904 F.3d 1020, 1027-28 (D.C. Cir. 2018) (an agency may not "tur[n] on a dime" in its reasoning, especially where its analysis is "internally inconsistent").

B. Reliance on the Flawed Legal Analysis in Nevada v. DOL *Is Arbitrary and Capricious*

Having failed to rely on any actual evidence of reduced EAP misclassification or other relevant changes since 2016 in promulgating the Proposed Rule, DOL instead bases its Proposed Rule almost entirely on a single district court's flawed interpretation of the EAP exemption. *See Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 529-31 (E.D. Tex. 2016); *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 804-07 (E.D. Tex. 2017) ("*Nevada II*"). The *Nevada* court erroneously concluded that the 2016 Final Rule's salary level of $913, which excluded certain workers from the EAP exemption who otherwise satisfied the duties test, violated the APA. Because the *Nevada* court misconstrued and misapplied the FLSA, and the appeal remains pending, DOL's uncritical reliance on the court's reasoning in the NPRM is arbitrary and capricious. *See Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 505 (9th Cir. 2018) ("[I]t is black letter law that where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

The *Nevada* court enjoined the 2016 Final Rule based on its finding that DOL had exceeded its authority by setting a salary level so high that it was effectively an independent requirement for EAP exemption, and, alternatively, that the inclusion of such a test was an impermissible construction of the EAP exemption under the FLSA. *See Nevada*, 218 F. Supp. 3d at 529-31; *Nevada II*, 275 F. Supp. 3d at 804-08. The *Nevada* court interpreted the FLSA to require the duties test to predominate the exemption inquiry; the salary test, it reasoned, served only to screen out jobs that were so low paying that application of the duties test was unnecessary in the first instance.[6] *Nevada*, 218 F. Supp. 3d at 530-31; *Nevada II*, 275 F. Supp. 3d at 806-07. In other words, the salary test could not function as a separate requirement that "supplanted" the outcome of the duties test. *Nevada,* 218 F. Supp. 3d at 531; *Nevada II*, 275 F. Supp. 3d at 806-07.

The court purportedly discerned congressional intent, not through legislative history, but through review of the dictionary definitions of "executive," "administrative," and "professional." The court reasoned that because the dictionary definitions of these job categories did not specify a salary amount, the salary test could not exclude workers that met the other requirements of the duties test. *Nevada,* 218 F. Supp. 3d at 529; *Nevada II*, 275 F. Supp. 3d at 804-05.

The NPRM offers the district court's decision as the primary reason for proposing to rescind the 2016 Final Rule. *See, e.g.*, 84 Fed. Reg. at 10,909 ("The Department is engaging in this rulemaking to realign the salary level with its appropriate limited purpose, to address the concerns about the 2016 final rule identified by the district court, and to update the salary level in light of increased employee earnings."). DOL references the *Nevada* decisions over 30 times in the Proposed Rule. The NPRM, however, makes no mention of how the statutory language, the Department's longstanding interpretation of the EAP exemption, the case law, and even the NPRM's own reasoning all directly contradict the *Nevada* court's legal analysis.

The FLSA itself expressly delegates authority to DOL to issue regulations defining and delimiting the terms in the EAP exemption. *See* 29 U.S.C. § 213(a)(1). In such circumstances, "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect." *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

Pursuant to that authority, DOL for over 75 years has consistently defined the salary test as separate and distinct from the duties test. *See* 29 C.F.R. pt. 541 (an employee must (1) be paid on a salary basis, (2) receive a minimum salary amount, *and* (3) perform a job primarily involving EAP duties). The Department "has always recognized that the salary level test works in tandem with the duties tests"—not as a subordinate component—"to identify bona fide EAP employees." 81 Fed. Reg. at 32,400.

Courts have also recognized with regularity the multifactor EAP exemption test, which requires an employer to satisfy all three independent prongs, as a permissible construction of the FLSA. *See, e.g.*, *Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275, 289-90 (D.D.C. 2017) (recognizing three prongs of EAP exemption test as separate requirements); *Cannon v. District of Columbia*, 717 F.3d 200, 204-05 (D.C. Cir. 2013) (employees do not fall into the EAP exemption

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[6] The court quoted a DOL report from 1949 for the proposition that "salary level was purposefully set low to 'screen[ ] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'" *Nevada*, 218 F. Supp. 3d at 531 (quoting Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949)). That same report, however, concluded the salary test had other purposes as well, which included "furnish[ing] a practical guide to the inspector as well as to employers and employees in borderline cases." 69 Fed. Reg. at 22,165.

if they meet the duties test but not the salary level test); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 847-48 (6th Cir. 2012) (employees not exempt from overtime even if they meet two out of three EAP exemption prongs). Indeed, the *Nevada* court is the *only* court that has found to the contrary.

The NPRM itself acknowledges that the salary test has an important independent function: to protect employees who may satisfy the salary basis and duties tests. Even under the salary test proposed in the NPRM, 1.3 million additional workers making less than $679 but more than $455, who may have otherwise satisfied the duties test, will become overtime eligible. *See* 84 Fed. Reg. at 10,949. Similarly, under the 2004 Final Rule, which tripled the previous salary level from $155 to $455, DOL strengthened overtime protections for 2.8 million additional workers that previously met the duties test criteria. *See* 69 Fed. Reg. at 22,199-201.

As DOL has previously explained, a bright-line salary test guards against abuse of the EAP exemption by preventing employers from saddling low-wage employees with EAP duties in order to avoid paying overtime. *See supra* 5-6. The inclusion of a meaningful salary test in the 2016 Final Rule, instead of being an unauthorized exercise of authority or an impermissible construction of the FLSA, is crucial to giving effect to the statute's purpose. Accordingly, DOL's reliance on the *Nevada* court's erroneous interpretation of the EAP exemption is irrational.

C. Removal of Automatic Updating Is Arbitrary and Capricious

In proposing to remove automatic updating, DOL ignores its own experience and again recommits to a course of action that it knows to be ineffective. The NPRM contains only a brief discussion of the decision to remove automatic updating and entirely fails to address the impracticality and ineffectiveness—demonstrated clearly by DOL's own repeated failure to timely update the salary level—of non-binding commitments to raise the salary level through the notice and comment process. 84 Fed. Reg. at 10,914-15.

DOL has emphasized repeatedly the need for an up-to-date salary test in order to protect "workers whom Congress intended to be covered by the minimum wage and overtime pay provisions of the FLSA." 81 Fed. Reg. at 32,504; 84 Fed. Reg. at 10,914; *see also supra* 2. Yet, as noted above, since 1938, DOL has only updated the salary level eight times. 81 Fed. Reg. at 32,392. The NPRM acknowledged that as early as 1970, the "Department remarked that one commenter's suggestion to implement automatic annual updates to the salary tests based on BLS earnings data 'appear[ed] to have some merit' given the delays between some of the Department's earlier updates." 84 Fed. Reg. at 10,914. Despite the DOL's awareness of the problem, however, it neglected to update the salary level for another three decades. In 2004, DOL recognized once more the need to adjust the salary level with more frequency and resolved to do so "on a more regular basis." *Id.* Following that commitment, the Department again took no action for over a decade.

Based on the agency's experience with the history of salary level updates, DOL chose in 2016 to set a carefully considered automatic updating mechanism based on the Consumer Price Index ("CPI"). 81 Fed. Reg. at 32,504. DOL found that the mechanism made sure that the salary level kept pace with changes in earnings, "allowing it to continue to serve as an effective dividing line between potentially exempt and nonexempt workers," in order to fulfill the purpose of the FLSA to protect non-exempt workers. *Id.* DOL also found that automatic updating would offer employers more predictability and notice with respect to salary level changes and allow these increases to occur gradually, instead of by factors of two or three every few decades. *Id.* Because DOL disclosed in detail the methodology for the updates in the NPRM and the 2016 Final Rule, notice and comment were not required each time an update went into effect. *Id.*; *see* 5 U.S.C. 553(b)(B).

The NPRM not only disregards the benefits of automatic updating, but also fails to adequately explain how DOL will avoid the pitfalls of prior alternatives. The NPRM states that the Department "intends" to update the salary threshold every four years, but does not address the likelihood that this will occur, particularly in light of the DOL's inability to meet prior commitments to increase salary levels more regularly through the notice and comment process. *See* 84 Fed. Reg. at 10,915.

The NPRM observes that certain commenters "argued that the Department lacked the authority to update the salary level automatically," but it does not itself conclude that DOL lacks such authority. 84 Fed. Reg. at 10,914. Nor could it, as administrative agencies regularly use regulations to create automatic updating mechanisms that do not require notice and comment rulemaking in advance of each update. *See, e.g.*, 16 C.F.R. § 436.8 (Federal Trade Commission Franchise Rule providing for automatic updating of monetary thresholds for exemptions every four years based on the CPI); 20 C.F.R. § 655.173 (DOL Rule providing for automatic indexing of maximum allowable meal charges for H-2A workers).

In sum, the Department's failure to consider the evidence of the disadvantages and impracticability of adjusting the salary level through formal rulemaking each time is without rational basis. *See State Farm*, 463 U.S. at 43 ("[a]n agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem" or "if the agency offers an explanation for the decision that is contrary to the evidence"); *Michigan*, 135 S. Ct. at 2699.

III. Conclusion

For the foregoing reasons, the undersigned states urge the Department to refrain from further expansion of the EAP exemption and to instead issue a final regulation that is at least as protective of workers as the 2016 Final Rule, including retaining its salary level and automatic updating mechanism. Workers and agencies enforcing labor laws in our states are depending on the DOL to provide the meaningful protections from EAP misclassification that Congress intended to afford under the FLSA.

Respectfully submitted,

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EXHIBIT A

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
LABOR BUREAU

September 25, 2017

Via Electronic Submission (Regulations.gov)

The Honorable R. Alexander Acosta
Secretary
United States Department of Labor
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Director of the Division of Regulations,
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**Re: Request for Information (RIN 1235-AA20)
Defining and Delimiting the Exemptions for Executive,
Administrative, Professional, Outside Sales and Computer Employees**

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington to comment in response to the Request for Information ("RFI") by the U.S. Department of Labor ("USDOL") regarding the regulations at 29 C.F.R. part 541 (RIN 1235-AA20), which define exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") for certain executive, administrative, and professional ("EAP") employees.

The undersigned state attorneys general believe that expansion of the EAP exemption, also known as the "white collar" exemption, would considerably scale back federal worker protections in a manner that will hurt the workers in our states and make our jobs enforcing labor laws harder. As detailed in this comment, we believe that the standard for EAP exemption should be at least as protective of workers—who remain at significant risk of being misclassified as EAP—as the 2016 regulations concerning the EAP exemption promulgated by USDOL (the "2016 Final Rule"), including retaining a meaningful salary level test and automatic updating mechanism. The 2016 Final Rule was recently struck down by a Texas federal district court,[1] and thus the USDOL rule, including the salary level test, adopted in 2004 remains in effect.

I. Statement of Interest

The undersigned attorneys general have an interest in protecting the workers in our states, advising state labor enforcement agencies, and in many cases, enforcing labor laws. Many signatories have extensive experience ensuring proper payment of wages, including minimum wage and overtime. We all have a shared interest in the well-being of workers nationwide, and multiple signatory state attorneys general have authority to enforce both state labor laws and FLSA.

Based on our collective experience, if USDOL expands the EAP exemption beyond the scope that was to be set by the 2016 Final Rule, it will result in more workers in our states being subjected to EAP misclassification and unlawful exclusion from minimum wage and overtime protections under FLSA. Weakening the bright-line salary level test and requiring law enforcement to rely increasingly on the easily manipulable "duties" test will make it significantly more difficult to investigate and prosecute EAP misclassification, which remains a pernicious and growing problem in our states.

Despite federal and state enforcement efforts, rampant violations of labor laws have continued nationwide. A 2009 study of over 4,000 low-wage workers in New York City, Chicago, and Los Angeles found that nearly 26% of workers were paid a sub-minimum wage, and of the workers who had worked over 40 hours in a week, over 76% were not paid overtime in accordance with FLSA. *See* Nat'l Emp. Law Project, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 20, *available at* http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf. Workers who were not paid on an hourly basis faced even higher risk of violation, with 46% being paid sub-minimum wages and 92% not being paid overtime. *Id.* at 30. In other words, at a time when the 2004 salary level test was in effect, there were extremely high labor law violation rates, and salaried workers—who are most at risk of being misclassified as EAP and deprived of their rights under FLSA—were subject to the highest violation rates of all. Since the 2004 salary level has not increased, despite the increased cost of living over the past 13 years, it is reasonable to assume that the rates of violation revealed in this 2009 study are the same, or worse, today.

The EAP exemption makes minimum wage and overtime protections under FLSA inapplicable to workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Historically, USDOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary that does not change based on the quality or quantity of work done (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive (management, supervision,

[1] As discussed, *infra*, at p. 3, the court in *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017), struck down the 2016 Final Rule on the grounds that USDOL exceeded its statutory rule-making authority. As further discussed herein, the undersigned attorneys general believe that decision was wrongly decided.

hiring/firing), administrative (office/non-manual work, discretion/judgment), or professional (advanced scientific/academic knowledge) in nature (the "duties test"). *See* 29 C.F.R. § 541.0 *et seq.*

The purpose of the EAP exemption must be understood in the context of the purposes of the overtime laws, which include discouraging employers from requiring employees to work extremely long workweeks, compensating employees for the burden of such workweeks, and encouraging employers to hire more workers and spread employment throughout the workforce. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942). Unlike the workers that the overtime laws seek to protect, bona fide white collar employees have the ability to decide how to get their work done in whatever hours or time is required, and have elevated status—and thus increased bargaining power—due to salaries far above minimum wage, fringe benefits, job security, and opportunities for advancement. *See* Defining and Delimiting the Exemptions for EAP Employees, 81 Fed. Reg. 32,392, 32,400 (2016) (citing 1940 USDOL Report by Harold Stein on EAP exemption); Nat'l Emp. Law Project, *The Case for Reforming Federal Overtime Rules* (Dec. 2014), *available at* http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf. The danger of defining the EAP exemption too broadly is that, in addition to applying to bona fide EAP employees, it will sweep up workers who are misclassified as EAP—whether inadvertently or in an attempt to evade labor laws—and deprive these workers of minimum-wage and overtime protections.

With these considerations in mind, USDOL's 2016 Final Rule raised the minimum weekly salary level for the EAP exemption from $455 to $913 and created a mechanism for updating the salary level automatically every three years. *See* 81 Fed. Reg. 32,405, 32,408, 32,438. Before the 2016 Final Rule went into effect, it was challenged in a federal district court, resulting in a nationwide order partially enjoining the salary level test. *Nevada v. USDOL*, 218 F. Supp. 3d 530 (E.D. Tex. 2016). In a subsequent opinion and order, the court stated that it invalidated the 2016 Final Rule because the $913 salary level purportedly "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017).

We believe that the district court's opinion is wrongly decided and based on an incorrect interpretation of FLSA and the 2016 Final Rule that ignores the plain text and remedial purpose of the statute, as well as the broad authority of USDOL to implement it.[2] However, in response to the district court's decision, Labor Secretary Alexander Acosta "has decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule," instead issuing this RFI to "determine what the salary level should be." (RFI at 7.)[3] We believe that the 2016 Final Rule

[2] We note that the signatories are not parties to the Texas litigation largely for procedural reasons and have a significant interest in this issue.

[3] The RFI states that USDOL's review of the salary test will focus on "lowering the regulatory burden" consistent with President Trump's Executive Order 13777 on Regulatory Reform, which tasks federal agencies with identifying regulations for repeal, replacement, or modification, including regulations that "eliminate jobs, or inhibit job creation." (RFI at 8.) The 2016 Final Rule does not require modification on the grounds set forth in Executive Order 13777; indeed, the 2016 Final Rule furthers President Trump's job creation goals. As discussed above, an original purpose of the overtime requirement was to create a financial incentive for employers to hire *more* employees rather than requiring existing workers to work longer hours. *See Davis v. J.P. Morgan Chase*, 587 F.3d

fairly considered the comments of stakeholders and struck an "appropriate balance between minimizing the risk of employers misclassifying overtime-eligible employees as exempt, while reducing the undue exclusions from exemption of bona fide EAP employees." 81 Fed. Reg. 32,409. Furthermore, we note that the 2016 Final Rule was the carefully considered product of a two-year deliberative process in which USDOL reviewed more than 270,000 comments from a broad array of constituencies, including unions, worker advocacy groups, small businesses, Fortune 500 corporations, state and local governments, and economists. *Id.* at 32,397.

Accordingly, we urge USDOL to establish an EAP standard, including, but not limited to, a meaningful salary test and automatic updating mechanism, that is at least as protective of workers who are potentially subject to EAP misclassification as the 2016 Final Rule.

II. The Salary Level Test Makes State Labor Law Enforcement More Effective and Efficient (Response to RFI Question 7)

The RFI seeks input on a proposal that eliminates the salary level test entirely and instead relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer. (RFI at 11.) We urge USDOL to reject any such proposal.

The salary level test is essential to meaningful enforcement of FLSA. A salary level test makes it simpler for both workers and law enforcement agencies to identify underpayments of wages. Because enforcement is more difficult without a salary level test, misclassification would be even more pervasive, due to employer and employee uncertainty, as well as intentional abuse by employers. As discussed above, many employers do not pay overtime even with a bright-line test. Law enforcement agencies can more easily identify misclassified workers by clearly knowing which employees are overtime eligible using a salary test. In the absence of this bright-line test, law enforcement agencies must rely solely on a multifactorial duties test that is more susceptible to exploitation. The fact-specific determination required by the duties test forces law enforcement agencies to spend valuable resources gathering facts—interviewing workers, analyzing documents, and taking testimony—in order to assess whether employees were properly classified. If a law enforcement agency determines that a worker should not have been EAP exempt, it then often must engage in a resource-intensive litigation in which these issues of fact will need to be determined and proven.

A clearly defined EAP exemption under FLSA is also critically important to states' enforcement of labor laws. Workers across the country rely on FLSA, and its implementing USDOL rules and regulations, to protect them on the job. Some states have more limited labor protections than those provided under FLSA, and any expansion of the EAP exemption will directly impact workers and employers in these states. Other states have passed their own overtime protections, which in some cases include their own versions of an EAP exemption. These states will also be impacted to the extent that their laws are less protective than FLSA, and because many of these states' laws expressly reference FLSA or look to FLSA for guidance. Accordingly, a clear EAP exemption with a meaningful salary test is required for our states to achieve effective labor enforcement.

529, 535 (2d Cir. 2009). The 2016 Final Rule took this job-creation goal into account in devising the final rule. *See* 81 Fed. Reg. 32,394.

A salary test also facilitates compliance and detection of noncompliance because it creates a clear, bright-line rule for employers. Even for well-intentioned, law-abiding employers, a salary level test is a useful bright line, particularly for small companies that may not have sophisticated employment counsel to advise them on the complexities of the duties test. Further, employees themselves can more easily detect and report misclassification.[4] Indeed, in promulgating the 2016 Final Rule, USDOL estimated that "5.7 million white collar workers who are currently overtime eligible because they do not satisfy the EAP duties tests and who currently earn at least $455 per week but less than $913 per week will have their overtime protection strengthened [immediately] because their status as overtime-eligible will be clear based on the salary test alone without the need to examine their duties." 81 Fed. Reg. 32,393.

With a salary test in place, law enforcement resources can focus on investigating and litigating the proper payment of overtime to employees falling below a salary threshold rather than investigating and litigating whether a given employee satisfies the duties test for exemption, as would be required *in every case* in the absence of a salary test. *See id.* at 32,463 ("The salary level test has historically been intended to serve as an initial bright-line test for overtime eligibility for white collar employees."). If USDOL eliminates the salary test, law enforcement will be forced to undertake a fact-intensive analysis in every instance of suspected violations, and employers would be required to expend resources on this same analysis in monitoring compliance. *See id.* at 32,419–20 (observing that "[g]iven the new standard salary level, there will be 9.9 million fewer white collar employees for whom employers could be subject to potential litigation regarding whether they meet the duties test"). A meaningful salary test, used in conjunction with the duties test, allows law enforcement to assess the bona fide status and bargaining power of employees designated as EAP more accurately, and allows for more efficient and effective enforcement by federal and state law enforcement.

III. A Meaningful Salary Test Is Essential to Protecting Workers from EAP Misclassification (Response to RFI Question 1)

The RFI seeks input on multiple proposals, including retaining the salary level established by USDOL in 2004 ($455 per week) adjusted for inflation (approximately $595 per week). (*See* RFI at 9.) Adopting these proposals would be a large step backwards, as they would significantly increase the number of workers potentially subject to EAP misclassification.

If USDOL expands the EAP exemption by setting the salary level test significantly below $913, the adverse impact on workers in our states would be significant. The population of workers most directly affected by rolling back the 2016 Final Rule's EAP salary threshold to the 2004 level is employees classified as EAP and making salaries between $455 per week ($23,660 annually) and $913 per week ($47,476 annually). USDOL estimated in 2016 that 4.2 million workers perform qualifying duties and have salaries in this range, and another 5.7 million workers do not perform qualifying duties but make less than $913 per week. These 9.9 million workers would all receive additional protection from the bright-line salary test. USDOL observed that these workers are "at particular risk of misclassification," and, indeed, that 732,000 of them were likely already

[4] Establishing a clear, bright-line salary test thus also furthers President Trump's Executive Order 13777 on Regulatory Reform by streamlining compliance with regulations. *See supra* note 3.

misclassified. *See* 81 Fed. Reg. 32,500. Retaining the 2004 salary level would again expose all of these workers to EAP misclassification and deprive them of FLSA protections.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. Under the 2004 salary test, many of these workers could potentially be subject to misclassification as EAP exempt. Based on our enforcement experience, we have observed that large categories of employees can be misclassified as EAP exempt, such as crew leaders and supervisors who work alongside janitorial, car wash, retail, construction, and fast-food workers (executive); clerical and office workers (administrative); and medical and dental technicians, film and television production assistants, and mid-level IT employees (professional).

USDOL statistics are consistent with our experience, indicating high rates of misclassification of first-line supervisors in food preparation and service (41%), sales (34%), landscaping (26%), construction and extraction (19%), and other occupational categories. *See* 81 Fed. Reg. 32,464 tbl. 10. This is particularly the case in large cities where higher median wage rates results in higher wages for non-EAP employees. *See id.* at 32,409 ("As we have previously explained when discussing the salary level to be paired with the more rigorous long duties test, the threshold can be of little help in identifying bona fide EAP employees when large numbers of traditionally nonexempt workers in large cities earn more than this amount." (internal quotation marks omitted)).

More generally, state attorneys general regularly see workers who make weekly wages between $455 and $913—including workers in the janitorial, waste processing, transportation and delivery, elder care, and food service occupations—filing complaints at high rates alleging exploitative labor practices, including failure to pay overtime. The fact that these workers are paid above minimum wage does not mean they are free from exploitation; to the contrary, such workers often come to our office precisely because they lack the financial resources and bargaining power that are hallmarks of bona fide white-collar employees. The clear intent of FLSA is to protect these types of vulnerable employees, some of whom may have duties that could be classified (or misclassified) as administrative, executive, or professional in nature, but who nonetheless lack the status and power associated with bona fide EAP capacity. *See* 81 Fed. Reg. 32,413 (observing that "the purpose of the salary level test has always been to distinguish bona fide [EAP] employees from those who were not intended by Congress to come within these exempt categories" (internal quotation marks omitted)).

Accordingly, USDOL should adopt a salary level test at least as protective as the one set forth in the 2016 Final Rule. *See id.* at 32,465 (observing that USDOL findings "underscore[] the large number of overtime-eligible workers for whom employers must perform a duties analysis, and who may be at risk of misclassification as EAP exempt").

IV. A Salary Level of $913/Week Is Consistent with Congressional Intent (Response to RFI Question 5)

The RFI asks whether a $913 salary level "work[s] effectively with the standard duties test or, instead . . . eclipse[s] the role of the duties test in determining exemption status?" (RFI at 10.) The Texas district court, in considering this issue and invalidating the 2016 Final Rule, ruled that the $913 salary level "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employer's job duties" and ignoring Congress's "intent for employees doing 'bona fide executive, administrative, or professional capacity' duties to be exempt from overtime pay." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017). This ruling was clearly erroneous for the following reasons, and should not be given deference in the USDOL's rulemaking process.

First, the court improperly substituted its judgment for USDOL, which comprehensively detailed its rationale and methodology in determining the salary level in the implementing regulations of the 2016 Final Rule. Specifically, USDOL observed that the 2004 salary level ($455) "was too low to effectively screen out from exemption overtime-eligible white collar employees" for a number of reasons, including both inflation and the fact that the 2004 revisions to the EAP standard had weakened the duties test, thus exposing greater numbers of workers to potential misclassification.[5] 81 Fed. Reg. 32,404. USDOL thus concluded that revising the EAP regulations was necessary to "effectively distinguish between overtime-eligible white collar employees who Congress intended to be protected by FLSA's minimum wage and overtime provisions and bona fide EAP employees whom it intended to exempt." *Id.* at 32,393.

We believe that the 2016 Final Rule was reasonable in observing this shortcoming of the 2004 salary level. For example, adjusting the salary level that was in effect in 1975 (and paired with a more rigorous duties test) for inflation results in a salary level of $1,100 (in 2016 dollars), which is significantly higher than the $913 salary level set forth in the 2016 Final Rule. Indeed, from 1958 to 1975, the real value of the salary level associated with the more rigorous duties test was *always* higher than $913. (*See* 81 Fed. Reg. 32,450 & fig. 1.) Indexing the 2004 salary level for inflation results in a salary level (approximately $595) that is significantly less protective than both the pre-1975 levels and the 2016 Final Rule. Thus, while the court relied heavily on the 2004 salary level, we submit that in the long history of FLSA and its EAP exemption, the 2004 level should be viewed as the outlier, not the standard-bearer.

Second, the court incorrectly concluded that Congress, in passing FLSA, "defined the EAP exemption with regard to duties" primarily, and that salary may *only* be used as a secondary "defining characteristic" when determining who performs EAP duties. *Nevada v. USDOL*, 2017 WL 3837230, at *8. Neither "duties" nor "salary" is referenced in the text of FLSA, which states only that "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt, and the Labor Secretary may "define[] and delimit[]" those terms. 29 U.S.C. § 213(a)(1). If Congress had wanted to exempt categorically any employee performing executive, administrative, or professional duties, it easily could have done so—but it did not. Instead, as discussed above, USDOL has for over 75 years defined the term EAP to mean that an employee must (1) be paid on a salary basis, (2) receive a minimum salary amount, and (3) perform a job

[5] "In the [2016] Final Rule, the Department corrects for the elimination of the [more rigorous] long duties test [in 2004] and sets a salary level that works in tandem with the [more easily manipulable] standard duties test [adopted in 2004] to appropriately classify white collar workers as entitled to minimum wage and overtime protection or potentially exempt. [The] standard salary level [of $913] set by the Department . . . is set at the low end of the range of the historical short test levels, based on the ratios between the short test and long test levels, and much lower than the historical average for the short test." 81 Fed. Reg. 32,463.

primarily involving EAP duties. *See* 29 C.F.R. pt. 541. In other words, USDOL "has always recognized that the salary level test works in tandem with the duties tests"—not as a subordinate component—"to identify bona fide EAP employees." 81 Fed. Reg. 32,400. Accordingly, it is well within USDOL's authority and historical practice, and Congress's intent, to adopt a salary test that renders certain employees exempt *even if* they satisfy the duties test.[6]

Third, even accepting the court's flawed premise that the salary test is subordinate to the duties test, it is empirically false that using a $913 salary level makes overtime status depend "predominately" on salary, thereby "supplanting" the duties test. The court relies heavily on the 2016 Final Rule's finding that 4.2 million employees who pass the standard duties test no longer qualify for the EAP exemption, concluding that the 2016 Final Rule must be invalid if it "would exclude so many employees who perform exempt duties." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (citing 81 Fed. Reg. 32,405). But the $913 salary level plainly does not predominate the EAP exemption. The additional 4.2 million workers who cannot be exempt from FLSA overtime and minimum wage protections because of the $913 salary level test are dwarfed, for example, by 78.3 million workers who cannot be exempt because of the salary basis test (*i.e.*, EAP workers must be paid on a non-hourly basis). *See* 81 Fed. Reg. 32,456 (observing that of the 132.7 million workers potentially subject to FLSA and its regulations in Part 541, 78.3 million are hourly workers and thus excluded from the EAP exemption). Similarly, USDOL estimated in 2016 that there are 12.2 million salaried, white collar workers who earn more than $455 per week but are overtime eligible because they fail to meet the duties test. *Id.* at 32,465.[7] Thus, of the three factors determining EAP status, it is clear that the salary basis test and the duties test continue to predominate, and the salary level test does not supplant them even when set at $913.

Accordingly, the 2016 Final Rule's salary level of $913 is consistent with Congressional intent and we urge USDOL to use a salary level at least as protective of workers as this amount.

V. Automatic Updating Is Essential to a Meaningful Salary Level Test (Response to RFI Question 11)

Automatic updating is necessary to ensure that the salary level test remains a meaningful, bright-line test for the reasons set forth above, and that the salary level's effectiveness is not eroded over time as the wages of employees rise with inflation. As USDOL observed in promulgating the 2016 Final Rule, "misclassification of overtime-protected employees occurs more frequently when the salary levels have become outdated by a marked upward movement of wages and

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[6] And this was precisely USDOL's intent in adopting a higher salary test to compensate for the weakening of the duties test caused by the 2004 revision to the EAP regulations. *See supra* note 5. This is quite different from an impermissible "salary only" test, which would permit USDOL to exempt workers from FLSA protections based solely on their high salaries, even though they have no executive, administrative, or professional characteristics whatsoever, such as "mechanics, carpenters, or linotype operators." 81 Fed. Reg. 32,446 n. 84. The 2016 Final Rule does not do this; it continues to require a worker's duties to be considered and determined to qualify as EAP if he or she is to qualify for the exemption from FLSA.

[7] Indeed, there are many factors in the EAP analysis that have a greater effect than the increase of the salary level to $913. *See, e.g.*, 81 Fed. Reg. 32,451 (noting that "14.9 million workers do not satisfy the duties tests for EAP exemption and/or earn less than $455 per week" and another 7.4 million are not even subject to a salary test—only a duties test—because they are in certain statutorily enumerated occupations).

salaries." 81 Fed. Reg. 32,402 (quotation omitted). We need not imagine whether this could happen; the RFI acknowledges that federal labor protections did, in fact, atrophy over time due to failure to update the EAP exemption's salary threshold. In the 1970s, USDOL set "what were intended to be 'interim' salary levels," which, in fact, remained unchanged for nearly 30 years. By that point, "the passage of time had eroded the . . . salary levels below the . . . minimum wage," and thus the salary test "as a practical matter . . . fell out of operation." (RFI at 5–6.)

With the 2016 Final Rule, USDOL "established a mechanism for automatically updating the salary level every three years to ensure it remained a meaningful test for helping determine an employee's exempt status." (RFI at 6–7.) In contrast, the 2004 rule that the RFI proposes retaining did not have such a mechanism. USDOL should ensure that the salary threshold is automatically updated to remain an accurate measure of the line between bona fide EAP employees and non-EAP employees, as was provided for in the 2016 Final Rule. USDOL should not risk letting labor protections erode again due to legislative or regulatory inaction. The signatory states believe that an automatic updating formula should be used that is at least as protective of workers as the one set forth in the 2016 Final Rule.

VI. Conclusion

For the foregoing reasons, the signatory states urge USDOL to refrain from further expansion of the EAP exemption and to adopt a standard that is equally or more protective of workers—who remain at significant risk of being misclassified as exempt from minimum wage and overtime protections—than the 2016 Final Rule, including retaining a meaningful salary test and automatic updating mechanism.

Respectfully submitted,

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Mr. DESAULNIER. Ms. Shierholz, I wanted to ask you sort of a disposable income, economic growth, regional question. And I do this in the context of having been in the restaurant business for 35 years in California, where we go beyond the Federal laws. But we had a real problem with the underground economy, and we actually worked jointly, when I was in the legislature, Republicans and Democrats, because the chamber was concerned that people who weren't complying and weren't paying our rules were undermining conscientious, law-abiding businesses.

And the relationship to the growth and the economy—now, I know every State and every region is different, but I would argue, our GDP, particularly in the Bay Area, has grown, because we do have good protections for workers. And as somebody in the restaurant business, I couldn't afford to pay people anything. But it was my job to manage overtime, which created more jobs because—you also wanted people in an area where there is high cost of living, but difficult transportation issues in the service industry to get people there, be able to get a livable wage, so they can afford to actually live in that region. And this is the context of these urban regions are driving the national economy 65 percent—64 percent of the GDP comes from these urban regions. I don't think that is right. I think we should be dispersing more jobs around the country. I have some people in the Bay Area who disagree with me when I say Google should take more of the jobs somewhere else.

But the dynamics of a regional economy, having people in the service industry, for instance, have enough disposable income. Because when we raised the minimum wage in California, I would argue, as the only member of the legislature who was also a member of the California Restaurant Association, that as long as it was proportionate, it was good for me, because there was more disposable income.

So, could you talk to that a little bit from an economic standpoint, knowing that you can't pay everybody everything they want? But we are going in the opposite direction. And I would say this in the context of it is a great economy if you are not relying on wages. When you rely on wages, you are following further behind. When you look at the metrics on capital investments, if you own a house, if you own investments, it is a great economy. But this is what is adding to our inequality.

So maybe you could just give a little summary of my comments.

Ms. SHIERHOLZ. Yep. No, I think that is really important. So, we know we have had four-plus decades of rising inequality, stagnant wages for working people. And one key driver of that is the erosion of labor standards, like the overtime protections we are talking about today. If we strengthen those protections, we reduce inequality, and what that does is it gets money into the hands of people who are likely to spend it, rather than people who have a low marginal propensity to consume, is the term that economists have, but people who have no choice but to spend the money, they get it into their local economy, that generates more demand for goods and services, that generates jobs. That's good for everyone.

So, in this way this actually—these kinds of protections are deeply important, not just to the individuals who are protected, but to the economy as a whole.

Mr. DESAULNIER. And when you look at the regional disparities between urban and rural America, this reinforces the disparities, correct?

Ms. SHIERHOLZ. That is exactly right.

Mr. DESAULNIER. Mr. Winebrake, I want to ask you a question about litigation, unnecessary litigation, and our Ranking Member has some good points on this. But I read a book by Francis Fukuyama, and I actually agreed with him, called "Trust." And his whole argument as he looks at the amount of infrastructure to get people to do the right thing, particularly in the business community, and he measures the United States and Japan and Europe over time, and I think we went from 5 percent in the fifties to 25 percent.

One of his arguments is, I take from it, is that proper regulation is a better enforcer of ethical behavior than private rights of action. You sort of said this. Your business actually went down when the regulation was more focused. Could you maybe elaborate on that observation?

Mr. WINEBRAKE. Sure. So, a higher—what the salary threshold does is it creates a bright-line test. Either if—let's say the salary threshold were $47,000, that is a bright-line test. Most of the litigation in white-collar misclassification cases happens with employees underneath the $47,000 threshold. In fact, when I look at my inventory, it is people between $35,000 and $47,000. So, if for all those workers who right now it's iffy whether they are misclassified, we have to look to their duties. If instead we just had the bright-line test, all of those employees underneath $47,000 would get reclassified without us having to analyze the duties test. And, therefore, all of that litigation where lawyers fight about is the person's job duties executive or not.

All of that goes away, and that is the basis for—all of the cases that we filed are happening in that gap between the Trump administration proposal and the Obama Administration proposal.

Mr. DESAULNIER. I appreciate that. Another incentive for us to do what the Obama Administration did, less work for lawyers.

And I yield back.

Mr. WINEBRAKE. I don't want to put myself out of business, but—

Chairwoman ADAMS. The gentleman is out of time. Thank you.

I want to now recognize the distinguished Chair of Education and Labor, Mr. Scott, of Virginia.

Mr. SCOTT. Thank you, Madame Chair.

I just want to get a couple of things on the record. First, the Ranking Member talked about the system allowed a single judge to set aside rules and regulations, and that is true as part of the system. It is also part of the system, as Mr. Winebrake pointed out, the appeal is part of the process. Not only did the administration switch sides, they also essentially suspended the appeal altogether, all the rulemaking. That is not part of the system, we should have a full decision.

Second, Mr. Winebrake, we heard—I think we heard that if you are a salaried employee and showed up 1 hour during the week, that you could get your full salary. Is that right?

Mr. WINEBRAKE. It is more complicated than that. My friend is correct that if a salaried employee works under 40 hours, she could still get the full salary. It is not quite as cut and dry as that.

Mr. SCOTT. If somebody showed up an hour for the week, they would get fired. Isn't that right?

Mr. WINEBRAKE. Sure. And the other thing to keep in mind, Mr. Chairman, is when these salaried employees don't work a full week, which is very rare, they are running their leave time, they are having to take sick time or vacation time. It is not as if it is just free.

Mr. SCOTT. I just wanted to make the point that if somebody shows up an hour a week, isn't going to get the full salary.

Ms. Shierholz, the Department of Labor in 2016 did some evaluations, and we have heard about higher education—

Ms. SHIERHOLZ. Uh-huh.

Mr. SCOTT [continuing]. for example. Most of the people in higher—many people in higher education are already exempt, like teachers, coaches, department heads, and things like that. Did they calculate that about less than 4 percent of workers in college would be affected by the rule and most of those don't work overtime anyway, and that the effect on payroll would be about 2/100th's of 1 percent?

Ms. SHIERHOLZ. Yep. I think that is really important. Community colleges, 4-year colleges, the vast majority of their staff are teachers, and they are exempt from this entire discussion. Research universities may have post-docs who are researchers who don't do any teaching that may be affected. Asking big research universities to pay their Ph.D. employees $50,000 a year is, you know, not an overreach.

Mr. SCOTT. And for nonprofits, less than 1 percent of nonprofit workers are both directly affected and regularly work overtime. Is that right?

Ms. SHIERHOLZ. Yep. Yes.

Mr. SCOTT. And that for small businesses, the estimate was that the effect on payroll would be less than 1 percent.

Ms. SHIERHOLZ. That is right.

Mr. SCOTT. Okay. Now, one of the things about the exemption is that it is for bona fide executive, administrative, and professional personnel. At this administration's level, 15 percent of the people would be covered by that. How likely is it that somebody who is making less than 85 percent, of salaried employees, is actually a bona fide executive, administrative, and professional personnel?

Ms. SHIERHOLZ. No, that's a really good point. So, one of the issues is the duties test is so weak that somebody can be classified as executive, administrative, or professional if they spend 99 percent of their time actually doing nonexempt duties. And so, the salary threshold is really important in that case to make sure that workers who are doing a ton of nonexempt duties aren't getting taken advantage of if they are being paid really low salaries.

Mr. SCOTT. I think we heard somewhere along the lines that if you are not exempt, that you have to be reclassified and paid as an hourly worker rather than a salaried worker. Is that true?

Ms. SHIERHOLZ. That is absolutely false. There are millions of salaried workers in this country who get overtime when they work more than 40 hours a week. There is nothing in this rule that says you have to reclassify salaried workers—

Mr. SCOTT. So, if you are not exempt and you are entitled to overtime, it would just be prorated based on your salary?

Ms. SHIERHOLZ. Yes.

Mr. SCOTT. Now, Mr. Winebrake, you kept talking about people working more than 40 hours a week. If they are not exempt, they get paid time and a half. Is that right?

Mr. WINEBRAKE. That is correct.

Mr. SCOTT. And if they are exempt, if they work 10 hours extra during the week, how do they—much more do they get paid?

Mr. WINEBRAKE. They get paid zero.

Mr. SCOTT. I mean, not time and a half.

Mr. WINEBRAKE. They get paid nothing. A salaried employee just gets no pay for their extra work.

Mr. SCOTT. Now, does that extra work that is not paid for have to be executive, administrative, or professional?

Mr. WINEBRAKE. To Dr. Shierholz's point, it generally is not. It is generally the reason that—

Mr. SCOTT. They just work whatever hours they work. They could be stocking shelves for those extra hours.

Mr. WINEBRAKE. Sure.

Mr. SCOTT. But you do not have to be—you are taking advantage of the executive, administrative, or professional exemption, but the extra hours do not have to be executive, administrative, or professional?

Mr. WINEBRAKE. They generally are not. Correct.

Mr. SCOTT. Thank you, Madame Chair.

Chairwoman ADAMS. Thank you.

And thank you all for your testimony and for your questions as well.

I want to remind my colleagues that pursuant to committee practice, materials for submission to the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format. The materials submitted must address the subject matter of the hearing. Only a member of the committee or an invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages. Documents longer than 50 pages will be incorporated into the record via internet link that you must provide to the clerk within the required timeframe. Please recognize that years from now that link may no longer work.

Again, I want to thank the witnesses for their participation today. What we've heard is very valuable. Members of the subcommittee may have some additional questions for you, and we ask the witnesses to please respond to those in writing. The hearing record will be held open for 14 days in order to receive those responses.

I remind my colleagues that pursuant to committee practice, witnesses' questions—witness questions for the hearing record must be submitted to the majority committee staff or committee clerk within 7 days. The questions submitted must address the subject matter of the hearing.

Before recognizing the Ranking Member for his closing statement, I would ask unanimous consent to enter the following materials into the record: The National Employment Law Projects comment letter opposing the Trump Administration's 2019 proposal; a 2016 letter from over 200 college and university professors in support of the 2016 rule.

Without objection.

[The information referred to follows:]

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May 21, 2019

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Comments on Regulatory Information Number (RIN) 1235-AA20: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Submitted at: https://www.federalregister.gov/documents/2019/03/22/2019-04514/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and#open-comment

Dear Ms. DeBisschop:

The National Employment Law Project submits these comments on the Department of Labor's (Department or DOL) Notice of Proposed Rulemaking regarding the executive, administrative, professional (EAP) and related exemptions from minimum wage and overtime coverage under the Fair Labor Standards Act (FLSA or the Act), RIN 1235-AA20 (NPRM).

NELP is a non-profit research, policy, and advocacy organization that for 50 years has sought to insure that all workers, especially those most vulnerable to workplace exploitation or abuse, receive the basic workplace protections guaranteed by our nation's labor and employment laws, including the FLSA. NELP supports groups with members who include low- and middle-wage earners who have been denied minimum wage and overtime protections, and works closely with worker centers, labor unions, lawyers and other economic fairness advocates who promote and protect the rights and interests of workers. NELP's *National Wage & Hour Clearinghouse*, at www.just-pay.org, serves more than 1,000 members, including organizers, scholars, policymakers, lawyers, and others who through organizing, litigation, and policy advocacy work to cement basic wage protections, including the FLSA's minimum wage and 40-hour workweek and overtime pay guarantees, for all workers who are or should be covered by the Act.

NELP has submitted comments on overtime rules in the past, including in 2004, 2016, and 2017, primarily to urge proper coverage of a large and fast growing workforce that includes many workers in low-wage industries.

NELP writes to raise five primary concerns with the Department's proposal:

- The NPRM fails to uphold the purpose of the FLSA and the EAP exemptions, which are meant to cover only bona fide white-collar employees.
- The proposal's low salary threshold paired with the standard duties test perpetuates the mismatch problem created by the 2004 Rule, arbitrarily leaving too many workers out of coverage, in contravention of the statute.
- If the DOL rejects its own 2016 Final Rule and its appropriate balancing of the exemptions to today's labor market, DOL must either align a higher salary threshold to the standard duties test or bring back the long test.
- The NPRM fails to provide for automatic indexing of the salary threshold.
- The workers who will not get overtime protection under this proposed rule are precisely the workers who most need the FLSA's protection.

Finally, NELP agrees with the Department's decision in the proposed rule to decline to create separate geographical or exemption category salary thresholds.

I. The Purpose and History of the EAP Exemption and Regulations, Up to the Texas Court Ruling.

Congress passed the FLSA to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), quoting Message of the President to Congress, May 24, 1934; 29 U.S.C. § 202(a). Among other things, the Act shields workers from oppressively long working hours and "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941).

The FLSA's guarantee of premium pay for overtime hours was meant to encourage employers to spread out extra work to more, instead of giving more hours to fewer employees. *Overnight Motor Transport v. Missel*, 316 at 576. Workers protected by the FLSA are presumed entitled to the overtime premium unless they are explicitly exempted under the terms of the Act. Relevant to these comments, section 213(a)(1) exempts "bona fide executive, administrative or professional employees" (EAP) from minimum wage and overtime coverage. Congress did not define or delimit those terms, instead leaving it to Secretary to do so "from time to time by regulations."[1]

The EAP exemptions apply only to "bona fide" EAP workers, to distinguish them from a general exemption for white collar workers or even from the subset of all EAP employees."[2] Of the

[1] 29 U.S.C. §213(a).

[2] Congressional Research Service Report R45007 (October 31, 2017), pp. 3-4, ("As noted in the supporting analysis for the 1940 rule, 'if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act.'") *See* Harold Stein, "Executive, Administrative, Professional ... Outside Salesman Redefined", U.S. Department

exemptions included in the originally-enacted FLSA, the EAP exemptions are the only ones to use the qualifier of "in a bona fide capacity" for the class of workers to which the exemptions apply.[3] These exemptions are based on the understanding that bona fide EAP employees have more power in the workplace such that they can set their own schedules and negotiate their own pay.[4] The EAP definitions were meant to be limited to workers who typically earned salaries well above the minimum wage and those that earned privileges above the baseline fringe benefits that set them apart from nonexempt workers entitled to overtime pay.[5] Congress also anticipated that exempt workers performed the type of work that was "not easily standardized to a particular period and could not be easily spread to other workers after 40 hours in a week."[6]

The Department issued its first regulations defining the EAP exemptions in 1938. It has subsequently revised them 12 times. The first rule defined the test for the exemption in terms of "duties" performed rather than occupational titles. In order to assure a worker was truly a "bona fide" exempt worker, the duties tests for all the EAP exemptions first promulgated by the DOL included the requirement that they could do "no substantial amount of work of the same nature as that performed by non-exempt employees of the employer."[7] This rigorous duties test, which became known as the "long test,"[8] was developed after a conference of representatives of industry and labor were convened to discuss and then approve the appropriate definition and delimitation of these terms.[9] In effect, the long duties test ensured that employers could not avoid paying overtime by assigning lower-paid employees a minimal amount of exempt work.

A salary level test was also included in most of the original definitions because the "final and most effective check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question."[10] The salary level test has been updated seven times, and every time the Department has recognized that the salary level test works in tandem with the duties test to identify bona fide EAP employees.[11]

In 1949, the Department established a second duties test for each exemption, commonly known as the "short test."[12] This less-stringent duties test, which only applied to employees who were

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of Labor, Wage and Hour Division, Washington, DC, October 10, 1940, pp. 6-7 (hereafter cited as "Stein Report").

[3] Congressional Research Service Report R45007, p. 4.

[4] Report of the Minimum Wage Study Commission Volume IV, pp. 236 & 240 (June 1981).

[5] *Id.*

[6] *Id.*

[7] 3 Fed. Reg. 2518 (October 20, 1938).

[8] In 1940 the "no substantial amount of work" was defined as no more than 20% for executive and professional employees. *See* 5 Fed. Reg. 4077. In 1949, it was defined that way for administrative employees. 14 Fed. Reg. 7705 (Dec. 24, 1949) at 7706. When retail employees were covered by the Act in 1961, it was defined as no more than 40% for them. *See* Public Law 87-30, May 5, 1961.

[9] Stein Report p. 1.

[10] *Id.* at pp. 6-7.

[11] 81 Fed. Reg 32391 at 32444 (May 23, 2016).

[12] "Although commonly referred to as the "short" duties test, the pre-2004 regulations actually referred to these tests as the ''special proviso for high salaried executives," *See* 69 Fed. Reg. 22122 at 22173, (April 23, 2004); *see also* 29 CFR §541.119, the "special proviso for high salaried administrative employees;"

paid at a level well above the long test salary threshold, did not take into account the amount of non-exempt work an EAP employee performed. Rather, under this test, an EAP-exempt employee "must have as a 'primary duty' those of a bona fide executive, administrative or professional employee."[13] The term "primary duty" was defined as the principal activity. Under this test, there was no limit placed on the amount of non-exempt work an employee performed because the employees who met the higher salary level were more likely to meet all of the requirements for exemption, and thus a "short-cut test for exemption . . . would facilitate the administration of the regulations without defeating the purposes of section 13(a) (1)."[14]

The main difference between the long and short duties tests was a quantitative limit in the long test on the amount of time an EAP employee could spend performing nonexempt work (no more than 20% in a workweek; 40% for retail). With the exception of 1975,[15] from 1949 until 2004, the Department, with some variations in data, set the two salary levels using a consistent methodology. For employees who would be subject to the long test, DOL set the salary level so that "no more than about 10 percent" of 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."[16] The short test salary level was set ranging from 130 to 180 percent of the long test salary levels.[17] During this 55-year period of using long and short tests, the salary level for the short test averaged 149% of the salary for the long test.

In 2004, the Department abandoned the concept of separate long and short tests for different salary levels. It opted instead for one "standard" test, which it admitted was the functional equivalent of the old short test,[18] and one salary level set at an amount equivalent to the lower old "long test" salary level.[19] The Department set the standard salary level at $455 per week in the 2004 Rule. In arriving at this number, the Department relied on the methodology it had historically used to set the long test salary level, but with two changes. First, the Department set

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see also 29 CFR §541.214; and *see also* the "special proviso for high salaried professional employees" 29 CFR §541.315.

[13] 81 Fed. Reg. at 32400.

[14] Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report") at pp. 22-23.

[15] In 1975, the Department adjusted the salary levels based on the Consumer Price Index. These were interim levels and the Department intended to issue new regulations based on a salary study to be completed six months later. The Department also stated that the 1975 rulemaking should not be considered a precedent. 40 Fed. Reg. 7091, at 7091 (Feb 19, 1975).

[16] Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) ("Kantor Report") at pp. 5–7.

[17] 81 Fed. Reg. at 32400.

[18] In 2004, the Department described the difference as merely "de minimis," and explained that the new standard duties test is "substantially similar" to the old short duties test. 69 Fed. Reg. at 22192–93 and 22214. Although the duties test for executives included an additional requirement separate from the old long test, the Department said that the numbers of workers these differences would impact "is too small to estimate quantitatively." 69 Fed. Reg. at 22193.

[19] 81 Fed. Reg. at 32467 and 69 Fed. Reg. at 22168.

the salary level based on the earnings of exempt and nonexempt full-time salaried employees. In previous rulemakings, the Department had looked only at salary data on employees who met the EAP exemption, who earn higher salaries on average than nonexempt salaried employees.[20] Second, recognizing that "employees earning a lower salary are more likely non-exempt," the Department offset the first change by making an additional adjustment.[21] The 2004 Final Rule set the salary level to exclude from exemption "approximately the lowest 20 percent of all salaried employees," whereas previously the Department set the salary level to exclude "approximately the lowest-paid 10 percent of exempt salaried employees."[22] By setting the salary threshold at a higher percentile of a data set that included employees likely to earn lower salaries, the Department explained that it reached a final salary level that was "very consistent with past approaches" to setting the long test salary threshold.[23]

Although the Department recognized the need to make additional adjustments to the long test salary level methodology because of the move to the weaker standard duties test,[24] the salary level included in the 2004 Final Rule notably did not do so. The Department indicated that the change in percentile could account for both the fact that the data now "included nonexempt salaried employees" and "the proposed change from the 'short' and 'long' test structure."[25] At the same time, however, it is clear from the Department's analysis that the change to the 20th percentile of exempt and nonexempt salaried employees produced a salary that was in fact roughly equivalent to, although a little lower than, the salary derived through the methodology previously used to set the long test salary levels.[26] The prior long test salary levels were based on salaries of approximately the lowest 10 percent of exempt salaried employees in low- wage regions and industries (known as the Kantor long test method). Yet, the $455 salary level excluded only 8.2 percent of likely exempt employees in the South and 10.2 percent of likely exempt employees in retail.[27]

The 2004 Final Rule also for the first time created the "highly compensated employee" (HCE) test for exemption. Under the HCE test, employees who receive at least $100,000 in specified total annual compensation (which must include at least the standard salary amount per week paid on a salary or fee basis), are exempt from the FLSA's overtime requirements if they meet a very minimal duties test. They must customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption.[28]

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[20] *See* 69 Fed. Reg. at 22166–67.
[21] *Id.*
[22] *Id.* at 22168; 22166.
[23] *Id.* at 22167.
[24] *Id.* at 22167
[25] *Id.*
[26] *See* 69 Fed. Reg at. 22168. "The result of this analysis is Table 4, showing salary ranges for likely exempt workers. As shown in Table 4, the lowest 10 percent of all likely exempt salaried employees earn approximately $500 per week. The lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week. The lowest 10 percent of likely exempt salaried employees in the retail industry earn approximately $450 per week."
[27] *Id.*
[28] 29 CFR § 541.601.

In 2016, the Department recognized that

> the effect of the 2004 Final Rule's pairing of a standard duties test based on the less rigorous short duties test with the kind of low salary level previously associated with the more rigorous long duties test was to exempt from overtime many lower paid workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime- eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt—that is overtime exempt—who pass the standard duties test but would have failed the long duties test.[29]

In order to remedy this mismatch of the duties and salary level tests, and in deference to the overwhelming demands of the employer community to not revise the duties test, in the 2016 Final Rule the Department set the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).[30] The Department concluded that this standard salary level would adequately distinguish between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work, as existed under the long duties test.[31] The Department also included in the regulations a mechanism to automatically update the salary and compensation thresholds every three years by maintaining the fixed percentiles of weekly earnings set in the Final Rule.

The 2016 Final Rule was challenged in the Eastern District of Texas, where the judge erroneously enjoined the implementation of the Rule. The Department appealed that decision, and has been granted a stay of the appeal pending the outcome of its current attempt at re-regulation.

A. DOL Relies on a Deeply Flawed District Court Ruling to Support the Need to Re-Regulate and Abandon the 2016 Final Rule.

In proposing to rescind the 2016 rule in the current NPRM, the DOL relies on the questionable opinion of one district court judge. The Texas district court used a faulty analysis to enjoin the DOL's implementation of the 2016 Rule, and should not determine the Department's policy. The Department's over-reliance on the district court's decision is evidenced by the 33 times it cites to the decision and the numerous references to the court's reasoning.[32]

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[29] 81 Fed. Reg. at 32392.

[30] Although the DOL used a slightly different data set in 2016 to calculate the salary level it proposed, the differences resulting from the slightly different data sets are de minimis. For example, the $679 salary level proposed in the 2019 NPRM is set at the 20th percentile when using the 2004/19 data set. Using the 2016 data set, $679 is the 19th percentile.

[31] 81 Fed. Reg. at 32393.

[32] "The Department reconsidered the $913 per week standard salary level set in the 2016 final rule in light of the district court's decisions..."; "To address the district court's and the Department's concerns with the 2016 final rule and set a more appropriate salary level..."; "In proposing a new salary level, the Department considered the district court's conclusion that the salary level set in the 2016 final rule exceeded the Department's authority..."; 84 Fed. Reg. 10900 (March 22, 2019) at 10900, 10901; "As the district court noted in its decision invalidating the 2016 final rule, the increase also untethered the salary

In *Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017), the court determined that a salary level set by the DOL was not valid because it "excludes from exemption an unusually high number of employees who pass the duties test." However, as NELP detailed in its comments in response to the Request for Information, this decision was wrong on the merits and should have no bearing on the Department's overtime regulations.[33] The judge fundamentally misconstrued the Department's historical use of the salary-level test as part of its definition and delineation of the EAP exemptions. He failed to consider any of the vast economic analysis prepared by the Department in support of the 2016 Rule, which demonstrated the mismatch the 2004 regulations created. Instead, the judge was unduly focused on the Department's doubling of the threshold, without addressing why the Department considered such a level necessary. The judge also erred by failing to afford the Department deference with respect its interpretation of the EAP exemptions.[34]

The district court noted that the 2016 Rule raised the salary level to twice the 2004 level, but did not explain why the salary level should be lower simply due to the high number of employees that would suddenly become overtime exempt without any change to their duties. The court failed to account for the fact that those employees are exempt because they pass the standard duties test, but may not have been overtime exempt if the 2004 rule had either kept the more restrictive long duties test, or raised the salary level to one more equivalent to the old short test level. And the court ignored the fact that the salary level has historically worked in tandem with the duties test, so the standard duties test is not the only or necessarily the best way to define who is a bona fide exempt employee.

Though the judge was troubled that workers earning below the salary level are automatically excluded from the EAP exemption without regard to their duties, he failed to realize that this is the point of a salary level test. It has been true of every salary level test since just after the enactment of the FLSA in 1938, including the 2004 salary level. The judge appeared to place great weight on the fact that the Department estimated that 4.2 million workers who were subject to the EAP exemption under the 2004 Rule would become automatically covered under the 2016

test from its historical justification..." *Id.* at 10901; "The district court's summary judgment decision endorses the Department's [current approach] to setting the salary level..." *Id.* at 10907; "The court then explained that in contrast to these acceptable past practices, the 2016 standard salary level..." *Id.* at 10907; "The court also emphasized the magnitude of the salary level increase..." *Id.* at 10908; "The Department has reexamined the 2016 final rule in light of the district court's decision." *Id.* at 10908; "The district court approvingly cited the Weiss Report and explained that setting 'the minimum salary level as a floor to 'screen[] out the obviously nonexempt employees'' is 'consistent with Congress's intent.'" *Id.* at 10909; "Further endorsing the Department's earlier rulemakings, the district court stated..." *Id.* at 10909; "As the district court recognized..." *Id.* at 10908; "As the district court stated, that increase department from the salary level's purpose..." *Id.* at 10909; "The proposed standard salary level also addresses the concerns raised in the district court's summary judgment decision." *Id.* at 10909; "The district court's decision raised concerns regarding the large number of exempt workers..." *Id.* at 10909; "The district court noted that this relatively high number indicated that the salary level was displacing the role of the duties test..." *Id.* at 10909.

[33] National Employment Law Project Comment Letter response to RIN 1235-AA20, published September 25, 2017, available at: https://s27147.pcdn.co/wp-content/uploads/nelp-opposes-efforts-to-change-overtime-rule-criteria.pdf

[34] *See Id., see also. Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017).

Rule, without any change to their duties. However, the promulgation of the 2004 Rule was itself expected to lead to the automatic coverage of 1.3 million previously exempt workers, also without any change to their duties. Furthermore, as discussed below, that number would have been much higher if the 2004 salary level had been set at an amount more appropriate to the standard duties test.

The judge failed to mention, let alone account for, the Department's conclusion in 2016 that there was a mismatch in the 2004 Rule between the salary level – set at the lower long-test salary level – and the standard duties test, which was essentially the short duties test – and so the 2004 salary level should have been set higher. If the 2004 rule had been set at an appropriate level, e.g. between 130% and 180% of the long test level, there would have been far more than 1.3 million workers affected by the 2004 Rule. And as a result, there would have been between 700,000 and 2.8 million fewer workers affected by the 2016 Rule. As the Department concluded in 2016, in the absence of a long test "it is necessary to set the salary level higher (resulting in exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test."[35]

The judge's conclusion that the salary level supplants an analysis of an employee's job duties is belied by the record, which shows that there are 6.5 million white-collar salaried workers who earn above the 2016 salary level and yet are expected to fail the duties test.[36] In fact, fully 47% of the entire salaried white-collar workforce would fail the test, and therefore are overtime-eligible as a result of the application of the duties test.[37]

Finally, to the extent the judge determined that the particular salary level used in the 2016 Rule is inconsistent with the EAP exemption, he failed to support this assertion with any economic or legal analysis. The judge simply relied upon the number of workers affected to distinguish the 2016 salary level from the 2004 level, which he in a footnote suggested – in purely conclusory fashion – was valid.[38]

The current NPRM continues the 2004 error of pairing a low salary level with a duties test that allows the exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense.

II. The Proposed Rule's Low Salary Threshold Perpetuates the Mismatch Created by the 2004 Rule and Fails to Advance the Goals of the FLSA.

This NPRM does not advance the overarching goals of the FLSA because it perpetuates the 2004 mismatch by proposing a low salary level while pairing it with the weaker standard duties test. This NPRM will lead to continued inappropriate classification of overtime-eligible employees, denying overtime to many workers who are not bona fide EAP workers.

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[35] 81 Fed. Reg. at 32409.
[36] 81 Fed. Reg. at 32465.
[37] 81 Fed. Reg. at 32466.
[38] The Judge suggested that if the Department updated the 2004 methodology adjusting for inflation, then the case would not have moved forward because "[the salary level] would still be operating more the way it has. . . as more of a floor." *Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795, n. 6.

The Department of Labor has long recognized the symbiotic nature of the salary threshold and the duties test in determining the EAP exemptions:

> At a lower salary level, more overtime-eligible employees will exceed the salary threshold, and a more rigorous duties test would be required to ensure that they are not classified as falling within an EAP exemption and therefore denied overtime pay. At a higher salary level, more employees performing bona fide EAP duties will become entitled to overtime because they are paid a salary below the salary threshold. Setting the salary threshold too low reduces the risk that workers who pass the duties test become entitled to overtime protections, but protections but does so at the cost of increasing the number of overtime-eligible employees exceeding the salary level who are subject to the duties test and possible misclassification.[39]

Indeed, this is exactly what happened in 2004, when the Department paired a relatively low salary threshold with a the less rigorous duties test that was previously used to determine bona fide EAP status only at much higher salary levels. When the Department examined the results of this pairing for the 2016 Rule, detailed economic analysis demonstrated that the 2004 regulation created what it termed a "mismatch" between the salary level and the duties test, such that far more people were classified as overtime exempt, well outside of historical ranges. As noted in the 2016 Final Rule, "[r]ather than pair the standard duties test with a salary level based on the higher short test salary level, . . .[the Department] tied the now standard duties test to a salary level based on the long duties test. This resulted in a standard salary level that, even in 2004, was too low to effectively screen out from the exemption overtime eligible white collar employees."[40]

In the current pending NPRM, DOL does not and cannot dispute that in 2004 it paired a duties test substantially similar to the old short test,[41] with a salary level that was equivalent to the old long test level.[42] Now, DOL proposes to rescind the 2016 Rule that was intended to correct the 2004 methodological error. However, by simply reverting to the 2004 methodology, and not considering any alternatives that could help correct the mismatch it does not dispute exists, the DOL has made no effort to assure that lower paid workers, especially those who perform a great deal of non-exempt duties, are appropriately classified as overtime eligible.

DOL claims that the 2016 Rule did not account for the absence of an "effectively dormant"[43] long test allowing for "many"[44] exempt employees to qualify for overtime. NELP believes the DOL set an appropriate salary level in 2016, and that it did account for the absence of the long test by setting the salary level at the low end of the historical level of the short test. In 2016, the Department explicitly determined that, "[b]ased on the historical relationship of the short test salary level to the long test salary level ... a salary between approximately the 35th and 55th

[39] 80 Fed. Reg. 38516 at 38531 (July 6, 2015).
[40] 81 Fed. Reg. at 32404.
[41] 81 Fed. Reg. at 32400.
[42] 69 Fed. Reg. at 22167.
[43] 84 Fed. Reg. at 10906.
[44] 84 Fed. Reg. at 10903.

percentiles of weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test."[45] It further noted that:

> As we noted in the NPRM, we are concerned that at the current low salary level employees in lower-level management positions who would have failed the long duties test may be inappropriately classified as ineligible for overtime. At the same time, the Department proposed a lower salary level than the average salary traditionally used for the short duties test in order to minimize the potential that bona fide EAP employees, especially in low-wage regions and industries, might become overtime- protected because they fall below the proposed salary level.[46]

In the NPRM, the Department further claims that "[t]he 2016 final rule went beyond the limited traditional purpose of setting a salary "floor" to identify certain obviously nonexempt employees, and instead excluded from exemption many employees who had previously been, and should have continued to be, exempt by reference to their duties."[47] However, the NPRM provides no analysis of how many employees should have continued to be exempt or why they should have continued to be exempt.

DOL further states that "[t]he [2016] increase excluded from exemption 4.2 million employees whose duties would have otherwise qualified them for exemption, a result in significant tension with the text of section 13(a)(1)."[48] However, qualification for the exemption was never based on passing a duties test alone; it was always based on a duties test working in tandem with an appropriate salary level.[49] Indeed, DOL still endorses the maxim that a duties test must work with an appropriate salary level in order to determine if one is an exempt EAP employee. For example, with regard to HCE employees, a worker must not only pass the very minimal HCE duties test but must also make above a certain salary in order to be exempt from overtime requirements.

As the Department has long recognized, the salary level threshold "cannot be drawn with precision but at best can be only approximate."[50] From 1949 to 2004, the salary level that worked with the functional equivalent of the standard duties test was 130% to 180% higher than the salary level the DOL is proposing in this NPRM.[51] Because DOL has abandoned the long duties test, a salary level must set a floor that accounts for absence of the long test. The NPRM's proposed salary level does not do that.

One of the more galling assertions in the NRPM is the following:

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[45] 81 Fed. Reg. at 32404.
[46] 81 Fed. Reg. 32391 at 32404.
[47] 84 Fed. Reg. at 10903.
[48] 84 Fed. Reg. at 10901.
[49] The fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee. The salary level test and duties test have always worked in tandem to distinguish those who Congress intended the FLSA to protect from those who are "bona fide" EAP employees. 81 Fed. Reg. at 32413,
[50] Weiss Report at 11.
[51] 81 Fed. Reg. at 32392.

> The mismatch rationale also failed to account fully for the Department's part 541 exemption history. The standard duties test was introduced by the 2004 final rule and has been in effect for 15 years. The short duties test, which it is similar to, was functionally the predominant test in use for the preceding 13 years, since the 1975 long test salary levels were equaled or surpassed by the FLSA minimum wage in 1991. Altogether, most employers and employees have effectively been covered by this one-test system for over 25 years. This practice is highly relevant to any update by the Department's approach.[52]

In effect, DOL is relying on its failure to effectively define and delimit the EAP exemptions over the last 25 years, first by failing to update the salary level, and then by pairing an inappropriately low salary level with a weak duties test to justify its continuing failure to properly define and delimit the exemption. Such reasoning does not justify DOL abdicating its responsibility to promulgate effective and appropriate regulations.

And rather than fashioning any solution to the mismatch, the Department now simply wants to reinstate the deeply flawed 2004 regulation, setting the salary threshold once again at approximately the 20th percentile of full-time salaried workers in the lowest wage region in the country and in the retail sector. Not only does the Department simply return to the flawed 2004 methodology, but it does so without consideration of any other alternative that could solve the problem of the mismatch that it concedes exists.

Contrast that with the 2016 Final Rule, which explicitly discussed a number of other methods of setting the salary threshold. First, DOL looked at updating the threshold based on a number of different measures of inflation, but decided, consistent with longstanding DOL practice, that while inflation is a useful tool to underscore how a threshold may have eroded, the threshold should be updated by relying on the annual earnings of workers as the best evidence of prevailing salary levels.[53]

The Department also contemplated updating the 2004 methodology, as it is proposing to do now, or using the Kantor method discussed above. Both methodologies were rejected because the 2004 regulation created the mismatch, and the Kantor method only works if the salary threshold is paired with a long test. DOL also considered setting the salary threshold "equal to the median earnings for all full-time wage and salaried workers combined," but decided it wasn't appropriate to include hourly workers' wages in the calculation because it would have resulted in too low a salary level when combined with current duties test. And finally, DOL considered setting the threshold at 50 % of median earnings for salaried workers but determined that would be too high for some low-wage regions in the country.[54]

Instead of a thoughtful approach that examines many alternatives, the current NPRM simply follows the path of least resistance (coincidentally that which was suggested by the business community's largest lobbying associations), and in conclusory fashion decides to simply update the 2004 regulations with the mismatch, and not examine any other meaningful alternatives.

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[52] 84 Fed. Reg at 10908.
[53] 81 Fed. Reg. at 32461.
[54] 81 Fed. Reg. at 32495.

Though the Department looked at various inflation-based indices it could use to bring the 2004 threshold to a current value, in spite of its long history of rejecting inflation as a proper tool to update the salary threshold, it did not consider a single alternative that would actually correct the mismatch it acknowledges exists.

DOL did not consider any alternatives to the 40th percentile solution fashioned in the 2016 Final Rule. As noted above, in 2016, the Department concluded that a salary threshold somewhere between 35% and 55% of the weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test and correct the mismatch, but in this NPRM, there's no consideration of setting the salary threshold consistent with the 35% level, which would result in a weekly threshold of $919, a present value of $47,788 per year, or any other level that attempts to address the issues with the 2004 rule. Nor did the Department even consider the possibility of phasing in an appropriate salary level.

As previously mentioned, NELP believes the DOL set an appropriate salary level in 2016 and that it did account for the absence of the long test by setting the salary level at the low end of the historical level of the short test. If DOL continues to disagree, it should propose and adopt a salary level that it believes does account for the absence of the long test. The 2004 method clearly does not do that since it is nowhere near the short test salary level; in fact it is lower than the long test salary level.[55]

Finally, the Department should set the threshold at a level that is found in a series published on a regular basis by the Bureau of Labor Statistics (BLS), as the 2016 Rule did. To return--as the NPRM proposes--to a methodology that requires a sophisticated and time-consuming analysis of microdata would be a major step backwards in transparency.

III. If DOL Will Not Implement a Significantly Higher Salary Threshold, Then it Must Reinstate the Long Test.

If DOL refuses to revise the salary threshold high enough to remedy the mismatch, then it must reinstate the long duties test. Though the Department attempts to minimize its longstanding emphasis on the importance of the salary level test,[56] if it so chooses to do so, then it must adopt a duties test appropriate to the salary level it chooses. The DOL reasoned that "[s]alary is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees. But it is not 'capacity' in and of itself."[57] By the same reasoning, any particular duties test, in and of itself, is not a true indicator of "capacity" either. Through 1949 to 2004, the Department recognized that lower salary levels require a more rigorous duties test in determining exempt status, and it still does in terms of the differences between the standard duties test and the HCE duties test, which the Department continues to endorse.

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[55] *See, infra,* footnotes 19 and 25.
[56] "More fundamentally, except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee's duties. It is, at most, an indicator of those duties. For most white collar, salaried employees, the exemption should turn on an analysis of their actual functions, not their salaries, as Congress commanded." 84 Fed. Reg. at 10908.
[57] 84 Fed. Reg. at 10907.

As discussed above, when the FLSA was passed, and the first definitions of the EAP exemptions were promulgated by the Department, they did not all have a salary level test, but they all had a duties test which required that exempt employees could not perform a substantial amount of non-exempt duties. It was only when the highly compensated salary level was introduced in 1949 that the minimal duties test, which has evolved into the standard test, came into being. From 1949 to 2004, the more restrictive duties test was what the Department required to determine who was a bona fide exempt employee if they were not highly compensated. Therefore, if the Department chooses to abandon the emphasis it has placed on the salary level and instead emphasize an analysis of duties, it cannot keep the standard duties test, which places no limit on the amount of non-exempt work that an employee can perform.

The NPRM proposes setting the salary level using the 2004 methodology, which results in a salary level that the DOL acknowledged in 2004,[58] 2016,[59] and 2017,[60] and that the district court[61] recognized was the equivalent of the long duties test salary level. At that salary level, DOL must reintroduce the long duties test in order to assure that employees are indeed "bona fide" exempt workers.

In 2016, the DOL opted to increase the salary level in large part because business opposed any changes to the standard duty test. Because the salary level and duties tests have always worked in tandem, the DOL has two choices: it can increase the salary level to a level more appropriately paired with the standard duties test, or it can use a duties test more appropriately paired with the salary level it is proposing. DOL is arbitrary when it does neither, proposing a low salary level and no changes to the less than rigorous standard duties test.

IV. DOL Has Ample Authority to Index the Salary Threshold and Should Do So in the Final Rule.

Though the Department favored indexing the salary threshold on a regular basis in its 2016 Rule, in its current NPRM, it has bowed to threats from corporate lobbyists, who favor the difficulty of intermittently updating the EAP regulation to the benefit of employers.[62]

NELP is in favor of an updating salary threshold to prevent the dramatic erosion of the standard's value in the face of DOL's failure to act. Even though the FLSA is meant to reduce wage inequality, today's poverty-level salary threshold is a potent example of the harms that accompany a lack of salary level indexing. Growing wage inequality is a continuing and significant problem for our nation, and the loss of coverage from the lower salary level will be substantial. Failure to index the threshold will only exacerbate these losses. According to recent data from the Economic Policy Institute (EPI), due to the lack of indexing, the earnings loss for

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[58] *See, infra,* footnote 19.
[59] 81 Fed. Reg. at 32401-402.
[60] 82 Fed. Reg. 34616 (July 26, 2017) at 34618.
[61] "In addition, the Department set the salary level equivalent to the lower minimum salary level previously used for the long test." *State of Nevada et al v. U.S. Dept. of Labor*, 275 F. Supp. 3d. 795, 795 (E.D. TX Aug. 31, 2017).
[62] Chris Opfer, *Punching In: Legal Drama for Labor Department*, Bloomberg Law, February 11, 2019, https://news.bloomberglaw.com/daily-labor-report/punching-in-legal-drama-for-labor-department-19.

workers from this proposal will grow from $1.2 billion to $1.6 billion over the first 10 years of implementation.[63]

DOL has updated the salary threshold only eight times in 75 years, and only once since 1975; there is thus no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. While the DOL has used different methods over the decades as it has adjusted the EAP salary thresholds, regulatory adjustments to the thresholds have slowed in recent years, causing the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions, as happens now.[64]

The FLSA exemption from the minimum wage and overtime protections for EAP employees specifies that these exemptions must be "defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). As indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL would be acting entirely reasonably and within its statutory authority[65] to adopt indexing as a means to define and delimit the EAP exemptions in a timely manner. And, in the current NPRM, the Department acknowledges that Congress has instructed the Department to make these determinations "from time to time."[66]

Indexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming federal regulations.[67] Even if the Department finalizes its proposal to "commit" to updating the rule through notice and comment rulemaking every four years based on the same methodology used in the Final Rule, benchmarking the rule to a regularly-published BLS series would still provide a crucial planning tool for the regulated community and for affected workers.

V. The Workers Who Will Not Get Overtime Protection Because of this Proposed Rule are Precisely the Workers Who Most Need the FLSA's Protection.

The Supreme Court, citing the statute, stated that "[t]he principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'"[68] Worried about over-work, Congress enacted a time-and-one-half premium pay requirement for hours worked beyond 40 in one week.[69] Congress recognized, however, that

[63] Heidi Shierholz, *More than eight million workers will be left behind by the Trump overtime proposal*, Economic Policy Institute, April 8, 2019, https://www.epi.org/publication/trump-overtime-proposal-april-update/
[64] *See,* 81 Fed. Reg. at 32392.
[65] Law Professors Overtime Comments in response to RIN 1235-AA11 (September 4, 2015) letter on DOL's authority to index the salary threshold: https://www.regulations.gov/document?D=WHD-2015-0001-4585.
[66] 84 Fed. Reg. at 10914.
[67] The Department cites industry stakeholders' views that indexing would not account for unique economic circumstances and would be "unduly disruptive." 84 Fed. Reg. at 10914. These vague and unsubstantiated assertions are not a proper basis for the Department's determination not to index.
[68] *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)).
[69] 29 U.S.C. § 207.

while many workers did not have sufficient individual bargaining power to protect themselves against abuses like low pay and excessive hours, some workers did enjoy the kind of labor market and workplace power that would enable them to protect themselves. These are the workers they decided should be exempted from minimum wage and overtime protections based on their status as bona fide executive, administrative or professional employees.[70]

The workers losing protections under this proposed Rule, as compared to the Obama-era 2016 Rule, are the very ones meant to get coverage: those without the requisite power to protect themselves in their job hours and including a disproportionate number of women and people of color. The Economic Policy Institute estimates that 8.2 million workers will be left behind by this proposed rollback of the Obama Rule.[71] Of those workers, 4.2 million are women, 3.0 million are people of color, 4.7 million are without a college degree, and 2.7 million are parents with children under the age of 18.[72] Leading categories of jobs left behind by this NPRM include retail, health, education, services, and manufacturing.

NELP's own analysis of publicly-noted cases alleging EAP misclassification abuses, filed as an Appendix to its comments on the 2015 Rule, shows that the following sectors are well-represented in those with overtime abuses: retail, restaurants, hotels, banks, oil and gas inspection and repair, insurance company and call center service jobs.[73]A recent update to that case compendium shows that gas station attendants, logistics workers, oil drillers, fast food managers, and retail workers continue to work long hours and are treated as exempt under the EAP exemptions by their employers.[74]

VI. The Department is Correct to Reject Overly Confusing and Complex Regional Salary Levels and Separate Levels for E, A, and P Employees.

The Department rightly declines to revise its definitions of the EAP exemptions to contain multiple salary levels, based on either geographic or job category bases for distinct thresholds. NELP believes the approach of a single salary level is best.

Segmenting the salary level adds legal risk of a challenge to the Rule. As the Department knows, there is a wide array of possible methods for dividing salary levels, and selection of one method over an alternative would need to be carefully reasoned and empirically justified to survive

[70] 29 U.S.C. §213(a)(1).
[71] And because the NPRM does not index, this number rises to 11.5 million workers left behind in ten years, https://www.epi.org/publication/trump-overtime-proposal-april-update/.
[72] *Id.* at Table 1.
[73] National Employment Law Project, comments submitted in response to RIN 1235-AA11, September 4, 2015, https://www.regulations.gov/document?D=WHD-2015-0001-5653.
[74] *See, Goussen v. Mendez Fuel Holdings LLC*, No. 1:18-cv-20012 (S.D. Fla. Oct. 2018); *Hudgins et al. v. Total Quality Logistics, LLC,* No. 1:16-cv-07331 (N.D. Ill. Jan. 2019); *McQueen et al v. Chevron Corp.*, No. 4:16-cv-02089 (N.D. Ca. Feb. 2019); *Watt v. Fox Restaurant Venture LLC et al (aka Jimmy Johns)*, No. 2:17-cv-02104 (C.D. Ill. Feb. 2019); *Misa Choi v. LG Electronics USA, Inc. et al*, No. 2:19-cv-12236 (D.N.J. May 2019).

judicial review.[75] Second, classification of employers as between the different salary levels would be administratively difficult, require more of the Department's resources, and would invite more lawsuits as stakeholders second-guess the Department's line-drawing. Whether the levels are divided by geography or industry, or type of exemption, there are bound to be close-calls that will generate litigation. As the Department explained when it rejected regional salary thresholds in the 2004 rulemaking, adopting multiple different salary levels is not administratively feasible "because of the large number of different salary levels this would require."[76]

Finally, the compliance burden for employers subject to different salary levels, or for whom the applicable salary level is unclear, would escalate under the multi-level regime. Corporations often operate in multiple areas of the country, transfer workers frequently, and require work to be conducted across state lines, even within a single day or workweek. And the three EAP-exemption categories of employment are not always easily distinguishable. There is significant overlap between these exemptions, resulting in workers in many occupations being potentially covered by more than one exemption.[77]

Applying multiple different salary levels, or attempting to discern which single level applies to a job or a geographical area, would constitute a new and unwarranted cost to the regulation.[78]

Conclusion

For the reasons stated above, NELP is opposed to the NPRM as currently composed. It arbitrarily does not resolve the mismatch between the salary level and the standard duties test and it does not include automatic updating, in contravention of the purposes of the Fair Labor Standards Act (FLSA). The Department's proposed rule to define and delimit the Executive, Administrative and Professional exemptions (EAP) does not go far enough to reduce inappropriate classification of workers and reduce wage inequality and would especially hurt those workers in low wage industries who need the protections of the FLSA the most.

Sincerely,

Christine L. Owens

Christine L. Owens, Executive Director

[75] *See,* 82 Fed. Reg. 34616; National Employment Law Project, comments submitted in response to RIN 1235-AA20, September 15, 2017 at pp. 5-7, https://www.regulations.gov/document?D=WHD-2017-0002-140183.
[76] 69 Fed. Reg. at 22171.
[77] *See,* 69 Fed. Reg. at 22192.
[78] Indeed, such a scenario would appear to be the opposite of what many employer groups have advocated. For example, according to the HR Policy Association, "It is imperative that stakeholders work with policymakers to reach agreement on which employees continue to need the law's overtime protections *and establish clear lines distinguishing between exempt and non-exempt employees.*" HR Policy Association, Classification of Employees as Exempt/Nonexempt, http://www.hrpolicy.org/issues-and-advocacy/sub-issues/classification-of-employees-as-exemptnon-exempt-2201 (last visited September 17, 2017) (emphasis added).

To Whom It May Concern:

We, the undersigned, are all professors at colleges and universities across the United States. We strongly support the Department of Labor's new rules governing overtime under the Fair Labor Standards Act. Though many institutions of higher education have publicly opposed these new regulations and projected significant extra costs, we suspect there are many others who are quietly supporting them. That is because the updated overtime rule will ensure that millions of American workers receive a fair day's pay for a hard day's work, restoring access to protections lost as the value of the overtime salary threshold eroded over decades and employers sought to exploit loopholes allowing them to deny overtime pay to their employees.

In terms of the impact on institutions of higher education, it's important to begin with the fact that the majority of workers in this sector are exempt from the rules because they don't apply to anyone whose duties include a significant amount of teaching. So professors, instructors, coaches, counselors, and most student assistants, including those who are RA's in residence halls are all exempt. Whereas higher education hourly workers in offices, cleaning and food service are already covered and the regulations don't alter that fact. Relative to the small proportion of workers who are covered, we believe the benefits throughout the American workforce far exceed the small portion of new costs to higher education. After all, when workers receive deserved overtime pay the dollars flow into local economies across the nation, as well as making it possible for more workers and their children to attend college.

While people are right to be concerned about the ever-increasing costs of higher education, we must be clear about the key drivers of this trend. First and foremost, there is sharply decreasing governmental support for universities, with state support per student steadily cut for decades to cover other costs or shortfalls, or declining federal support for research in the non-defense and non-medical areas. Second, the amount and percentage of personnel costs going to administration, which many find excessive both in terms of the numbers of administrators and their salary levels, has increased significantly over the past few decades. Finally, there is the ever-rising cost of facilities—updated information technology and libraries, "smart" classrooms, remodeled dorms and the very latest workout facilities—all of which are expected by many of today's students when they choose a university.

We don't believe that these financial pressures should be resolved on the backs of lower-wage workers, expecting one to do the job of two for no extra compensation. Public institutions can mitigate the costs of overtime for these workers by offering compensatory time off instead. Private institutions can use flextime (comparable time off within the pay period) when there is a real need for work to go beyond eight hours in a day. Under the new rules, these workers will likely see a reduction of their expected overtime, more comp and flextime options, and actually being paid for overtime when it is really needed. This should have minimal effect on overall university budgets, particularly because of comp and flex time, but a significant effect on the lives of the workers.

The effect of the new rule on 'post-docs' has also exposed a shocking reality: many students earn a doctorate in a scientific field and yet regularly work 60-plus hours a week for less than the new $47,476 threshold—far below median pay in the United States. What message does this send to prospective graduate students about pursuing more education? What does it say about the value our nation places on scientific research, including life-saving medical breakthroughs? Raising the pay of these highly trained researchers above the threshold is something we believe the granting bodies, primarily the National Institutes of Health (NIH) and the National Science Foundation (NSF) must support. Indeed, as part of the implementation of the new overtime rules, DOL is working closely with the both institutions to ensure a smooth implementation of the new rules vis-a-vis post-doctoral employees. For example, NIH will raise its stipends for post-docs to bring them above the new salary threshold.

The fact is that colleges and universities have <u>many</u> exemptions as well as many ways to meet the new standards. And these same colleges are full of smart people who regularly opine on solutions to a host of problems in the rest of the world. Broad support for sustainability among students has led many campuses to adopt pledges of sustainable behavior—and those extend to the economic and social as well as the environmental. The new emphasis on ethics in business schools should be a signal that the public expects higher education to practice what it preaches.

We, the undersigned, remind those in higher education who speak against overtime reform that we are not just teaching facts and theories. Our behavior sets an example to students of the proper way for employers to treat their workers. Colleges and universities are supposed to represent the best ideals and virtues of our communities. Rather than fighting the new overtime regulations in the small number of cases where they apply in higher education, we should be leading by example and enthusiastically working toward compliance. We are confident that many campuses will do exactly that.

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Chairwoman ADAMS. I now recognize the distinguished Ranking Member for his closing statement.

Mr. BYRNE. Thank you, Madam Chairwoman. And I do agree with you, this has been a very enlightening session.

Let me begin by asking unanimous consent to place into the record letters from the following organizations expressing concerns with the Department of Labor's 2016 overtime rule: the American Hotel and Lodging Association, College and University Professional Association for Human Resources, and the Society for Human Resource Management.

Chairwoman ADAMS. Without objection.

[The information referred to follows:]

AHLA
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May 20, 2019

Melissa Smith, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

Re: Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (84 Fed. Reg. 10900; RIN: 1235-AA20)

Dear Ms. Smith:

The American Hotel & Lodging Association ("AHLA" or "Association") submits these comments in response to the above-referenced Notice of Proposed Rulemaking ("Proposed Rule") published in the Federal Register on March 22, 2019.

Serving the hospitality industry for more than a century, AHLA is the sole national Association representing all segments of the U.S. lodging industry, including hotel owners, real estate investment trusts (REITs), chains, franchisees, management companies, independent properties, bed & breakfasts, state hotel Associations, and industry suppliers. Headquartered in Washington, D.C., AHLA focuses on strategic advocacy, communications support, and workforce development programs for an industry that advances long-term career opportunities for employees, invests in local communities across the country, and hosts more than one billion guests in American hotels every year. AHLA proudly represents a dynamic hotel industry of more than 54,000 properties that supports $1.1 trillion in U.S. sales and generates nearly $170 billion in taxes to local, state and federal governments.

The Fair Labor Standards Act ("FLSA") requires that employers pay employees at least a minimum hourly wage set by statute and an "overtime" rate of one and one-half times an employee's regular rate of pay for any hours the employee works over forty in a given workweek. The FLSA exempts from the overtime pay requirements certain classes of employees, including those working in "bona fide executive, administrative and professional" capacity ("EAP") "as such terms are defined and delimited from time to time by regulations" issued by the Department of Labor ("DOL" or "Department"). Under the current regulations the EAP exemption applies to employees who: (1) are paid on a salaried basis; (2) are paid at or above the minimum salary threshold of $455/week ($23,660 annually); and (3) have primary duties of executive, professional or administrative positions. *See* 29 C.F.R. Part 541.

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With this rulemaking, the Department is proposing to update the EAP exemption test by increasing the minimum salary level to $679 per week ($35,308 annually) from $455 ($23,660) by applying the same methodology it used when it made the last adjustment to the salary level thresholds in 2004. Additionally, DOL is proposing to allow incentive-based income to count toward the minimum salary threshold for exempt status. Finally, the proposed rule would establish periodic review of the minimum salary threshold by mandating that the Department initiate a rulemaking every four years to consider an increase using the 2004 methodology.

AHLA supports updating the minimum salary threshold by using the 2004 methodology and counting incentive compensation toward the threshold. The Association also supports the Department's decision to not make any changes to the duties test at this time. However, AHLA has concerns with the following aspects of the proposal: 1) DOL's proposal to establish a periodic review of the threshold on such short set intervals; 2) the limit on incentive compensation that may count toward the minimum salary threshold; 3) the proposed level for the highly compensated test; and 4) DOL's inconsistency with respect to whether it treats room and board and other benefits as compensation. Additional details on AHLA's support for and concerns with DOL's proposed rule are provided below.

Proposed Minimum Salary Threshold and Methodology
AHLA and its members agree with DOL that an increase to the salary threshold is due; in fact, in a survey AHLA conducted of its members in response to DOL's 2018 Request for Information (RFI) on the overtime regulations, eighty-nine percent (89%) agreed DOL needed to increase the minimum salary threshold.

AHLA commends DOL for using the 2004 methodology to determine a new salary threshold. AHLA recommended the Department do so in the comments it filed in response to the DOL's proposed changes to the EAP exemptions in 2015 as well as its 2018 RFI. AHLA believes that methods previously proposed by DOL in 2015 and in the 2016 Final Rule, which would result in higher thresholds, would be damaging to businesses and employees in the lodging industry and the U.S. economy as a whole (for more details see both comments as Exhibits A and B, respectively).

The 2004 methodology sets the minimum salary threshold at the bottom 20th percentile of the salaried population in the South[1] and the retail industry (i.e., the lowest-wage geographic area of the country and industry in the economy). This approach results in an increase to the threshold that is consistent with DOL's handling of the threshold throughout the history of the FLSA. It also recognizes that there are significant differences in wages and costs of living between geographic regions and industries and that too high a threshold would have significant negative

[1] We suggest DOL reconsider including Virginia, Maryland and DC from it calculation of wages in the South as these states and the district do not reflect low wage areas.

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consequences on businesses, nonprofits, governments and employees in lower-wage regions and industries. Additionally, the 2004 methodology continues the original objective of the salary threshold by screening out the obviously nonexempt employees in *all regions, census divisions, states, and metropolitan statistical areas*.

By applying the 2004 methodology to current salary data, DOL will be providing employers and the Department with an easily applied, bright-line rule that protects employees who obviously should not be exempt from overtime pay. AHLA believes the hospitality industry can absorb the increased cost associated with this change without significant and negative repercussions to the industry or economy as a whole.

Future Updates to the Salary Threshold

AHLA thanks the Department for ensuring that any future proposed increases to the salary threshold be preceded by an opportunity for the public to comment via the formal notice-and-comment process. Input from stakeholders is vital, and no changes to the EAP tests should be made without first giving the public notice of potential changes, guaranteeing interested stakeholders a chance to share with the Department how those changes will impact them, and providing employers with sufficient time to understand and implement those changes. Thus, the opportunity for notice and comment will help ensure that the knowledge and expertise of interested stakeholders will be considered before moving forward with increases. It also meets the FLSA's requirement that DOL make any changes to the EAP exemption test by regulation.

Additionally, AHLA thanks DOL for utilizing the 2004 methodology as the default for future increases to the threshold. As explained above, this methodology takes into consideration lower wage aspects of the economy, provides thresholds that are in line with historic norms, and can be absorbed by the employer community.

AHLA is concerned, however, with the Department establishing a periodic review of the threshold on set intervals. While AHLA is supportive of DOL's intent to update the threshold on a more regular basis, the Association does not believe DOL has the authority to establish regular intervals for updating the threshold. DOL itself acknowledged this in 2004, when it explained that "nothing in the legislative or regulatory history ... would support indexing or automatic increases."[2] In addition, the FLSA specifically mandates the Department define and delimit the terms "bona fide executive, administrative and professional" "from *time to time* by regulations." The language does not appear to allow DOL to establish regular intervals for updates and thus may make the final rule susceptible to legal challenges.

Moreover, the economy and labor markets fluctuate and do not follow any linear pattern. In AHLA's survey, 85% of respondents believed DOL should evaluate economic circumstances

[2] 69 Fed. Reg. 22121.

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before raising the salary threshold. Consequently, DOL should act based on circumstance, not on a rigid schedule. In many cases, it will not be economically viable or wise for DOL to impose an increase every four years. The agency should not waste government and stakeholder resources on a rulemaking and inject uncertainty into a possibly shaky economy when it does not to intend to increase the threshold. DOL should have the capacity to decide when it is appropriate to raise the salary level and should not need to build in an automatic review process that may not be appropriate for a given economic climate.

Furthermore, regular increases within that short timeframe will also pose a major economic burden on employers. Determining which employees need to be reclassified based on changes to the test is an extremely time-consuming process for employers. Once employers determine who needs to be reclassified, they must evaluate and implement necessary changes to compensation rates, benefits packages, training opportunities, and the overall organizational structure of the employer's operations. They must also adjust timekeeping and recordkeeping requirements for reclassified workers. All changes must be communicated to affected employees. These are significant, time-consuming, and resource-intensive activities which should not be imposed employers if not necessary. Therefore, AHLA believes increases should not occur more than from time to time as significant changes to the economy occur, and no more frequently than every five years. This approach is consistent with historical precedent. Indeed, DOL acknowledged in its 2015 Proposed Rule that historically, the shortest period of time between salary level increases was five years.[3]

If DOL chooses to move forward with its plan to establish periodic review of the threshold, AHLA urges the Department to include in its final rule meaningful, clear clarification that any changes to the methodology used to determine a new minimum salary threshold be preceded by an additional proposed rulemaking that follows the requirements of the Administrative Procedures Act. As evidenced by the Department's unimplemented 2016 final rule altering the overtime regulations, Secretaries of Labor may have different perspectives on what salary level is economically feasible and/or appropriate, but altering the methodology used to determine the salary threshold will have significant consequences on the employer community and economy. In its final rule DOL should mandate that any future DOL or Secretary of Labor who wishes to move away from the 2004 methodology must do so through a separate proposed rulemaking that allows for public input and preparation.

Incentive Compensation as Part of the Salary Threshold

In our comments on the 2015 proposal and 2018 RFI, AHLA encouraged the Department to allow incentive compensation to be counted toward the minimum salary threshold, and the Association supports DOL's proposal to do the same here. Allowing incentive compensation to count towards the minimum threshold encourages companies to provide bonuses and other

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[3] 80 Fed. Reg. 38515.

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opportunities that allow exempt employees to share and potentially profit from a company's overall performance. Additionally, AHLA supports DOL's proposal to allow this incentive compensation to be paid on a yearly basis.

However, AHLA encourages DOL to remove, or at the very least substantially increase, the limits on the amount of incentive compensation that may be considered when determining if the salary threshold has been satisfied. Indeed, AHLA encourages DOL to consider allowing employers to count all incentive compensation that is paid during a year in determining whether the minimum salary level is met.[4]

In prior comments, AHLA also encouraged the Department to allow "catch-up" payments if the metrics for an incentive payment were not met for a given employee, and the Association supports DOL including such a provision in the current proposal. It does suggest, however, that the Department extend the time limitation for making the catch-up payments from one pay period to the end of the following quarter. As a practical matter, incentive compensation is not necessarily calculable right at year-end, so it is not feasible to determine what income exists until well after the next pay period at the end of a year. Thus, moving the time period to allow catch-up payments will permit employers to achieve a better reflection of the annual payments made to employee and reduces the likelihood that compliance errors will be made in an effort to reconcile within a short period of time.

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

Highly Compensated Exemption

In 2004, the Department included in its Final Rule a Highly Compensated Employee (HCE) test. That test was a streamlined determination of exempt status, pairing a reduced duties requirement with a higher compensation level. Since 2004, that level has been $100,000, a figure that appears to have been selected without methodology (and which represented a sizable increase from the proposed $65,000). For the last fifteen years, the difference between the standard and HCE levels has been $76,340.

In the 2016 Final Rule, the Department for the first time articulated a methodology for setting the HCE threshold: the 90th percentile of full-time salaried workers generally. In 2016, that was

[4] Considering all incentive compensation paid within a year to count toward the salary level is consistent with the time frame utilized for the current highly compensated test. See 29 C.F.R. § 541.601.

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$134,004. In the current proposal the Department proposes to use the same methodology it included in the 2016 Final Rule, which would result in a $147,414 HCE threshold.

AHLA believes the $100,000 threshold continues to serve the purpose of the HCE test and does not need further adjustment at this time. Should the Department determine that the HCE threshold should be increased, the simplest and most logical way to achieve this goal is to marry the currently proposed methodology for the standard salary threshold with the proposed methodology for the HCE threshold, replacing the 90th percentile of salaried workers nationally with the 90th percentile of salaried workers in the lowest wage Census region (the South) and in the lowest wage industry (the retail sector). This will help ensure lower wage regions and industries are not disproportionately and negatively impacted as they compete for business and talent.

Room, Board and Other Benefits
In conjunction with the Department's efforts to update and clarify the regular rate regulations,[5] the Department should expand the forms of compensation that can be used to satisfy the base salary level and highly compensated test. In the hospitality industry, board, lodging, and other facilities can represent a significant amount of compensation. However, the Department expressly excludes that compensation to satisfy the salary test "exclusive of board, lodging or other facilities."[6] Similarly, the Department previously has excluded from the HCE threshold costs of employee benefits, such as payments for medical insurance and matching 401(k) pension payments, noting that inclusion of such costs would make the test "administratively unwieldy."[7]

The Department should take the current opportunity to harmonize the salary level rules with the regular rate rules. If an employer must include a non-hourly payment in the regular rate, that payment should likewise count towards the salary threshold. If the employer can exclude the payment, it should not count towards the salary threshold. If the employer (and the Department) must determine the value in the context of a regular rate calculation, there is no reason why the determination of the value is "administratively unwieldy" in the context of salary. Non-hourly payments that count towards regular rate should count towards both the standard salary threshold and the HCE threshold.

Sincerely,

Brian Crawford
Executive Vice President of Government Affairs
American Hotel & Lodging Association

[5] *Regular Rate Under the Fair Labor Standards Act*, 84 Fed. Reg. 11888 (March 29, 2019).
[6] 29 C.F.R. 600(a).
[7] 69 Fed. Reg. at 22175.

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June 12, 2019

Chairwoman Alma Adams
Committee on Education and Labor
Subcommittee on Workforce Protections
U.S. House of Representatives
2436 Rayburn House Office Building
Washington, DC 20515

Ranking Member Bradley Byrne
Committee on Education and Labor
Subcommittee on Workforce Protections
U.S. House of Representatives
119 Cannon House Office Building
Washington, DC 20515

Dear Chairwoman Adams and Ranking Member Byrne:

On behalf of the American Hotel & Lodging Association (AHLA), I would like to thank the House Education and Labor Subcommittee on Workforce Protections for holding a hearing today on possible updates to the regulations on overtime pay.

Serving the hospitality industry for more than a century, AHLA is the sole national Association representing all segments of the U.S. lodging industry, including hotel owners, real estate investment trusts (REITs), chains, franchisees, management companies, independent properties, bed & breakfasts, state hotel Associations, and industry suppliers. Headquartered in Washington, D.C., AHLA focuses on strategic advocacy, communications support, and workforce development programs for an industry that advances long-term career opportunities for employees, invests in local communities across the country, and hosts more than one billion guests in American hotels every year. AHLA proudly represents a dynamic hotel industry of more than 54,000 properties that supports $1.1 trillion in U.S. sales and generates nearly $170 billion in taxes to local, state and federal governments

On May 20, 2019, AHLA submitted the attached comments in response to the Department of Labor's (DOL) Notice of Proposed Rulemaking "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (84 Fed. Reg. 10900; RIN: 1235-AA20)" published in the Federal Register on March 22, 2019.

AHLA supports the DOL effort and looks forward to an updated rule that ensures a fair and equitable working environment for both employees and employers. The Department's 2016 rule set the salary threshold for exempt status too high and the implementation was too fast. This would have ultimately harmed the very employees that is was designed to help by preventing employee advancement and opportunity and keeping the industry from continuing to grow and create jobs. We look forward to continuing to work with DOL and Congress on this immensely important workplace issue.

Sincerely,

Chris Burgoyne

Chris Burgoyne
Vice President, Government and Political Affairs

College and University Professional
Exhibit B 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.

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

[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.

current law, it did increase awareness of certain unique provisions within the regulations that would help higher education comply.

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.

College and University Professional
Association for Human Resources

May 21, 2019

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2019-0001

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretations
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (84 Fed. Reg. 10900, March 22, 2019) (RIN 1235-AA20)

Dear Ms. Smith:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) and the undersigned higher education associations in response to the above referenced Notice of Proposed Rulemaking (NPRM). CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other higher education leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions and over 500 two-year and specialized institutions.

STATEMENT OF INTEREST

Colleges and universities employ approximately 4 million workers nationwide, and there are institutions of higher education located in all 50 states.[1] Many universities are the largest

[1] See *Enrollment and Employees in Postsecondary Institutions, Fall 2015; and Financial Statistics and Academic Libraries Fiscal Year 2015,* Institute of Educational Services National Center for Educational Sciences (February 2017), at page 4, accessed on September 4, 2017 at *https://nces.ed.gov/pubs2017/2017024.pdf*.

employer in the state in which they operate.[2] Of those 4 million workers, approximately 2.6 million are employed full time and 1.4 million part-time.[3]

The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL or department) seeks to modify with this rulemaking.[4] As a result, colleges and universities, their employees, and the students they serve would be affected by proposed changes in this NPRM.

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

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities
NASPA – Student Affairs Administrators in Higher Education
National Association of College Stores
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation

[2] See http://www.marketwatch.com/story/these-are-the-largest-employers-in-the-us-state-by-state-2017-01-26
[3] *Id.*
[4] According to the National Center for Education Statistics, 2.9 million (approximately 75%) of the 3.9 million workers in higher education are "professional staff," including at least 1 million employees that do not have teaching as their primary duty. See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp. Median salary for exempt employees in higher education are detailed in CUPA-HR's salary survey and this related article http://chronicle.com/article/Median-Salaries-of/228735?cid=megamenu#rp.

SUMMARY

The FLSA requires employers to pay their employees at least a minimum hourly wage, which is set by the statute, and an "overtime" rate of 1.5 times the employee's regular hourly wage for every hour the employee works over 40 hours in a given week. The statute exempts certain categories of employees from these requirements, including executive, administrative and professional employees (sometimes referred to the "EAP" or "white collar" exemption). The FLSA tasks DOL with defining executive, administrative and professional employees by regulation and requires the department to revisit these definitions from "time to time." Under the current regulations, last set by DOL's final rule in 2004, an individual must satisfy three criteria to qualify as a white collar employee exempt from federal overtime pay requirements: first, they must be paid on a salaried basis (the salary basis test); second, that salary must be at least $455/week ($23,660 annually) (the minimum salary requirement or salary threshold); and third, their "primary duties" must be consistent with executive, professional or administrative positions as defined by DOL (the primary duties test).

On May 23, 2016, DOL issued a final rule (the 2016 rule) doubling the minimum salary threshold, increasing it to $913 per week (or $47,476 per year), and imposed automatic updates to the threshold every three years. DOL set both the salary threshold and the automatic updates to the threshold so it would exclude from the exemption the bottom 40% of salaried workers in the lowest-cost Census Region. As we noted during the notice and comment leading up to release of the 2016 rule, this type of dramatic increase to the salary threshold would require mass reclassification of professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemptions but are paid less than $47,476.[5] We also noted that automatic increases without notice and comment are unlawful.[6]

On November 22, 2016, a federal court temporarily enjoined DOL from enforcing the 2016 rule and issued a decision permanently enjoining the rule on September 1, 2017 on the grounds that the rule's high salary threshold created a "de facto salary-only test," and that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption."[7] In response, DOL issued a Request for Information (RFI) on June 26, 2017, seeking comment about how DOL should go about updating the overtime regulations in light of the court's ruling.

On September 25, 2017, CUPA-HR, in partnership with 20 other higher education associations, filed substantive comments on the RFI.[8] The comments recommended that DOL:

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[5] *See* Attached Exhibit A, Comments by CUPA-HR and other higher education groups in response to DOL's 2015 proposed rule.

[6] Id.

[7] *State of Nevada v. United States Department of Labor* (November 22, 2016) at 14 http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf.

[8] *See* Attached Exhibit B, Comments by CUPA-HR and other higher education groups in response to DOL's 2017 RFI.

- update the salary threshold by applying the methodology used in 2004 to current salary data;
- make no changes to the duties test;
- consider prorating the salary threshold for part-time employees;
- continue with its past practice of updating the regulations as appropriate through notice and comment rulemaking rather than through any automatic mechanism; and
- consider changes to 29 CFR Section 541.600 that would allow the cost of employer-provided room and board to count towards the salary threshold.

On March 22, 2019, DOL published the NPRM which formally rescinds the 2016 rule, proposes several changes to the white collar exemptions and invites public comment on those proposals. Specifically, DOL proposes increasing the current (2004) level of $455 per week ($23,660 annually) to $679 per week ($35,308 per year) by using the same formula it employed in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail. DOL also proposes requiring, every four years, an update to the salary threshold using the 2004 formula through notice-and-comment rulemaking. The Secretary could suspend any update based on the economic circumstance or for other reasons. The department did not propose any changes to the existing "duties test."

We agree that an increase to the minimum salary threshold is due and that DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused. We also support DOL's decision to update the salary threshold by applying the methodology used in 2004 to current salary data and its decision not to make any changes to the duties test.

We also have several suggestions for improving on the proposal (our first three points were included in our comments to the 2016 rule and the RFI):

- First, any final rule should allow employers to prorate the salary threshold for part-time employees.

- Second, DOL should count the cost of employer-provided room and board toward the salary threshold.

- Third, while we support DOL's decision to update the threshold only via notice and comment, we believe DOL should update the regulations every five to seven years based on circumstance, as it did prior to the 1970s, not through regularly scheduled update. Our economy and labor markets are very complex and influenced by technological developments, immigration and other factors and do not follow any linear pattern. As such, DOL should act based on circumstance, not on a rigid schedule. We also are concerned that any automatic update—even one that involves notice and comment—may exceed DOL's authority under the FLSA and, therefore, will be susceptible to legal challenge.

- Fourth, if DOL does decide to proceed with an automatic update, the agency should make clear that any change to the methodology used to determine the standard salary level as part of future updates would require multiple proposed rulemakings. In other words, DOL would issue the initial proposal seeking comment on the regularly scheduled update to the salary threshold using the 2004 methodology. As part of that proposal, DOL would also ask if the 2004 methodology remains appropriate. If based on the comments, DOL determines it needs to change the methodology or make other adjustments to the regulation, the agency would need to propose those specific changes in a separate and subsequent rulemaking with an implementation period that accounts for the planning and expectations the DOL set by having updates on regular intervals.

COMMENTS

I. DOL Should Update the Salary Threshold By Applying the Methodology Used in 2004 to Current Salary Data

A. DOL's Proposal is Consistent with the Purpose and History of the Minimum Salary Level

For over a half century, DOL has consistently stated the purpose of the minimum salary level is to provide a "ready method of screening out the obviously nonexempt employees" (69 Fed. Reg. at 22165). Keeping with this purpose, DOL has historically set the minimum salary at a level that tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests. The Department's approach in this rulemaking is consistent with DOL's statutory obligations and will prevent obvious abuse of the exemption. At the same time, setting the salary threshold within these parameters avoids mass reclassification of employees in jobs that clearly meet the duties test, have always been exempt and are well-suited to exempt status.

As detailed by the higher education community in previous comments on the salary threshold, this type of mass reclassification, associated with setting the salary level too high, is not only inconsistent with the FLSA, but harms employees, institutions and students.[9] Furthermore, this type of mass reclassification ignores congressional intent by essentially making "an employee's duties, functions, or tasks irrelevant [resulting in] entire categories of previously exempt

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[9] Specifically, we said in the 2015 Comments that:

> Employees would face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement with no guarantee of increased compensation. As nonprofits and public entities, institutions would not be able to absorb the increased costs that come with higher salaries for exempt employees, expanded overtime payments and other labor and administrative costs associated with transitioning traditionally exempt employees into nonexempt status. In the face of these costs and challenges, institutions would need to both reduce services *and* raise tuition, to the detriment of students. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

See Exhibit A page 3.

employees who perform "bona fide executive, administrative, or professional capacity" duties [ineligible] for the EAP exemption based on salary alone, thereby supplanting an analysis of an employee's job duties.[10]

B. Updating the 2004 Methodology with Current Data is Preferable to an Inflationary Alternative

While DOL could rely upon various formulas to set a salary level that "tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests," the formula used by DOL to set the threshold in 2004 not only meets this criterion, but has been previously field-tested on the U.S. economy—giving it a distinct advantage over other options.

We believe that DOL should apply the 2004 methodology rather than use an inflationary adjustment for several reasons. First, the Department has historically avoided using inflationary measures to adjust the salary level and instead has relied on formulas. We see no reason to deviate from that approach now. Second, determining the best inflationary measure further complicates the rulemaking process and unnecessarily invites future disputes and delays to needed threshold updates. Lastly, nationwide inflationary measures may not track changes to salaries in lower-cost regions of the country or lower-cost industries or other benchmarks the Department uses to set the salary level. As a result, relying on an inflationary measure may not accurately reflect salary changes in those industries or regions and could lead to a threshold that is either too high or too low.

C. DOL's Methodology Accounts for Regional and Sector Differences in Pay

By proposing to set the standard salary level at the 20th percentile of earnings for full-time salaried workers in the lowest-wage Census region and in the retail sector, DOL is setting a nationwide salary floor that is sufficiently low to account for regional and industry differences in pay for nonprofits, public employers and those operating in areas with lower costs of living. Under the FLSA, states can and do impose more protective standards for overtime pay, including setting higher salary thresholds for exemptions. This is why the Department does not need to consider setting different salary levels for different regions of the country as States are in a better position to determine whether their local economies and employees would benefit from a higher threshold.

II. DOL Should Prorate the Salary Threshold for Part-Time Employees

As noted in the previous comments on the EAP exemption, higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time

[10] *State of Nevada v. United States Department of Labor* (August 31, 2017) at 14, http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf.

professionals, and the salary threshold should accommodate such arrangements. This is evidenced in much of the feedback that CUPA-HR members provided for past comments, such as the statement from a Southeastern member that, "flexible work arrangements provided for exempt employees seeking reduced or part-time schedules for personal reasons will be significantly reduced under the proposed changes." While the Department has proposed a salary level that is much more in line with historic trends, greatly reducing the impact of the proposal on part-time employees, there still are currently exempt employees on campus that would have difficulty reducing their full-time status to part-time status.

To understand why, we provide the following example. Under the current regulations, an employee who performs tasks that clearly meet one or more of the exempt duties tests can be classified as exempt so long as the salary exceeds $23,660 per year. Thus, a part-time employee working a 50% schedule can still qualify as exempt so long as that person works in a position that has a full-time salary of approximately $47,000 per year. This is true not because the full-time equivalent salary is $47,000, but because the part-time salary is still in excess of the regulatory minimum.

Under the DOL's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, an employee working a 50% schedule would need to be working in a position earning more than $70,616 on a full-time basis. Without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be more limited than it is today, so we suggest the Department consider prorating the salary threshold for part-time employees.

III. DOL Should Allow the Cost of Employer-Provided Room and Board to Count Towards the Salary Threshold

Compared to other employers, higher education institutions disproportionately provide employees with room and board as part of their compensation, particularly residential directors (also known as RDs). RDs often are responsible for the supervision of graduate coordinators, resident assistants and management of one or more student residence halls. They also are responsible for the creation and execution of programming connecting the "student life experience" 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 2016 rule taken effect, a significant number of resident directors would either have needed to be reclassified or have their salaries increased. Reclassification to non-exempt and tracking of hours for this group of employees is impractical if not impossible, as their workweek can fluctuate dramatically depending on the time of year (orientation, finals, campus emergencies, summer break etc.). Since these employees typically live on campus, they are often in contact with students or others outside normal working hours, making it very difficult to determine what student contact constitutes work time. Unfortunately, even though these professional staff may be furnished with room and board, a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold under 29 CFR Section 541.606(a). While DOL's current proposal impacts far fewer RD's, close to 50% of resident hall managers living in the South and Midwest make less than DOL's proposed threshold, but also receive room and board. As a result, we ask the Department to consider adjusting 541.606 to allow the cost of employer-provided room and board to count towards the salary threshold.

We also urge the Department to make this change to create a consistent position on room and board across the various overtime pay regulations. Currently, while employers cannot count room and board as salary for the purposes of meeting the white-collar exemptions, under 29 CFR 778.116, employers must include the cost of room and board as compensation when calculating a worker's overtime pay rate. We believe that it is inconsistent for DOL to require employers to count room and board as compensation for the purposes of calculating overtime costs for nonexempt employees while at the same time requiring they disregard that very cost when determining whether an employee meets the standard salary threshold of the white collar exemptions. As such we ask that the department align the part 541 regulations with part 778 regulations so that room and board can be calculated as compensation for purposes of meeting the standard salary threshold.

IV. Future Updates to the Salary Threshold

DOL has proposed codifying in regulations a commitment that the department will revisit the salary thresholds on regular intervals. Specifically, every four years DOL would publish a NPRM in the Federal Register proposing to update to the thresholds using the same methodology that appears in any final rule (in this instance the 2004 methodology) and inviting comment on whether another methodology should be used. The commitment would also stipulate that the Secretary could suspend any update based on the economic circumstance or for other reasons, by publishing a notice in the Federal Register explaining reasons for the suspension.

We are supportive of DOL's intention to update the salary levels on a more regular basis and have consistently recognized the need for the department to do so from time to time through notice and comment rulemaking. We are thankful that DOL is proposing to only increase the salary level via notice and comment rulemaking. We believe, however, DOL should update the thresholds based on circumstances every five to seven years, as it did prior to the 1970s, not through any regularly scheduled updates. We also are concerned that any preordained intervals for updates—even via notice and comment rulemaking and associated economic analysis—may exceed DOL's authority and make any final rule more susceptible to legal challenge. Lastly, if DOL does move forward with automatic updates, the agency must clarify that any changes to the methodology for determining the salary threshold would require multiple NPRMs.

As we have discussed in greater detail in previous comments to the department on the Part 541 regulations, every time DOL has increased the salary test to date, it has done so via Administrative Procedure Act rulemaking by proposing a new salary level and allowing the public to comment on the proposal. This process not only forces thoughtful examination of the exemptions and public participation, but also requires DOL to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis — which is an important part of assessing the impact of any increase to the salary level. It also allows the agency to tailor any changes to the salary level and other regulatory requirements, so the exemptions better meet their statutory purpose in the face of changing workforces and changing economies.

When Congress authorized DOL to issue regulations under the FLSA, it did not grant the agency the authority to index the minimum salary level. Rather, Congress tasked DOL with updating the exemptions defining and delimitating the terms executive, administrative and professional employee from "time to time," *by regulation*. DOL recognized its lack of authority in this regard in 2004, when it acknowledged, in response to requests for an automatic updating mechanism, that "nothing in the legislative or regulatory history ... would support indexing or automatic increases." [11] However, understanding the need for more regular updates the Department in 2004 expressed its intent "in the future to update the salary levels on a more regular basis."[12]

We are concerned that DOL's current proposal which goes beyond merely expressing its intent to update the regulations more regularly is not supported by the FLSA and could jeopardize any final rule. In addition, our economy and labor markets are very complex and influenced by technological developments, immigration and other factors and do not follow any linear pattern. As such, DOL should act based on circumstance, not on a rigid schedule.

As mentioned in previous comments, if DOL does move forward with its proposal to require regularly scheduled updates via notice and comment, it should do so in intervals no shorter than five years, as updating the salary level too frequently would negatively impact institutions' and other employers' budgets and budget planning, ability to provide merit-based increases and employee morale.

Lastly, if DOL does move forward with updates on regularly scheduled intervals, it must clarify how a future Secretary and Department could or could not change the methodology used to determine the salary threshold in future updates. As evidenced by the 2016 Rule, Secretaries and Departments will differ in their approach to what they regard as an economically feasible and appropriate salary threshold. Yet, if the Department promulgates a final rule with updates on regular intervals based on a specific formula, employers and employees will expect and plan for those changes. DOL must account for such planning before making <u>any</u> changes to the methodology or intervals and adhere to the Administrative Procedure Act requirements by providing specific proposals on which the public may comment. As such, DOL must clarify that any future Secretary that wishes to change the methodology used to update the salary threshold must do so through multiple NPRMs that allow for public input and preparation.

Specifically, we suggest DOL clarify that any changes to the methodology or intervals for updates adhere to the following procedures or something similar. DOL would issue the initial proposal seeking comment on the regularly scheduled update to the salary threshold using the 2004 methodology. As part of that proposal, DOL would ask if the 2004 methodology remains

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[11] 69 Fed. Reg. 22171.

[12] 69 Fed. Reg. 22171-72.

appropriate. If based on the comments, DOL determines it needs to change the methodology or make other adjustments to the regulation, the agency would need to propose those specific changes in a separate and subsequent rulemaking with an implementation period that accounts for the planning and expectations the DOL set by having updates on regular intervals.

CONCLUSION

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

Respectfully Submitted,

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College and University Professional Association for Human Resources

June 12, 2019

The Honorable Alma S. Adams
Chair
Subcommittee on Workforce Protections
U.S. House Education and Labor Committee
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bradley Byrne
Ranking Member
Subcommittee on Workforce Protections
U.S. House Education and Labor Committee
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Adams and Ranking Member Byrne:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for holding this hearing on the U.S. Department of Labor's (DOL) ongoing efforts to update the regulations at 29 CFR Part 541 defining and delimiting exemptions for executive, administrative and professional employees to the Fair Labor Standard Act's (FLSA) overtime pay requirements. I write to share our views with respect to the current rulemaking as well as DOL's 2016 final rule.

CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other higher education leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions and over 500 two-year and specialized institutions. Colleges and universities employ approximately 4 million workers nationwide, and there are institutions of higher education located in all 50 states.[1] Many universities are the largest employer in the state in which they operate.[2] Of those 4 million workers, approximately 2.6 million are employed full time and 1.4 million part-time.[3]

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[1] See *Enrollment and Employees in Postsecondary Institutions, Fall 2015; and Financial Statistics and Academic Libraries Fiscal Year 2015,* Institute of Educational Services National Center for Educational Sciences (February 2017), at page 4, accessed on September 4, 2017 at https://nces.ed.gov/pubs2017/2017024.pdf.
[2] See http://www.marketwatch.com/story/these-are-the-largest-employers-in-the-us-state-by-state-2017-01-26
[3] *Id.*

The FLSA and similar state laws cover all or nearly all of these employees and many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the Part 541 regulations DOL seeks to modify with its current rulemaking and 2016 rule.[4]

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, 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.

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. We also detailed in the comments our significant concerns about the burden and costs of this mass reclassification on institutions.

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 2016 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.

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 required automatic updates to the threshold every three years, rather than the proposed annual updates.

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

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

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 have imposed significant costs on higher education. Twenty-four position classifications in that survey have median national salaries below the final rule's threshold.[5] If an institution moved just one employee in each of those 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.

As you know, a federal court struck down the 2016 rule before it went into effect and DOL revisited updating Part 541 by issuing a Request for Information (RFI) on July 26, 2017, holding listening sessions and then issuing a proposed rule on March 22, 2019. CUPA-HR and approximately 20 other higher education associations filed comments in response to the RFI and pending rule. In both sets of comments, we urged DOL to use the same methodology it used in 2004 to set the salary threshold. In the comments on the current rule making, we also suggested DOL make the following improvements to its proposal:

- First, any final rule should allow employers to prorate the salary threshold for part-time employees.

- Second, DOL should count the cost of employer-provided room and board toward the salary threshold.

- Third, while we support DOL's decision to update the threshold only via notice and comment, we believe DOL should update the regulations every five to seven years based on circumstance, as it did prior to the 1970s, not through regularly scheduled updates. Our economy and labor markets are very complex and influenced by technological developments, immigration and other factors and do not follow any linear pattern. As such, DOL should act based on circumstance, not on a rigid schedule. We also are concerned that any automatic update—even one that involves notice and comment—may exceed DOL's authority under the FLSA and, therefore, will be susceptible to legal challenge.

- Fourth, if DOL does decide to proceed with an automatic update, the agency should make clear that any change to the methodology used to determine the standard salary level as

[5] 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.

> part of future updates would require multiple proposed rulemakings. In other words, DOL would issue the initial proposal seeking comment on the regularly scheduled update to the salary threshold using the 2004 methodology. As part of that proposal, DOL would also ask if the 2004 methodology remains appropriate. If based on the comments, DOL determines it needs to change the methodology or make other adjustments to the regulation, the agency would need to propose those specific changes in a separate and subsequent rulemaking with an implementation period that accounts for the planning and expectations the DOL set by having updates on regular intervals.

For your convenience, we attach the comments we filed on the 2016 rule, the RFI and the current rulemaking as well as our testimony before this subcommittee on February 16, 2017.

Thank you again for holding this hearing and please do not hesitate to reach out to me to discuss this matter further.

Respectfully Submitted,

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College and University Professional
Association for Human Resources

September 4, 2015

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

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

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

Dear Ms. Ziegler:

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

STATEMENT OF INTEREST

Colleges and universities employ over 3.9 million workers nationwide and there are institutions of higher education located in all 50 states.[1] The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are

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

currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL) proposes to modify in the NPRM, yet many of those earn less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[2] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the NPRM.

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

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

SUMMARY

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

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

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

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

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

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

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

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

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

COMMENTS

I. DOL Should Lower the Proposed Minimum Salary Threshold

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

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

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

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

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

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[3] See id.

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

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

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

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

[5] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.
[6] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[7] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.
[8] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.
[9] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This was echoed by another comment, which states:

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

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

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

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

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

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

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

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

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

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

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

[18] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[19] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

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

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

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

[20] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[21] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf
[22] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[23] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.
[24] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[25] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.
[26] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

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

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

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

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

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

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

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

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

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

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[30] Increasing College Opportunity for Low-Income Students, Promising Models and a Call to Action at https://www.whitehouse.gov/sites/default/files/docs/white_house_report_on_increasing_college_opportunity_for_low-income_students.pdf

[31] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 23 percent increase over the current threshold.

[32] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 27 percent increase over the current threshold.

[33] This equals approximately the 30th percentile of earnings for all full-time salaried workers and is a 71 percent increase over the current threshold.

[34] The complete responses were as follows:

Which level do you think DOL should use?

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

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

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

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

[35] See Partnership to Protect Workplace Opportunity fact sheet at http://protectingopportunity.org/wp-content/themes/ppwo/ppwo_1pager.pdf.
[36] The American Society for Association Executives has also requested that DOL "set a lower salary level applicable to all employers or the minimum salary level at a lower percentile of the national average for nonprofit[s]." See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[37] If DOL decides to expand the exemption to the minimum salaried level for certain learned professionals in line with what the State University System of Florida recommends, it should be done in a separate rulemaking where stakeholders have the opportunity to review and comment on a specific regulatory proposal (see herein section III). The State University System of Florida recommended the following in its comments:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3) DOL Should Phase In Over Time Any Salary Increase

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

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

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

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

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

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

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

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

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

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

II. DOL Should Not Automatically Update the Salary Levels

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

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[45] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[46] Many institutions have expressed concern about existing federal and state research grants which specify how funds must be allocated — specifically, jeopardizing millions of dollars of research funding by increasing salaries above the permitted threshold in the contract.
[47] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

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

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

1) DOL Lacks the Authority to Impose Automatic Updates

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

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

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

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

[48] 69 Fed. Reg. 22171

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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On Behalf of the Following Undersigned Organizations:

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

College and University Professional
Association for Human Resources

September 25, 2017

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2017-0002-0001

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (82 Fed. Reg. 34616, July 26, 2017) (RIN 1235-AA20)

Dear Ms. Smith:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) and the undersigned higher education associations in response to the above referenced Request for Information (RFI). CUPA-HR serves as the voice of human resources in higher education, representing more than 23,000 human resources professionals and other campus leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions and 500 two-year and specialized institutions.

The below higher education associations members' listed include approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

The following associations join CUPA-HR in these comments:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education

American Indian Higher Education Consortium
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities (HACU)
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation

STATEMENT OF INTEREST

Colleges and universities employ approximately 4 million workers nationwide, and there are institutions of higher education located in all 50 states.[1] Many universities are the largest employer in the state in which they operate.[2] Of those 4 million workers, approximately 2.6 million are employed full time and 1.4 million part time.[3]

The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL) attempted to modify in its rule dated May 23, 2016 (hereinafter the 2016 Rule) and earn less than that rule's minimum salary level of $913 per week (or $47,476 per year).[4] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the 2016 Rule and have an interest in responding to the RFI and encouraging DOL to apply the exemptions in a manner that protects employees and workplace fairness, while also ensuring the exemptions function as intended.

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[1] See *Enrollment and Employees in Postsecondary Institutions, Fall 2015; and Financial Statistics and Academic Libraries Fiscal Year 2015,* Institute of Educational Services National Center for Educational Sciences (February 2017), at page 4, accessed on September 4, 2017 at *https://nces.ed.gov/pubs2017/2017024.pdf.*
[2] See http://www.marketwatch.com/story/these-are-the-largest-employers-in-the-us-state-by-state-2017-01-26
[3] *Id.*
[4] According to the National Center for Education Statistics, 2.9 million (approximately 75%) of the 3.9 million workers in higher education are "professional staff," including at least 1 million employees that do not have teaching as their primary duty. See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp. Median salary for exempt employees in higher education are detailed in CUPA-HR's salary survey and this related article http://chronicle.com/article/Median-Salaries-of/228735?cid=megamenu#rp.

BACKGROUND
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).

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

In response to the president's memorandum, DOL published on July 6, 2015, a Notice of Proposed Rulemaking or NPRM, in which the agency proposed a 113% increase to the minimum salary threshold and automatic annual increases to the salary threshold moving forward. DOL did not propose any changes to the duties test in the NPRM.

CUPA-HR and 18 other higher education associations filed extensive comments on the NPRM on September 4, 2015 (2015 Comments). We have attached the 2015 Comments as Exhibit A. Our primary point in those comments was that while we agree that an increase to the minimum salary threshold is due and that DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused, the proposed minimum salary threshold was simply too high. Our 2015 Comments were informed by a survey of CUPA-HR membership, in which 88 percent of the 796 CUPA-HR members responding stated that DOL should take a more measured approach to raising the salary level.

The essence of our argument against the threshold proposed in the NPRM was as follows:

> To comply with the proposed change, colleges and universities would increase salaries for a few individuals whose current pay is closest to the new threshold, but would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would be appropriate and would keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status. This mass reclassification would be to the detriment of employees, institutions and students. Employees would face diminished workplace autonomy and fewer opportunities for flexible work

arrangements, career development and advancement with no guarantee of increased compensation. As nonprofits and public entities, institutions would not be able to absorb the increased costs that come with higher salaries for exempt employees, expanded overtime payments and other labor and administrative costs associated with transitioning traditionally exempt employees into nonexempt status. In the face of these costs and challenges, institutions may 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.

We also stated in the 2015 Comments that we do not believe DOL has the authority to impose automatic updates. We also noted that even if the agency did have such authority, it should not automatically update the salary level, as doing so will also negatively impact institutions' budgets and budget planning, their ability to provide merit-based increases and employee morale. Our opinion at that time and now is 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. We also stated that if DOL does choose to move forward with automatic updates, the updates should occur at most every five years, and the agency should provide the public with notice of the new level and the opportunity to comment at least one year prior to implementation.

Finally, our 2015 Comments stated that DOL should not change the duties tests at this time, an opinion which we continue to hold.

In addition to filing comments with DOL on NPRM, many of the undersigned organizations, their members and others concerned with the rule's impact on the higher education community had meetings and sent letters to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). In fact, 25 percent of all stakeholder meetings conducted and nearly 50 percent of letters submitted to the OIRA docket were on behalf of either individual institutions or higher education associations. In addition, numerous members of Congress from both sides of the aisle urged DOL and OIRA to carefully consider the impact the proposal would have on higher education before proceeding with the rule.[5]

Despite these efforts, on May 23, 2016, DOL issued a final rule which doubled the minimum salary threshold, increasing it to $913 per week (or $47,476 per year), and imposed automatic updates to the threshold every three years. DOL set both the salary threshold and the automatic updates to the threshold so it would exclude from the exemption the bottom 40% of salaried workers in the lowest-cost Census Region. It did not make any changes to the duties test.

[5] We assume DOL has access to the OIRA record on this rulemaking. If for some reason that is not the case, we have records of meetings held and letters filed with OIRA and are happy to provide them to the Department.

A group of business organizations and state attorneys general challenged the 2016 Rule in court in September 2016 in the United States District Court for the Eastern District of Texas, Sherman Division. On November 22, 2016, Judge Amos Mazzant of that court preliminarily enjoined the 2016 Rule on the grounds that the rule's high salary threshold created a "de facto salary-only test," and that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption."[6]

At a February 16, 2017 hearing by the U.S. House Subcommittee on Workforce Protections, CUPA-HR's President and CEO Andy Brantley testified and shared higher education's concerns with the final rule. Brantley also highlighted some of the challenges CUPA-HR members encountered in preparing to comply with the 2016 Rule prior to the court's injunction. We have attached that testimony (2017 Congressional Testimony) as Exhibit B.

On July 26, 2017, DOL issued an RFI, where it noted "it has decided not to advocate for the specific salary level ($913 per week) set in the [2016 Rule] at this time and intends to undertake further rulemaking to determine what the salary level should be." DOL stated that it has nonetheless appealed the injunction over concerns that the court's reasoning "called into question the Department's authority to utilize a salary level test" generally.

A little over a month later, on August 31, 2017, Judge Mazzant granted the motion for summary judgement filed by the plaintiff business organizations and in doing so struck down the 2016 Rule.[7] The court found that by setting the salary level so high, "the Department effectively eliminates a consideration of whether the employee performs 'bona fide executive, administrative, or professional capacity' duties" as Congress required. The court went on to say that nothing in the FLSA authorized DOL "to make salary rather than an employee's duties determinative of whether [an employee] should be exempt from overtime pay." The court specifically clarified, however, that DOL could rely on a salary threshold as part of the exemption test, but that "a permissible salary level would need to be set somewhere near the lower end of the range of prevailing salaries for these employees," (quoting Harry Weiss, *Report and Recommendations on Proposed Revisions of the Regulations, Part 541* at 7-8 (1949)) and DOL should use the threshold to "screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary" (again quoting the Weiss report, this time at 11-12). The judge also suggested that adjusting the salary threshold DOL set in 2004 for inflation would be permissible.

RESPONSE TO RFI

Below we provide answers to the RFI questions relevant to our collective membership. Our answers are informed by data we have collected as part of the 2015 Comments, letters and meetings with OIRA, plans for implementation, the 2017 Congressional Testimony and an

[6] *State of Nevada v. United States Department of Labor* (November 22, 2016) at 14, found on September 4, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf.

[7] *State of Nevada v. United States Department of Labor* (August 31, 2017), found on September 11, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf.

August 2017 survey by CUPA-HR of 334 chief human resource officers at both public and private institutions of higher education (2017 CUPA-HR CHRO Survey), which CUPA-HR conducted in response to the RFI.

Question 1:

> In 2004, the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

Response:

As expressed in the 2015 Comments, CUPA-HR's 2017 Congressional testimony and the many letters filed with OIRA by higher education organizations and institutions, the higher education community believes that an increase to the salary threshold is due and that DOL has an obligation to update the threshold from time to time to ensure the exemptions are not abused. At this time, we believe DOL's best course of action is as follows:

- update the salary threshold by applying the methodology used in 2004 to current salary data;
- make no changes to the duties test;
- consider prorating the salary threshold for part-time employees; and
- consider changes to 29 CFR Section 541.600 that would allow the cost of employer-provided room and board to count towards the salary threshold.

Salary Threshold

With respect to setting the salary threshold, DOL should follow historical precedent and the guidance provided by Judge Mazzant and set the minimum salary at a level "that tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests." This approach is consistent with DOL's statutory obligations and will prevent obvious abuse of the exemption. At the same time, setting the salary threshold within these parameters avoids mass reclassification of employees in jobs that clearly meet the duties test, have always been exempt and are well-suited to exempt status. As detailed in the 2015 Comments and 2017 Congressional

Testimony, this type of mass reclassification is not only inconsistent with the FLSA, but harms employees, institutions and students.[8]

While DOL could rely upon various formulas to set a salary level that "tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests," the formula used by DOL to set the threshold in 2004 not only meets this criterion, but has been previously field-tested on the U.S. economy — giving it a distinct advantage over other options.

Also, and importantly, our members clearly favored this approach, with 84% percent of those responding to the 2017 CUPA-HR CHRO Survey indicating that DOL should set a new salary threshold by updating the 2004 level. While 54% supported updating the level via inflation and 30% applying the 2004 methodology, the overall message is the same — that the 2016 salary level was far too high, and the department should set a new salary threshold that is in line with the formula used in the 2004 Rulemaking. These results were consistent with a July 2015 survey CUPA-HR conducted of 819 higher education HR professionals, in which 58% of respondents supported some sort of update to the 2004 threshold, and 88% reported that any threshold over $40,352 would be too high.

We believe that DOL should apply the 2004 methodology rather than use an inflationary adjustment for several reasons. First, the Department has historically avoided using inflationary measures to adjust the salary level and instead has relied on formulas. We see no reason to deviate from that approach now. Second, determining the best inflationary measure further complicates the rulemaking process and unnecessarily invites future disputes and delays to needed threshold updates. Lastly, nationwide inflationary measures may not track changes to salaries in lower-cost regions of the country or lower-cost industries or other benchmarks the Department uses to set the salary level. As a result, relying on an inflationary measure may not accurately reflect salary changes in those industries or regions and could lead to a threshold that is either too high or too low.

Duties Test

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[8] Specifically, we said in the 2015 Comments that:

> Employees would face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement with no guarantee of increased compensation. As nonprofits and public entities, institutions would not be able to absorb the increased costs that come with higher salaries for exempt employees, expanded overtime payments and other labor and administrative costs associated with transitioning traditionally exempt employees into nonexempt status. In the face of these costs and challenges, institutions would need to both reduce services *and* raise tuition, to the detriment of students. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

Whatever formula the Department ultimately decides to use, it should not change the duties test as part of any immediate update. Eighty-four percent of respondents to the 2017 CUPA-HR CHRO Survey said that the duties test should be left unchanged at this time. While we did have members express issues with the current duties test as written, the vast majority of their concerns and comments were expressing the general need for additional examples from the Department on the specific application of "independent judgment and discretion" as it relates to particular positions in higher education. We feel these issues are best addressed via the opinion letter process and other guidance, not with changes to the duties test.

Part-Time Employees and Room and Board
As the Department considers a new threshold, we urge the agency to keep in mind the various negative impacts a high threshold could have on institutions, their employees and students. In particular, we want to draw your attention to room and board and flexible work arrangements.

As noted in the 2015 Comments, higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time professionals, and too high of a salary threshold would limit the ability to provide such arrangements. This is evidenced in much of the feedback that CUPA-HR members provided for the 2015 Comments, such as the statement from a Southeastern member that, "flexible work arrangements provided for exempt employees seeking reduced or part-time schedules for personal reasons will be significantly reduced under the proposed changes." We suggest the Department consider prorating the salary threshold for part-time employees.

Higher education institutions also disproportionately provide employees with room and board as part of their compensation, particularly residential directors (also known as RDs). RDs 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 for this group of employees is impractical if not impossible, 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, a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold under 29 CFR Section 541.600. In light of our experiences with the 2016 Rule, we ask the Department consider adjusting 541.600 to allow the cost of employer-provided room and board to count towards the salary threshold.

Question 2:

Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage-based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

Response:

If DOL updates the salary threshold in accordance with the 2004 methodology, there is no need for the Department to consider setting different salary levels for different regions of the country. Under the FLSA, states can and do impose more protective standards for overtime pay, including setting higher salary thresholds for exemptions. As a result, we believe DOL should focus on setting a nationwide salary floor that is sufficiently low to account for regional and industry differences in pay for nonprofits, public employers and those operating in areas with lower costs of living (the 2004 salary level would be an example of such a floor), and let states decide whether they need a higher threshold.

States are in a better position to determine whether their local economies and employees would benefit from a higher threshold. Not only are states more attuned to current needs of their local economy and workforce, but they will be better able to make timely and accurate adjustments to salary thresholds in the face of changes to regional workforce demographics, the rise and fall of local industries and employers and other changes to the economy.

In addition, while it may seem appealing to set different salary levels to more precisely address regional and industry pay differences, doing so can complicate compliance in an age where many employers have employees working in multiple states and remotely. In fact, over 90% of those responding to our 2017 CUPA-HR CHRO Survey believe that regionally-based thresholds could create arbitrary differences in exemptions around the country (particularly given that regional differences in costs are not stagnant) and would lead to increased confusion, compliance challenges and litigation. As stated in the preamble to the 2004 Notice of Proposed Rulemaking, "the salary tests were originally designed to operate as a ready guide to assist employers in deciding which employees were more likely to meet the duties tests in the exemptions,"[9] and multiple salary levels would only make such determinations more difficult.

Lastly, we also are concerned that tasking the Department with setting multiple salary levels will make the process of updating the regulations, which DOL is obligated to do "from time to time," more contentious and more complex and create further headwinds and delays. Currently, the Department is facing multiple stakeholders with strongly held and differing opinions over what constitutes an appropriate nationwide floor. If DOL starts imposing regional salary thresholds, the number of stakeholders and disagreements will expand, with debates over comparative salary levels, regional boundaries, how to handle employees' temporary assignments in other jurisdictions, state laws and a host of other issues.

Question 3:

Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

Response:

We believe that the Department should not set different salary levels for the different exemptions. We have not heard of any reasonable justification for making such a change, and over 95% of respondents to our 2017 CUPA-HR CHRO Survey felt that setting salary levels based on the different exemptions could lead to increased confusion, compliance challenges and litigation. An exempt employee's duties often straddle two or even three exemptions, and it may be difficult to determine which exemption applies at any given time. The 2004 regulations recognize this reality, stating that "an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption" (29 CFR Section 541.708). Establishing different salary levels for administrative and executive employees as compared to professional employees (or some other variation) would require employers to make a determination that a particular exemption applied or, more likely, that a particular exemption is that employee's "primary" primary duty. This will inevitably result in increased administrative and compliance burdens and litigation over which specific salary level might apply.

Question 4:

[9] See: https://www.federalregister.gov/d/03-7449/p-28

In the 2016 Final Rule, the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Response:

We support a standard salary level that follows the parameters outlined in the answers to questions 1-3. We do not support changes to the duties test at this time for the reasons set forth in our answer to question 1.

Question 5:

Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

Response:

The standard salary level that the Department set in the 2016 Rule would eclipse the role of the duties test in many cases. While the salary threshold in the 2016 Rule ($47,484) was slightly lower than what DOL proposed in the NPRM ($50,440), the following statement from our 2015 Comments on NPRM is applicable to the 2016 Rule as well:

> To comply with the proposed change, colleges and universities ... would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would be appropriate and keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution and students.

More specifically, following the NPRM's release, we heard from colleges and universities across the country that the proposed minimum salary level would force them to reclassify 40%, 50% and possibly as much as 60% of their currently exempt workers who meet the duties test, including highly educated scientists, admissions staff, human resources professionals and other professionals, all of whom are relied upon for their skills and who consistently exercise discretion and independent judgment with respect to matters of significance.

For example, the Iowa Association of Community College Trustees estimated in its comments on the NPRM that "community colleges in the most rural areas of Iowa will have 40% to 60% of their staff impacted by the proposed Salary Level Test."[10] A small Texas university responding to CUPA-HR's 2015 survey stated that of their 437 exempt employees, 239 (54.8%) are currently paid under the then-proposed salary threshold of $50,440, representing the majority of entry-level and mid-level professionals.

Even larger universities and state systems said they would need to reclassify large numbers of employees in the face of the proposed changes. One Midwestern university state system said "[i]f the proposed rule is promulgated, the status of over 5,000 employees would change from exempt to nonexempt." A large public university in the South calculated that its nonexempt population would increase from 1/3 of its current regular workforce to 1/2, since it could not afford the $11.8 million salary increases to keep the current level of exemption. Similarly, the University of Iowa said in its comments that "over 2,700 individuals we employ ... would immediately change from exempt salaried to nonexempt hourly" as a result of the proposal.[11] One public land-grant institution with 24,000 total employees informed CUPA-HR that 35% of its exempt workforce had salaries below the proposed threshold, including highly-educated scientists and postdoctoral researchers. Similarly, a large Florida university noted that approximately 25% of the exempt workforce would be affected if the proposal was implemented, and the changes would affect "those university functions that rely heavily on funding from grants, donations and other limited sources of funding support (primarily science and research jobs)."

In fact, several large research universities responding to CUPA-HR's 2015 survey noted they would need to reclassify many highly-educated research professionals. One large research university reported that 50% of the exempt scientific and research employees are below the initially proposed threshold of $50,400. The National Postdoctoral Association also expressed concern in its comments about the impact of the proposal on its members.[12] Salaries for researchers working on grants are often below DOL's then-proposed threshold of $50,440. In fact, at the time the NPRM was issued, the National Institutes of Health stipend levels for *postdoctoral* researchers were well below DOL's proposed minimum salary level. NIH has since increased those stipends above the 2016 Rule's threshold ($47,476) to $47,484.[13]

Following the publication of the 2016 Final Rule, CUPA-HR analyzed its *2016 CUPA-HR Professionals in Higher Education Salary Survey Report* in an effort to evaluate the rule's impact. CUPA-HR found that 24 position classifications in that survey had median national salaries below the 2016 threshold — all of the higher education positions that

[10] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[11] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[12] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[13] See https://grants.nih.gov/grants/guide/notice-files/NOT-OD-17-002.html.

are reported on the professionals survey are considered exempt.[14] Additionally, and this is explored in further detail in our response to question 6, 57% of institutions responding to the 2017 CUPA-HR CHRO Survey indicated that they made changes in anticipation of the 2016 Final Rule's effective date by reclassifying one or more positions from exempt to nonexempt status.

As Judge Mazzant noted in his August 31, 2017 decision striking down the 2016 rule, the Department's 2016 standard salary level ignores congressional intent, as the significant increase from $455 to $913 "would essentially make an employee's duties, functions, or tasks irrelevant [resulting in] entire categories of previously exempt employees who perform "bona fide executive, administrative, or professional capacity" duties [ineligible] for the EAP exemption based on salary alone, thereby supplanting an analysis of an employee's job duties.[15]

Question 6:

To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

Response

Immediately following the court's decision to enjoin the 2016 Final Rule, CUPA-HR surveyed its members regarding the extent to which institutions had changed their plans in response to the injunction. Survey responses were as follows:

- 28% of respondents said that they would fully implement all of the changes needed to comply with the 2016 Rule;
- 32% said they would implement some changes and but delay others;

[14] The *2016 CUPA-HR Professionals in Higher Education Salary Survey Report* reflects the salaries of 209,169 professionals in 334 positions at 1,079 colleges and universities nationwide. For more information or to obtain a copy of the full report, go to http://www.cupahr.org/surveys/publications/professionals-higher-education/.
[15] *State of Nevada v. United States Department of Labor* (August 31, 2017) at 14, found on September 11, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf.

- 32% said they planned to delay all changes;
- 8% said they implemented changes already, but would be reversing some or all of those changes.

These findings are consistent with the responses we received to our more recent 2017 CUPA-HR CHRO Survey in which 28% of members said they implemented their planned changes anyway, 39% implemented some changes and delayed others, and 24% delayed implementation of all changes. Again, 9% of members said that their institution reversed some of the changes they implemented following the preliminary injunction.

In many cases, those institutions that implemented changes followed expected patterns, with many institutions reclassifying employees from exempt to nonexempt status and/or raising salaries for employees. Specifically, of those institutions responding to the 2017 CUPA-HR CHRO Survey, 179 reported reclassifying one or more positions from exempt to nonexempt status and 210 reported raising salaries of one or more professional positions to above the 2016 Final Rule's salary threshold of $47,476.

We were not surprised to see that the institutions that implemented early chose in many cases to raise salaries. Colleges and universities that could afford to increase salaries tended to make those changes in advance of the rule as those changes were welcomed by employees and institutions wanted to ensure all payroll changes were implemented in time for compliance. In addition, colleges and universities said they were reluctant to reverse increases to salaries after those changes were implemented or announced for reasons related to morale and fairness. In contrast, many colleges and universities reported waiting until closer to the compliance deadline to reclassify employees as employees were generally not enthusiastic about this change. Institutions also informed us that they tended to reverse more reclassifications than pay increases that were implemented for the same reason.

While many institutions reported making more complex changes in response to the 2016 Rule, such as revisiting staffing of specific departments and operations, those adjustments were fairly unique to each institution and did not follow any particular patterns.

Economic Impact

The costs of these changes and the anticipated costs for those institutions that reversed or delayed changes are/would have been significant in a time of limited and sometimes shrinking budgets for higher education.[16] As mentioned earlier, in response to question

[16] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King

5, CUPA-HR found that 24 position classifications in our 2016 Salary Survey had median national salaries below the 2016 threshold. From that information, we calculated that 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.[17] We also asked our membership for data on their anticipated costs to implement the 2016 Final Rule. The 35 institutions that could provide data 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.

As discussed above, while not every institution implemented their planned changes following the preliminary injunction, of those members who reported making some changes and responded to the 2017 CUPA-HR CHRO survey, ninety-two percent indicated that their institutions sustained costs as a result. While many institutions are still in the process of evaluating the exact costs to their institutions, initial estimates by members responding to the 2017 CUPA-HR CHRO Survey regarding costs already incurred are illustrative:

- Ninety-three institutions sustained costs of around $50,000
- Fifty-five institutions sustained costs between $50,000 and $100,000
- Thirty-nine institutions sustained costs between $100,000 and $250,000
- Sixteen institutions sustained costs between $250,00 and $500,000
- Eight institutions sustained costs between $500,000 and $1,000,000
- Six institutions sustained costs of more than $1,000,000

If we assume that for each of the aforementioned cost bands half of institutions report costs at the low end and half at the high end, we can estimate that the total one time cost for implementing the rule for these 219 institutions is over $31.275 million.[18] This does not include ongoing costs as a result of the changes.

We have also received more detailed cost data from some institutions. A university system in the northeast reports that for the 1,000 exempt employees that would have been impacted, the institution would have incurred, on a best-case scenario, costs of $3.4 million in order to increase salaries and/or pay overtime to newly reclassified employees. While this particular institution held off on the majority of changes following

Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf

[17] This of course does not include other costs, such as increases to benefits. The costs would be much higher for institutions paying at the lower end of the salary range and who are therefore likely to have fewer financial resources. They would also be higher for those institutions employing more than one incumbent in these positions.

[18] For example, if 16 institutions report costs between $250,000 and $500,000, we assume costs for eight institutions to be at the lower end ($250,000) and costs for eight institutions to be at the higher end ($500,000) for a total estimated cost for this band of $4.125 million.

the preliminary injunction of the rule, they did raise salaries for 100 postdoctoral students at one of their campuses due to the contractual demands of union bargaining that occurred just before the rule went into effect—this change cost the institution $700,000 in the first year alone. For another large university system along the northeast corridor—an area with a high cost of living—the estimated cost of implementing changes to comply with the Final Rule would have been more than $12,000,000 annually, based on either salary increases or additional overtime costs.[19] Drilling down even more granularly, one large Midwestern university incurred costs of 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.

The cost data related to implementing the 2016 Rule is incomplete, however, as the majority of institutions delayed or reversed changes to their workforce following the preliminary injunction. Others are still undergoing a thorough cost analyses of their actions and therefore unable to provide cost data.

Reclassification

As we explained in question 5, professionals in thousands of positions at colleges and universities that clearly meet the duties test for exemption are paid less than $47,476 and the costs associated with raising salaries to that level were prohibitive for many institutions. As a result, many institutions that did implement changes reclassified a large portion of their exempt workforce to nonexempt positions. Members responding to our 2017 CUPA-HR CHRO Survey, indicated that they reclassified employees in the following job categories:

- Academic Affairs (264 institutions report reclassifying professionals in this category)
- Student Affairs (31 institutions report reclassifying professionals in this category)
- Community outreach/educational extension functions (108 institutions report reclassifying professionals in this category)
- Athletic Affairs (157 institutions report reclassifying professionals in this category)
- Positions relying on grants (65 institutions report reclassifying professionals in this category)

[19] That same university system planned to increase the salaries of 1,200 employees to meet the new salary threshold, to reclassify from exempt to non-exempt nearly 1,100 employees, to revise leave policies, revise workplace practices to telework, and to limit flexibility to work after normal hours. Additionally, all of these changes required extensive discussions with their labor unions prolonging and protracting the process.

In our view, this reclassification was 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. 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.

While it should go without saying, these losses inherently contribute to a negative impact on employee morale. Many higher education professionals view their exempt status as a reflection and recognition of their advanced education, academic success and professional prestige. Loss of exempt status is seen as a demotion in perceived status, even if all other aspects of the work remain the same and even if their overall compensation remains stable or increases with the addition of overtime pay. This sentiment is supported by 91% of institutions that reported reclassifying one or more of their professionals in the 2017 CUPA-HR CHRO Survey. Specifically, members report that they have experienced issues with the following:

- Employee Morale (165 institutions report experiencing issues)
- Reduction in opportunities for professional development (165 institutions report experiencing issues)
- Diminished workplace autonomy (165 institutions report experiencing issues)
- Less flexibility (165 institutions report experiencing issues)
- Time to review all job descriptions (165 institutions report experiencing issues)
- Time to communicate and train staff on changes (165 institutions report experiencing issues)

Additionally, several of the survey respondents indicated that reclassification was causing difficulties handling travel pay, counting vacation time as it takes nonexempt employees longer to accrue time off, creating "an us versus them mentality between employees and departments", spending substantial time creating a mobile app for tracking of hours in various departments, and changes to paid time off plans. This 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.

Higher Education's Unique Challenges

While higher education shares in many of the same concerns as other impacted stakeholders, 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 the 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.

Question 7:

Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

Response:

We believe the salary threshold plays an important role in preventing abuse of the exemptions, providing clarity for those who are implementing and enforcing the regulations and in screening out "those employees who by virtue of their compensation obviously will not meet the duties tests." In fact, the support by our members for a threshold is overwhelming, with 88% of those responding to our 2017 CUPA-HR CHRO Survey noting they had serious concerns about eliminating the salary threshold altogether.

Specifically, our members have said that a reasonable salary threshold is an important compliance tool for providing additional clarity to the duties test, particularly as the test relates to exercising independent discretion and judgment. They also have noted that a salary threshold provides another means for evaluating exemptions and that they fear relying solely on the duties test would leave too much room for interpretation, which could increase lawsuits and potentially damage employee morale.

In addition, if the Department were to eliminate the salary threshold, the agency would likely compensate by imposing new duties test requirements or reinterpreting existing requirements in an attempt to curb abuses previously addressed by the salary threshold. These new requirements will inevitably further complicate the exemption analysis not only for those employees currently below the threshold, but also those paid above the threshold. The additional complexity would do nothing to protect those entitled to overtime pay and would undoubtedly invite compliance challenges and unnecessary litigation.

For these reasons, we suggest the Department retain the salary threshold requirement in the current standard test.

Question 8:

Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

Response:

Please see our responses to questions 5 and 6.

Question 9:

The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit, or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

Response:

This aspect of the 2016 Rule does not have a significant impact on higher education.

Question 10:

Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

Response:

This aspect of the 2016 Rule does not have a significant impact on higher education.

Question 11

Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

Response:

Over 80% of those responding to our 2017 CUPA-HR CHRO Survey opposed automatic updates because of the potential negative impact on institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. For this reason and because we do not believe DOL has the authority to impose automatic updates, we urge DOL to continue with its past practice of updating the regulations as appropriate through notice and comment rulemaking.

When Congress authorized DOL to issue regulations under the FLSA, it did not grant the agency the authority to index the minimum salary level. Rather, Congress tasked DOL with updating the exemptions defining and delimitating the terms executive, administrative and professional employee from "time to time," *by regulation.* DOL recognized its lack of authority in this regard in 2004, when it acknowledged that "nothing in the legislative or regulatory history ... would support indexing or automatic increases." [20]

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

Regardless of whether it has authority or not to impose automatic updates, DOL should only increase the salary level via notice and comment rulemaking. To date, every time DOL has increased the salary test, it has done so via Administrative Procedure Act rulemaking by proposing a new salary level and allowing the public to comment on the proposal. This process not only forces thoughtful examination of the exemptions and public participation, but also requires DOL to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis — which is an important part of assessing the impact of any increase to the salary level. It also allows the agency to tailor any changes to the salary level and other regulatory requirements so the exemptions better meet their statutory purpose in the face of changing workforces and changing economies.

[20] 69 Fed. Reg. 22171

The history of changes to the exemptions emphasizes 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.

DOL needs to fulfill its duty and regularly update the threshold from time to time through notice and comment rulemaking, as it has with every past salary increase. Obviously, the agency has met that requirement before without any preordained intervals for updates and can do so again in the future.

If DOL decides it must impose some sort of automatic update, however, it should nonetheless conduct notice and comment rulemaking for *each* update in order to consider the economic consequence of such a change prior to implementation and adjust accordingly. Recent history illustrates why this is necessary; if the DOL had imposed automatic updates on a five-year interval in 2004, the increases would have gone into effect in 2009, when the country was struggling to recover from the 2008 economic crash without any thoughtful review by DOL.

As mentioned previously, if DOL does impose automatic updates, it should do so in intervals no shorter than five years (with somewhere between five and 10 years being ideal), as automatically updating the salary level too frequently would negatively impact institutions' and other employers' budgets and budget planning, ability to provide merit-based increases and employee morale. For example, the annual increases proposed by DOL in the NPRM would have created uncertainty year in and year out as to the application of the white collar exemptions. Once the specific salary threshold is ascertainable for a new year, colleges and universities would need to rapidly assess which exempt employees would be affected and determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to hourly status.

The financial impact of conducting such analysis year in and year out is significant — and the cost of annual salary adjustments and reclassifications would be far more. In fact, 91% (644 of 705 responses) of CUPA-HR members responding to our 2015 survey said automatic increases would negatively impact their budgets, and 63.6% (444 of 698 responses) said it would negatively impact their ability to engage in financial planning.

Frequent automatic updates would also interfere with operational and human resources functions, as repeated forced increases and related wage compression will make it hard for institutions to provide merit-based pay increases. Out of those responding to the 2015 survey question on this topic, 68.7% (475 of 691 responses) said automatic updates would negatively impact their institution's ability to provide merit-based increases to employees.

Beyond such financial and operational impacts, transitioning employees from exempt to nonexempt status often triggers morale issues.[21] If automatic updating goes into effect and it is imposed in short intervals, employers would need to reclassify employees on a regular basis, which would likely cause long-term morale issues. The morale issues would be exacerbated by two other unintended consequences resulting from the automatic increases — wage compression and deterioration in institutions' ability to provide merit-based increases. A whopping 86.6% (603 of 696 responses) of CUPA-HR members responding to the 2015 survey said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases. More recently, over 50% of those responding to our 2017 CUPA-HR CHRO Survey said that a *one-time* reclassification of employees in anticipation of the 2016 Rule caused morale issues with the reclassified employees. This morale issue would undoubtedly intensify with repeated reclassifications

ADDITIONAL COMMENTS

As part of issuing the 2016 Rule, DOL compiled and reaffirmed existing guidance on the application of the exemptions to higher education employees. The Department was also on the verge of releasing additional guidance on the application of the teaching exemption to agricultural extension agents and others similarly situated when the court issued the November 2016 injunction (this guidance was shared by DOL with us and is attached as Exhibit C). We request that the Department reaffirm the guidance for higher education issued as part of the 2016 Rule and release the guidance on extension agents as soon as possible.

CONCLUSION

The undersigned respectfully request that DOL consider our responses to the RFI and thank the agency for the opportunity to comment.

Respectfully Submitted,

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

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On Behalf of the Following Undersigned Organizations:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Indian Higher Education Consortium
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities (HACU)
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation

Mr. BYRNE. Thank you.

So, what this is really supposed to be all about are the people in America who work for a living, and sometimes in Washington, we forget them. We start thinking about things other than what this law is really aimed at doing, and that is protecting and helping men and women that work every day, yes, for a paycheck, but they do a lot of things for everybody in this country, and America wouldn't be America without them. And so, this law was designed to help them.

When we don't do anything about it, when we wait years and years and years before we change the threshold, we are not helping them. So, what we have was, prior to the Bush Administration, a period—a long period of time, nothing. Then at least the Bush Administration took a responsible action. And then we had years again when we didn't do anything.

And what the Trump Administration has done is dealt with this expeditiously. That is what is in the best interest of the workers of America. And remember what we were talking about earlier, some of these people that we tried to reclassify did not want to be reclassified. They were angry at being reclassified, and no one listened to them. No one paid them any attention. There were real costs here.

The University of Alabama provided information to my office that said it would cost the University of Alabama $15 million, and they put their decisionmaking in really stark contrast for me. They say, do we raise tuition to cover that or do we cut back on the services that $15 million represents? Either way, we hurt the students at the University of Alabama. And that is just one example of many, many universities and community colleges that we heard from.

So, I think sometimes we get up here and we debate these things in the ether, and it is not where things really matter. They matter out there in the many, many workplaces in America. My district doesn't have a lot of large companies in it. We have mainly small- to medium-size companies. And that is where most of the people are employed. That is where most of our workers work, not just in my district, but around America.

And we oftentimes forget that is who we should be thinking about, the workers at those small companies. Yes, workers at universities. Yes, workers at nonprofits, who are going to be terribly affected in a very terrible way by the Obama rule.

What the Trump Administration has done has been a responsible effort to help the workers of America. And I am deeply grateful that they have done that, and I hope they will continue to do that. And I hope future administrations will do so as well.

With that, Madam Chairwoman, I yield back.

Chairwoman ADAMS. Thank you, Mr. Byrne.

I now recognize myself for the purpose of making my closing statement.

As we have heard today, over the past 40 years, the Federal Government's failure to adequately update the white collar salary level has weakened overtime protections for millions of workers. These weak protections have made it all too easy for salaried workers to be denied the overtime protections to which they are entitled.

In fact, as one of our witnesses testified, some employers are building a business model based on weak overtime standards by loading up salaried workers with excessive hours, with no overtime pay, and leaving other workers with too few hours.

As we have heard, the Obama rule would have provided millions of workers with new or strengthened overtime protections. The 2016 rule would have also made it easier from employers to properly classify which part of their work force is eligible for overtime protections and decreased employers' exposure to costly litigation.

Rather than defending the Obama-era overtime update in court, the Trump Labor Department issued a proposal that falls well short of what workers deserve. Because the Trump Administration is using the same flawed approach used in 2004, we do not have to speculate what will happen to workers. We know that this proposal will leave too many workers with less money in their pockets and less time to spend with loved ones.

I urge the Department to abandon its current efforts and defend the 26—2016 rule in court. Democrats stand ready to protect workers where the administration fails to do so. The Restoring Overtime Pay Act, H.R. 3197, would codify the strong salary threshold set in the 2016 final rule and require automatic updates every 3 years to ensure the level remains in line with overall increases in workers' wages. I note the Department does currently have authority to do so.

Growing income and inequality and the declining power of workers have only reinforced the need for strong overtime protections. Restoring workers access to strong overtime protections, raising the Federal minimum wage, and protecting workers' rights to join a union are the pillars of Federal efforts to give hardworking Americans a raise. We must all work to build an economy that works for all Americans, not just the wealthy few.

Again, I want to thank all of our witnesses for their testimony today.

If there is no further business, without objection, the committee—the subcommittee stands adjourned.

[Additional submission by Mr. Byrne follows:]

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May 21, 2019

Ms. Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted via regulations.gov

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA20) (84 Fed. Reg. 10900, March 22, 2019)

Dear Ms. Stanton:

The Society for Human Resource Management (SHRM) is pleased to provide the Department of Labor ("DOL" or "the Department") with comments on its proposed revisions to the executive, administrative, professional, outside sales, and computer employees exemptions under the Fair Labor Standards Act (FLSA).

SHRM's mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. With 300,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. Changes to the overtime regulations affect the workplaces of nearly every SHRM member. Our comments are joined by SHRM's 51 affiliated state councils.

SHRM supports regular updates to the overtime salary threshold and has argued for reasonable increases to ensure that HR professionals and employers are able to classify employees with certainty while maintaining the ability to offer flexible schedules, opportunities for advancement and access to the professional development that many employees currently enjoy.

SHRM opposed the 2016 Final Rule on overtime exemptions which would have fundamentally changed the rules for employee classification and has since been invalidated by the U.S. District Court of the Eastern District of Texas in their August 31, 2017 decision. As we detailed in our 2017 response to the Department's Request for Information,[1] the 2016 Rule resulted in many SHRM members adjusting their policies.

Many of these changes had a direct financial impact on employees:

- decreasing work hours to avoid overtime;
- reducing the effective hourly rate so that total pay would remain the same while accounting for usual hours worked;
- removing eligibility to earn incentive compensation; and
- redistributing work responsibilities to shift duties to employees who would have remained exempt.

Other changes directly impacted employees' professional development and flexibility:

- reducing access to training programs, especially if travel would have been required;
- reducing flexible workplace offerings, such as job sharing and part-time exempt work; and
- removing the ability of employees to use mobile devices outside of work hours.

In order to provide employers with a clear understanding of the status of their obligations, SHRM urges DOL, as part of this rulemaking, to formally rescind the 2016 Final Rule.

SHRM is pleased that the Department has proposed an update to the overtime rules providing employers with finality as they craft policies regarding compensation and flexibility to drive employee engagement. As explained more fully below, SHRM supports the Department's decision to retain the current duties test and adjust the nationwide salary level using the same methodology used in previous rulemakings, without regional variation. As part of the salary level calculation, SHRM urges the Department to include the full amount of all types of bonuses and commissions and to regularly update the salary threshold under existing notice and comment rulemaking procedures. Lastly, SHRM urges the Department to harmonize the regular rate regulations with the rulemaking and provide at least 120 days for implementation of any final rule.

I. Using the Department's 2004 Methodology for Establishing the Minimum Salary Threshold for Exempt Status is Appropriate and Consistent with the Threshold's Historical Purpose of Screening Out Obviously Non-Exempt Employees.

The Department proposes to update the 2004 standard salary level by applying the same methodology to current data. According to the NPRM, "The Department proposes to set

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information, 82 Fed. Reg. 34,616.

the standard salary level at approximately the 20th percentile of earnings for full-time salaried workers in the lowest-wage Census region, again the South in this case, and/or in the retail sector. Normally, this would result in a weekly salary level of $641 per week ($33,332 annually), which is also approximately the 20th percentile of both: (1) Earnings for full-time salaried workers in the South, and (2) earnings for full-time salaried workers in the retail sector. However, the Department proposes to inflate this figure to reflect anticipated wage growth through January 2020. This results in the standard salary level proposed in this NPRM, which is $679 per week ($35,308 annually)."[2]

Since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[3] That is, the salary level should be set so that the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. In setting the threshold to serve this screening function, DOL has historically looked to set it "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." [4]

In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, in part due to the elimination of the long duties test. This regulatory history reflects both Democratic and Republican administrations adjusting the salary level between 10 and 20 percent while taking into consideration regional and industry differences.

The salary threshold provides employers with an abbreviated method to appropriately classify employees by screening out those who are obviously non-exempt. The 2004 methodology remains the best measure to achieve this goal.

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[2] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees;* 84 Fed. Reg. 56 (March 22, 2019).
[3] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).
[4] Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) at 6-7.

II. The Department Should Reconsider its Proposed Calculation of the Minimum Required Salary for the Highly Compensated Employee Exemption.

Since 2004, DOL has set the salary level for the Highly Compensated Employee (HCE) test at $100,000. For the last 15 years, the difference between the standard and HCE levels has been $76,340. In the 2016 Final Rule, the Department for the first time articulated a methodology for setting the HCE threshold: the 90th percentile of full-time salaried workers generally. In 2016, that was $134,004. The difference between the standard and HCE levels in the 2016 Final Rule was $86,528.

In the current proposal, the Department proposes to use the same methodology it used in 2016, resulting in a figure even higher than the 2016 figure -- $147,414. This increase in the HCE level is proposed despite the fact that the current proposal's standard salary threshold is significantly reduced from the 2016 Final Rule. As a result, the proposed HCE level is $112,106 more than the standard threshold.

The Department has offered no reason why the proposed level should be higher than the level in the 2016 Final Rule. And the Department offers no explanation for the gap between the standard threshold and the HCE threshold increasing from the 2016 Final Rule -- more than 2.5 times more than it did from 2004 to 2016 ($10,000 vs. $26,000).

A significant amount of administrative effort will be needed to determine that an employee who had been classified as exempt through application of the HCE test remains exempt under application of the standard duties test. The Department should reconsider the proposed increase to the minimum salary required for application of the HCE exemption and either leave it at the current level or adjust with consideration of a more appropriate gap between the standard and HCE thresholds.

III. Bonuses and Commissions Should be Counted Toward the Salary Threshold as Part of Total Compensation.

The Department proposes to allow employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided such bonuses are paid annually or more frequently. SHRM supports DOL's proposal to allow employee nondiscretionary bonuses paid quarterly, semi-annually, or annually to be included toward the salary threshold, but recommends removing the ten percent and nondiscretionary limitations.

As SHRM expressed in previous comments, we appreciate and commend the Department's willingness to consider inclusion of nondiscretionary bonuses toward the minimum salary level but suggested that some changes be made to make this option more attractive for a greater variety of employers. In its current proposal, the Department addresses some of those concerns by allowing inclusion of employee bonuses paid quarterly, semi-annually, or annually as this better reflects the timing of how these incentive payments are made by employers.

Similarly, SHRM encourages the Department to include all types of bonuses toward the minimum salary level in their full amount. In certain industries and jobs, bonuses and other incentive payments, both discretionary and nondiscretionary, account for a significant increase in an employee's total compensation. Employees who qualify to receive such incentive payments are typically those who would otherwise qualify for exemption because of the duties they perform. When employers create bonus plans, they do so with an eye toward the total compensation package. As such, these payments should count toward to salary threshold in full rather than limiting the contribution to an arbitrary ten percent.

Because the timing of bonus and incentive payments can vary across employers, we agree that the Department should allow a "catch-up" payment in the event that payments to the employee over the course of the preceding year do not satisfy the salary level and qualify the employee for exempt status. Given the manner in which annual bonuses are calculated and paid, SHRM suggests that the Department extend the time limitation for making such catch-up payment from the proposed one pay period to a longer period of time, such as a quarter of a year. This allows the employer to obtain a complete understanding of the annual performance by an employee and reduces the likelihood that compliance errors will be made in an effort to reconcile the employee's annual pay against the salary level within the brief time frame of one pay period.

IV. The Department Should Regularly Update the Salary Threshold Through Notice and Comment, But There Should be no Automatic Adjustments.

As mentioned earlier, SHRM supports regular updates to the salary threshold through the Department's existing notice and comment rulemaking authority. SHRM supports the Department's proposed rejection of automatic increases to both the standard salary level and the highly compensated employee (HCE) level for both legal and practical reasons.

The Administrative Procedure Act (APA) requires notice and comment rulemaking for informal rules, such as the current proposal issued by the Department. The purpose of the notice and comment requirement is, in part, to ensure that the regulated community has sufficient notice of proposed changes to which they will be bound so that they have an opportunity to respond to the proposal and offer the regulator opinions, facts, and other information that will be helpful in crafting a final rule.

The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. An automatic update mechanism would allow the Department to announce a new salary level on a predetermined schedule in the *Federal Register* without providing notice and an opportunity for public comment, without conducting a Regulatory Flexibility Act analysis, and without satisfying any of the other regulatory requirements established by various Executive Orders. Future automatic salary threshold increases would certainly take effect during economic downturns—exactly the wrong time to be increasing labor costs on employers.

Likewise, implementing a regulatory preset schedule for updating the salary threshold, like the periodic increases every four years proposed by the Department, can cause unanticipated problems. Automatic or preset mechanisms for updating the thresholds cannot account for ways in which the workforce changes over time. Making adjustments to the salary thresholds through notice and comment rulemaking helps ensure that geographical and sectoral disparities in pay are accounted for. Similarly, there may be times of economic downturn or other economic conditions that make an update unrealistic.

For the foregoing reasons, the Department should regularly update the threshold through notice and comment rulemaking. This allows DOL to take into consideration current economic conditions and the ability of the existing salary threshold to continue to serve as an appropriate method for screening out the clearly nonexempt employees under existing economic conditions.

V. The Department Should Not Set Varying Salary Thresholds Based on Geography or Other Factors.

Faced with the dramatic salary increase proposed during discussion of the 2016 Rule, some stakeholders proposed regional variations to address the difficulties that the salary level would cause for various industries or geographic regions.

While it is critically important for DOL to consider data from different regions of the country, different size employers, and different industries, this data should be considered to develop a single standard salary threshold, not to adopt multiple thresholds, which will only serve to increase compliance costs and create confusion for employers and employees alike. A salary level that is set appropriately for the lowest wage region, or lowest wage industry, will serve adequately in other regions. In addition, having different salary levels will significantly increase compliance costs on businesses as they will necessarily expend resources determining which salary level should be applied for each covered employee. No compelling reason has been articulated that would justify this significantly increased burden. The fact is that a single standard salary threshold will always be easier to apply than multiple thresholds.

By returning to the 2004 methodology, the Department has satisfied the District Courts criticism that the 2016 proposed rule was inconsistent with the salary level's historical purpose of setting a floor for exemption. By setting the threshold at a level that restores its role of screening out obviously exempt employees, the Department eliminates any need for such variations.

VI. SHRM supports the position taken in the proposal to refrain from making any changes to the existing duties test.

SHRM supports the Department's position that no changes should be made to the duties test. Employers and HR professionals have experience applying the current duties tests. In addition, application of the duties tests has been shaped by litigation. Making changes in this rulemaking would increase FLSA litigation at a time when such litigation is already exploding. Increasing these litigation costs is not good for employers, employees, or the economy.

For these reasons, the Department should not over complicate the rule by changing the duties test. Therefore, SHRM supports the Department's decision not to address the duties test in this rulemaking.

VII. The Department Should Harmonize Overtime and Regular Rate of Pay Regulations.

On March 29, 2019 the Department issued a proposed regulation to update and clarify the regular rate requirements of the FLSA.[5] Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. The Department proposes clarifications to confirm what employers may exclude from an employee's regular rate of pay. The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, "call back" pay, and others.

As part of the overtime rulemaking, the Department should include as appropriate to the calculation of the salary threshold for overtime, the same forms of compensation that can be used toward the regular rate. If an employer must include a non-hourly payment in the regular rate, that payment also should count towards the salary threshold. If the employer can exclude the payment, it should not count towards the salary threshold. For consistency and ease of administration, payments that count towards regular rate should count towards both the standard salary threshold and the HCE threshold.

VIII. The Department Should Provide as Least 120 Days for Implementation

In 2004, the Department established an effective date for its final revisions that was 120 days after publication of its final rule. Based on our experience at that time, compliance within that window was extremely challenging for employers given the substantial changes to the classification scheme. While these regulations will be more familiar to employers, many will need to re-engage on this issue after a long period of awaiting resolution. At a

[5] *Regular Rate Under the Fair Labor Standards Act;* 84 Fed. Reg. 61 (March 29, 2019)

minimum, we urge the Department to provide employers with at least 120 days after publication to implement the rule.

IX. Conclusion.

SHRM supports the Department's proposal to rescind the 2016 Final Rule and return to the 2004 methodology in setting a single, nationwide salary threshold for determining exempt status under the FLSA. However, we request the Department:

- Remove limitations on the type and amount of bonus and incentive pay that can count toward the salary threshold;
- Standardize the types of compensation that can be considered to satisfy the salary thresholds with the regular rate regulations and
- Provide at least 120 days to implement the final rule.

Sincerely,

Emily M. Dickens, J.D.
Chief of Staff
Society for Human Resource Management

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INTERNATIONAL FRANCHISE ASSOCIATION

June 12, 2019

The Honorable Alma Adams
Chairwoman
Subcommittee on Workforce Protections
Committee on Education & Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Bradley Byrne
Ranking Member
Subcommittee on Workforce Protections
Committee on Education & Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Adams and Ranking Member Byrne:

On behalf of the International Franchise Association (IFA), the oldest and largest association representing franchising worldwide, I am writing to share our views regarding the hearing, "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections," that was held on June 12, 2019, by the Subcommittee on Workforce Protections. IFA appreciates the Subcommittee's attention in reviewing the U.S. Department of Labor's proposal to increase the salary level of executive, administrative, professional and outside sales employees, which IFA supports.

Franchising is about opportunity, job creation and community engagement. Franchising is responsible for 7.6 million jobs and contributes $404.6 billion in economic output. The franchise business model creates economic opportunities for individuals of any age, race, background, or zip code. Most importantly, franchises are small businesses, who often lack the resources of larger corporations.

IFA generally supports the U.S. Department of Labor's proposal. In returning to the 2004 methodology for calculating the standard minimum-salary level for the executive, administrative, and professional exemptions, businesses are afforded consistency and predictability. IFA also welcomes the Department's decision to allow employers to credit certain incentive payments toward the minimum salary thresholds, as these changes will provide flexibility that will allow an employee's total compensation package to be considered in the calculation.

Because franchises are small businesses, they often lack the sophisticated legal, human resources, or accounting departments needed to understand and implement the new requirements issued in the proposal, such as adjusting payrolls to accommodate the new salary levels and establishing procedures to provide "catch-up" payments for employees earning part of their compensation through incentive payments. Although the franchisors of these small businesses could provide non-mandatory guidance in sharing information about the new regulation, IFA requests that the Department include a safe harbor so that such guidance is not used as factual evidence of a joint employment relationship, which would fissure the relationship between franchisor and franchisee.

Please find enclosed IFA's final comments to the U.S. Department of Labor in support of this much needed update to the overtime rules. Once, again we appreciate the Subcommittee's actions on this important issue, and we thank you for your consideration.

Sincerely,

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May 21, 2019

VIA ELECTRONIC FILING: www.regulations.gov

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation & Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

Re: RIN 1235–AA20, Notice of Proposed Rulemaking, 29 CFR. Part 541, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 FR 10900 (March 22, 2019)

Dear Mr. Secretary:

Thank you for the opportunity to respond to the Department of Labor's Notice of Proposed Rulemaking on its Part 541 regulations, *Defining and Delimiting the Exemptions for the Executive, Administrative, Professional, Outside Sales and Computer Employees*.[1] The International Franchise Association (IFA) submits these comments on its own behalf and on behalf of the millions of people working and doing business in the franchise industry.

The IFA is the world's oldest and largest organization representing the industry. Since 1960, it has educated franchisors and franchisees on beneficial methods and business practices to improve franchising. It also advocates on behalf of franchisors and franchisees. Through its educational, public-policy, and government-relations programs, it furthers the interests of more than 733,000 franchise establishments supporting nearly 7.6 million jobs and contributing more than $674 billion to the U.S. economy. Its members operate in all 50 states and in all facets of industry. Most franchises are small businesses, without human resources or in-house legal counsel. They depend on information and support provided by, among others, the IFA.

On behalf of these businesses, the IFA generally supports the Department's proposal. It agrees with the Department's decision to return to the 2004 methodology for calculating the standard minimum-salary level for the executive, administrative, and professional exemptions. It also

[1] 84 Fed. Reg. 10900 (March 22, 2019) [hereinafter "2019 Proposed Rule"].

welcomes the Department's decision to allow employers to credit certain incentive payments toward the minimum salary. These changes will help bring Part 541 closer in line with real-world compensation practices and provide welcome flexibility to the IFA's members.

The IFA believes, however, that the Department would improve its proposal by including a safe harbor for franchisors who provide education and compliance assistance to franchisees. Absent a safe harbor, franchisors will hesitate to offer franchisees any help out of fear of creating joint-employment liability. The Department included a safe harbor in its recent final rule on association health plans under ERISA. A similar provision here would ease franchisors' concerns, lead to more cooperation, and promote greater compliance. The IFA therefore strongly encourages the Department to adopt a safe-harbor provision.

Beyond these two issues, the IFA has several reservations about the proposal. First, the IFA believes the Department should have used more targeted data to calculate the standard minimum-salary level and the salary level for highly compensated employees. By using too broad a data set, the Department artificially inflated those salary levels. The burden of that mistake will fall most heavily on small businesses, including many of the IFA's members. Second, the IFA believes the Department should have allowed employers to credit nondiscretionary bonuses and other incentive payments toward the minimum salary without limit. The Department's decision to cap credit at 10% will reduce employer flexibility, increase costs, and hurt the small businesses driving the American economy. The IFA raised these same issues in response to the Department's 2017 request for information. It now again urges the Department to reconsider them before adopting a final rule.

1. Safe Harbor for Franchisors Providing Education and Compliance Assistance

The Department's proposal creates several new compliance issues for businesses. These issues include adjusting payrolls to accommodate the new salary levels and establishing procedures to provide "catch-up" payments for employees earning part of their compensation through incentive payments.[2] Many franchises are small businesses without sophisticated legal, human resources, or accounting departments.[3] So they will need help understanding and implementing the Department's new requirements.[4]

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[2] *See id.* at 10912–13.

[3] *See* Int'l Franchise Ass'n, Response to RIN 1235-AA20, at 12 (Sept. 25, 2017) [hereinafter "IFA 2017 Response"] (reporting that many IFA members "are small businesses operating in low-margin industries").

[4] *See id.* (noting that 2016 Rule placed "enormous strain" on these members' operations).

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Franchisors are understandably hesitant to provide that help, as their efforts could be cited as evidence of a joint-employer relationship.[5] If they were given assurances that they would not increase their risk of liability, they would be much more willing to help franchises work through these issues.[6]

The Department should therefore adopt a "safe harbor" provision protecting franchisors from increased liability. It should state that franchisors will not be deemed joint employers under the FLSA merely because they offer education and compliance assistance to franchisees implementing the new requirements.[7] Nor will their efforts in that regard be used as evidence of a joint-employment relationship.[8] Such assurances would encourage franchisors to help franchises implement the regulations, and thereby improve compliance.[9]

The Department took a similar approach in its recent final rule respecting association health plans under ERISA.[10] In response to concerns expressed by stakeholders, the Department clarified that it will not consider a business a joint employer solely because the business participates in an association health plan.[11] Nor will it consider the business an employer of independent contractors also participating in that plan.[12] It emphasized that "nothing in the final rule is intended to indicate that participating in an [association health plan] . . . gives rise to joint employer status under any federal or State law, rule, or regulation."[13]

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[5] *See* Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043, 14047 (April 9, 2019) (observing that uncertainty over joint-employment liability can impact an entity's willingness to provide assistance to another entity, such as a franchisee).

[6] *See id.* (stating that clarity around joint-employment liability will encourage positive behaviors, such as negotiating for workplace-safety requirements, and promote certainty in business relationships).

[7] *Cf. id.* at 14051 (clarifying that certain business practices, such as providing a sample handbook or other forms to a franchisee, do not make it more or less likely that the franchisor is a joint employer).

[8] *Cf. id.*

[9] *See id.* at 14047 (stating that it would be "helpful" for the Department to declare that certain business practices, including certain assistance from franchisors, do not affect the parties joint-employment status one way or the other).

[10] *See* Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28912 (June 21, 2018).

[11] *Id.* at 28935.

[12] *Id.*

[13] *Id.* at 28936.

A safe harbor is equally necessary here, if not more so. Joint employment carries significant legal consequences for the parties involved, particularly under the FLSA.[14] Assuring parties that their cooperation in implementing the Department's proposed rule will not lead to joint-employment liability will both protect stakeholders and promote the Department's regulatory goals.

2. Return to the 2004 Methodology

a. The 2004 methodology is consistent with historical practice and judicial precedent.

The IFA supports the Department's decision to return to the methodology it adopted in 2004 for setting minimum salary levels for exempt executive, administrative, and professional employees. As the IFA stated in its response to the Department's 2017 request for information, the 2004 methodology is sound as a matter of policy and defensible as a matter of law.[15]

The 2004 methodology sets the minimum salary level at the 20th percentile of the lowest-wage Census region (the South) and the lowest-wage industry group (Retail).[16] As a matter of policy, this approach adheres to the Department's historical practice. The Department has included minimum salary levels its regulations for nearly 80 years.[17] And since the beginning, it has recognized that the levels play only a limited role. The Department has learned through practical experience that employees who earn below a certain threshold almost inevitably fail to qualify under the duties tests.[18] It has therefore included the salary levels as a way to screen these employees out efficiently.[19] In that way, the salary levels save employers and the Department's investigators time and resources.[20]

[14] *See id.* at 28935 ("The commenters argued that the question of who is an "employer" or "joint employer" carries significant legal consequences because of the increasing prevalence of independent contractor and other third-party relationships in today's workplace, such as those between a business and a contractor's employees, or between a corporate parent and its franchisees' workers.").

[15] *See* IFA 2017 Response, *supra* note 3, at 4–5.

[16] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 79 Fed. Reg. 22122, 22164, 22167 (April 23, 2004) [hereinafter "2004 Final Rule"].

[17] *See id.* at 22166 (tracking historical development of salary levels).

[18] *See* 2019 Proposed Rule, *supra* note 1, at 10913.

[19] *See id.*

[20] *See, e.g.*, U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541 UNDER THE FAIR LABOR STANDARDS ACT DEFINING THE TERMS "EXECUTIVE, ADMINISTRATIVE," "PROFESSIONAL," "LOCAL RETAILING CAPACITY," "OUTSIDE SALESMAN" 2–3 (1958) [hereinafter "KANTOR REPORT"] (stating that the salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt

The salary levels were never intended, however, to displace the duties tests. They serve merely as a short-hand proxy for those tests.[21] To preserve that role, the Department has always placed the levels at the lower end of the salary range—lower even than suggested by the data.[22] Placing the levels any higher would risk screening out employees who otherwise pass the duties tests.[23] In short, the salary levels were always intended to exclude only "obviously nonexempt" employees.[24]

The Department ignored that principle when, in 2016, it abandoned the 2004 methodology and doubled the minimum salary.[25] Had the 2016 Rule gone into effect, more than four million employees would have become nonexempt overnight solely because of their salaries.[26] But in late 2016, the Eastern District of Texas enjoined the rule;[27] and the following year, the court struck it down.[28] The court reasoned that the Department had no authority to define the exemptions by salary alone.[29] The salary test is valid only when it serves as a proxy for duties.[30] In 2016, the Department raised the salary level so high so quickly that it overwhelmed the duties

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employees"); U.S. Dept. of Labor, Wage & Hour & Pub. Contracts Div., Report and Recommendations on Proposed Revision of Regulations, Part 541 under the Fair Labor Standards Act Defining the Terms "Executive, Administrative," "Professional," "Local Retailing Capacity," "Outside Salesman" 8 (1949) [hereinafter "Weiss Report"] (stating that the salary levels help prevent misclassification of "obviously nonexempt" employees); U.S. Dept. of Labor, Wage & Hour & Pub. Contracts Div., Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940) [hereinafter the "Stein Report"] (stating that the salary test would help identify employees "who obviously should be exempt" from those who were not).

[21] *See, e.g.*, Kantor Report, *supra* note [], at 2–3 (explaining that the salary levels "simplify enforcement by providing a ready method of screening out the obviously nonexempt employees").

[22] 2004 Final Rule, *supra* note 16, at 22168 (discussing historical approach).

[23] *See id.*

[24] *Id.*

[25] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) [hereinafter "2016 Final Rule"]

[26] *See id.* at 32393 (estimating that "4.2 million currently exempt workers who earn at least the current weekly salary level of $455 but less than the 40th earnings percentile in the South ($913) would, without some intervening action by their employers, become entitled to minimum wage and overtime protection under the FLSA.").

[27] *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016).

[28] *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806–808 (E.D. Tex. 2017).

[29] *Id.* at 806.

[30] *See id.*

tests and made salary determinative for large swaths of the workforce.[31] As a result, it exceeded its authority, and the Rule was invalid.[32]

Had the Department simply updated the salary levels using the 2004 methodology, it likely could have avoided that result. Indeed, the court itself suggested as much.[33] The Department has therefore reasonably returned to the 2004 methodology in its latest proposal.[34] The IFA supports that decision.

b. The Department should use more targeted data to ensure that the minimum-salary level reflects the lower end of the salary range.

Though the IFA generally agrees with the Department's approach, it has several reservations about the Department's data set. In particular, it believes that the Department erred by using salary data from some of the highest-wage jurisdictions in the country.

The Department used as its baseline the South Census Region, nominally the lowest-wage region in the country. But the South is hardly uniform. It comprises three divisions: the South Atlantic Division, the East South Central Division, and the West South Central Division. While the East and West Divisions contain largely lower-wage states, the Atlantic Division includes three of the ten highest-wage jurisdictions in the country: Maryland, Virginia, and the District of Columbia.[35] In fact, Maryland is ranked number one in median household income.[36]

By including these jurisdictions, the Department skewed its data set. It effectively canceled out lower-wage jurisdictions, like Mississippi, and so ended up with a salary level not truly reflecting

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[31] *See id.* at 806–07.

[32] *Id.* at 808.

[33] *See id.* at 807 n.6 ("[I]f [the salary level] had been just adjusted for inflation, the 2004 figure, we wouldn't be here today . . . because [the salary level] would still be operating more the way it has . . . as more of a floor." (quoting court's statements during oral argument)).

[34] 2019 Proposed Rule, *supra* note 1, at 10901 n.4 (citing *Nevada*, 275 F. Supp. 3d at 806–808).

[35] *See* U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, Median Household Income by State, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[36] *Id.* (reporting that the median household income in Maryland was $74,551 per year).

the lower end of the range. The burdens of this decision will fall most heavily on small businesses, which can least afford to bear the additional costs.[37]

The Department should correct this error by using a more targeted data set. It should exclude the South Atlantic Division and instead base the salary level only on the South East Central and South West Central Divisions.[38] Doing so will ensure that the minimum salary continues to screen out only "obviously nonexempt" employees, including those in lower-wage industries and states.[39]

3. Credit for Nondiscretionary Bonuses, Commissions, and Other Incentive Payments

The IFA agrees with the Department's decision to begin allowing employers to credit nondiscretionary bonuses, commissions, and other incentive payments toward the minimum salary.[40] This decision recognizes changes in modern compensation systems, which now commonly offer exempt employees a significant portion of their earnings through incentive payments.[41]

Allowing credit for incentive payments is also consistent with the salary level's purpose, which, again, is to quickly identify nonexempt employees.[42] As the Department has recognized, bonuses and other incentive payments correlate with exempt status.[43] So counting an employee's incentive payments toward the minimum salary does not diminish—and perhaps increases—the salary test's utility.

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[37] *See* 2016 Final Rule, *supra* note 25, at 32408 (surveying comments from business community suggesting that higher-than-necessary salary levels would disproportionately impact small businesses).

[38] The South Atlantic Division is comprised of Delaware, Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, and Florida; the East South Central Division is comprised of Kentucky, Tennessee, Alabama and Mississippi; the West South Central Division is comprised of Arkansas, Louisiana, Oklahoma and Texas.

[39] *See* 2016 Final Rule, *supra* note 25, at 32401 (observing that Department has historically set the salary levels at the lower end of the range in part to protect small businesses).

[40] *See* 2019 Final Rule, *supra* note 1, at 10912.

[41] *See* 2016 Final Rule, *supra* note 25, at 32432 (observing the "increased role bonuses play in many compensation systems").

[42] *See* 2019 Proposed Rule, *supra* note 1, at 10912.

[43] *See* 2016 Final Rule, *supra* note 25, at 32424 (reviewing public feedback showing that incentive payments are frequently a significant portion of exempt employees' compensation).

The IFA disagrees, however, with the Department's decision to cap credits for incentive payments at 10%.[44] The Department offered no justification for the 10% figure. Instead, it merely cited the 2016 Rule,[45] which likewise failed to support this arbitrary cap.[46] It offered no data or analysis suggesting that 10% was an effective or necessary level.[47]

Instead, in both 2016 and 2019, the Department limited its discussion to whether a cap was necessary at all.[48] It concluded that one was necessary because without a cap, employees might not be paid "regularly."[49] This fear is overblown. Few employees would agree to a compensation scheme guaranteeing them no minimum income. Besides, exempt employees *would* be guaranteed a minimum income. Employers would pay at least as much as the minimum salary level. Otherwise, they would lose the right to claim the exemption.[50]

The Department also suggested that a cap is necessary to defend nonprofits and government employers from competition.[51] But that rationale makes little sense. Governments and nonprofits do not typically compete with for-profit employers in the marketplace. To the extent they compete with for-profit employers for talent, any possible imbalance already exists. For-profit employers are already compensating exempt employees with incentive payments.[52] Allowing employers to credit those payments toward the minimum salary will not change that reality; it will merely recognize it.[53]

[44] *See* 2019 Proposed Rule, *supra* note 1, at 10912.

[45] *Id.*

[46] *See* 2016 Final Rule, *supra* note 25, at 32425–26.

[47] *See id.*

[48] *See* 2019 Proposed Rule, *supra* note 1, at 10912–13; 2016 Final Rule, *supra* note 25, at 32425–26.

[49] 2019 Proposed Rule, *supra* note 1, at 10912.

[50] *See id.* at 10912 (allowing employers to make an annual "catch up" payment to ensure exempt employees receive at least the minimum salary).

[51] *See* 2016 Final Rule, *supra* note 25, at 32426 (recounting comments from state- and local-government employers); 2019 Proposed Rule, *supra* note 1, at 10912 (citing comments the Department received in 2016).

[52] *See* 2016 Final Rule, *supra* note 25, at 32424 (reciting comments from the business community suggesting that the use of incentive payments is already widespread).

[53] *See id.*

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As the IFA explained in its 2017 response, the cap is unjustified.[54] The Department should abandon it and allow employers to take credit for nondiscretionary bonuses, commissions, and incentive payments without limit.

The Department should also expand the window for making "catch up" payments. As proposed, the Department's Rule would allow employers to make a one-time catch-up payment to ensure that employees receive enough incentive pay to reach the minimum annual salary.[55] But employers would have to make those payments within the first pay period after the end of the year.[56] Small businesses will struggle with that window. One pay period is simply not enough time to catch any small, inadvertent errors made over the preceding year—particularly for businesses lacking large accounting and human-resources departments. Instead, the Department should give employers one month to make those payments. The Department already gives employers one month to make catch-up payments under the highly qualified exemption.[57] It declined to give employers one month to correct incentive payments in 2016 because, at that time, it required employers to pay incentives at least quarterly.[58] Now, however, it proposes to allow employers to pay incentives annually.[59] So it makes sense to give employers the same corrective window for both purposes.

4. Updating the Salary Level Through Rulemaking

The IFA agrees with the Department that the appropriate way to update salary levels, when necessary, is through notice-and-comment rulemaking.[60] By contrast, updating the levels through indexing would have exceeded the Department's authority.[61]

[54] *See* IFA 2017 Response, *supra* note 3, at 15–16.

[55] 2019 Proposed Rule, *supra* note 1, at 10912–13

[56] *Id.* at 10913.

[57] 29 C.F.R. § 641.601(b)(2)

[58] 2016 Final Rule, supra note 38, at 32427.

[59] 2019 Proposed Rule, *supra* note 1, at 10912.

[60] 2019 Proposed Rule, *supra* note 1, 10902.

[61] *Nevada*, 275 F. Supp. 3d at 806.

Section 13(a)(1) of the FLSA authorizes the Department to define the executive, administrative, and professional exemptions "from time to time."[62] It says nothing about indexing.[63] Had Congress intended to give the Department power to update the exemptions by indexing, it would have said so—as it has done in numerous other statutes.[64] Here, its silence speaks volumes.

Moreover, indexing clashes with the Administrative Procedure Act (APA). The APA requires agencies to adopt major policy changes through notice-and-comment rulemaking.[65] Congress required rulemaking for such changes because it believed that agencies made better decisions when they considered the widest possible input.[66] Automatic indexing would deny the Department that benefit. It would also deprive the Department of the opportunity to consider broader conditions other than salary increases. In effect, it would strip the Department of judgment and delegate major policy changes to a formula. That is not the decisionmaking process Congress envisioned.[67]

Worse, indexing would create huge administrative burdens. It would require employers to reevaluate every year whether to classify their employees exempt or nonexempt.[68] Employers would have to decide, year after year, whether to increase salaries or move employees to hourly positions.[69] They would also have to decide whether to decrease hourly rates to ensure that any changes were cost neutral.[70] These burdens would fall most heavily on small businesses—which

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[62] 29 U.S.C. § 213(a)(1).

[63] *See id.*

[64] *See* 42 U.S.C.A. § 1395ww(d)(2)(H) (Social Security Act) (providing for adjustments to previously standardized payments); Pub. L. 111-148, § 1102(c)(3), 124 Stat. 119, 145 (2010) (Patient Protection and Affordable Care Act) (codified at 42 U.S.C. § 18002); 28 U.S.C.A. § 2412(d)(2)(A)(ii) (Equal Access to Justice Act) (providing for an increase in the amount of attorneys' fees due because of an "increase in the cost of living").

[65] 5 U.S.C. § 553.

[66] *See Brown Exp.*, 607 F.2d at 701.

[67] *See, e.g., Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking."); *Nat'l Retired Teachers Ass'n v. U. S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977) ("One of the central purposes of the notice and comment requirements is to allow public participation in the promulgation of rules which have a substantial impact on those regulated."), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979).

[68] *See* IFA 2017 Response, *supra* note 3, at 17 ("[F]requently adjusting the minimum salary level creates an unsustainable floor and results in instability within businesses that will be required to revisit base level salaries on a routine basis to ensure compliance.").

[69] *See id.*

[70] *See id.* at 12.

do not employ sophisticated accounting and legal departments—and would foster uncertainty more broadly.[71]

In short, the IFA agrees that rulemaking is more appropriate than indexing as a method for updating salary levels. The IFA takes no position, however, on whether the Department should update levels on a regular schedule (e.g., every four years). If the Department does adopt such a schedule, it should also tie any future updates to the 2004 methodology. Regular updates will cause the least disruption when stakeholders know what to expect and can plan for potential new costs. Tying future updates to the 2004 methodology will provide certainty about those costs and facilitate smoother implementation when the updates take effect.

5. Highly Compensated Employees

The IFA urges the Department to reconsider its proposed salary level for highly compensated employees. That level, $147,414,[72] surpasses the existing level by more than 47%.[73] The Department offered no rationale for such a huge spike.[74] It did not claim—nor could it—that salaries had risen by nearly half since 2004.[75] Nor did it claim that the existing level had caused otherwise nonexempt employees to be wrongly classified.[76]

It provided even less support for its methodology. It merely announced that it would use nationwide salary data and peg the salary level to the 90th percentile.[77] This approach clashes with the one the Department took in the same Notice for the standard salary level, which it calculated using regional and industry-specific data.[78] The Department offered no reason for these divergent approaches.

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[71] *See* IFA 2017 Response, *supra* note 3, at 1 (stating that most franchises are small businesses without legal or human-resources departments).

[72] 2019 Proposed Rule, *supra* note 1, at 10901–02.

[73] *See* 29 C.F.R. § 541.601 (setting minimum salary level at $100,000).

[74] *See* 2019 Proposed Rule, *supra* note 1, at 10913–14.

[75] *See id.* at 109013 (emphasizing that the highly compensated salary level must "keep[] pace with growth in nominal wages and salaries," but offering no evidence of a 47% increase since 2004).

[76] *See id.* (stating that even when the occasional highly compensated employee would not qualify under the duties test, "a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act" (quoting WEISS REPORT, *supra* note 20, at 22–23)).

[77] *Id.*

[78] *See id.* at 10917.

Worse, the Department ignored the highly compensated salary level's purpose. The Department has used special short-hand tests for well-compensated employees since the 1940s.[79] These tests are the mirror image of the standard salary levels: they allow employers and investigators to quickly identify employees likely to be performing exempt work.[80]

All employers, big and small, have such employees. But the Department's proposal puts the short-hand test for highly compensated employees out of reach for small employers, especially those in lower-wage jurisdictions. In more than half of all American states, fewer than 10% of households earn $150,000 per year.[81] But even that figure overstates the number of employees eligible for the exemption, as more and more households include at least two earners.[82] In lower-wage states, this means that the highly compensated exemption will lose its utility for many small employers, who simply cannot pay their employees $147,414 a year—regardless of how much they value those employees or what duties those employees perform.

The Department could avoid this result by using a more targeted data set. It could draw data from the South Census Region—in particular, the East and West Divisions—as well as the Retail industry group. It could then set the salary level at the 80th percentile: a mirror image to the standard salary level's 20th percentile. This method would not only be more consistent with the Department's historic approach to salary levels for highly compensated employees; it would also be more consistent with the Department's current approach to the standard salary levels. Using the same data set for both levels would provide uniformity and ensure that the exemptions remain available to employers across the country, both large and small.

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[79] *See* WEISS REPORT, *supra* note 20, at 22–23 (discussing "special provisos" for "high salaried" exempt employees).

[80] *See* 2004 Final Rule, supra note 16, at 22173–74.

[81] *See* Jeff Desjardins, *How Many People make More than $150,000 in Every U.S. State*, BUSINESS INSIDER (Nov. 7, 2017), https://www.businessinsider.com/how-many-people-make-more-than-150000-in-every-us-state-2017-11 (compiling figures from U.S. Census Bureau); *see also Current Population Survey, Annual Social and Economic Supplements*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-households/h08.xls (last visited April 4, 2019) [hereinafter "Census Population Survey"] (showing median income by state).

[82] *See The Rise in Dual Income Households*, PEW RESEARCH CENTER (June 18, 2015), https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ (reporting that percentage of dual-income households rose from 25% in 1960 to 60% in 2012).

6. Conclusion

On balance, the IFA supports the Department's proposal. The proposal takes a step in the right direction, offers employers long-overdue flexibilities, and brings the regulations closer to reflecting the real-world workplace. The IFA appreciate the opportunity to comment on the proposal, and it looks forward to continuing to work with you on this important issue.

Respectfully submitted:

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Statement for Hearing Record

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House Committee on Education and Labor
Subcommittee on Workforce Protections

"Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections"

Hearing Date: June 12, 2019

During the hearing on "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections" I was asked a question by Rep. Mark Walker (R-NC), about how a parent company providing advice on complying with overtime regulations to a franchise operator might possibly create a joint employer relationship within the franchising business sector. Rep. Walker concluded by asking me whether creating some form of a "safe harbor" so that such advice would not lead to a finding of joint employer status for franchisers/franchisees would be a good idea.

While my response at the hearing indicated support for such an approach, upon further reflection, I realize that as a representative of the U.S. Chamber of Commerce, I should have noted that the Chamber does not have a position on this question. Furthermore, I should have pointed out that the Department of Labor's ongoing rulemaking to clarify when a joint employment relationship does exist is the proper place for this question to be addressed, not the Department's rulemaking on overtime.

In addition, during my exchange with Ranking Member Virginia Foxx (R-NC) I opined that the Fair Labor Standards Act does not authorize the Secretary of Labor to create a salary threshold. I wish to reiterate and emphasize that those views were mine alone, and do not reflect the views of the U.S. Chamber of Commerce.

[Questions submitted for the record and their responses follow:]

COMMITTEE ON EDUCATION
AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

June 25, 2019

Ms. Heidi Shierholz, Ph.D.
Senior Economist and Director of Policy
Economic Policy Institute
1225 Eye Street, NW, Suite 600
Washington, D.C. 20005

Dear Dr. Shierholz:

I would like to thank you for testifying at the June 12, 2019, Subcommittee on Workforce Protections hearing entitled "*Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later Wednesday, July 3, 2019, for inclusion in the official hearing record. Your responses should be sent to Udochi Onwubiko of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
"Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections."
Wednesday, June 12, 2019
10:15 a.m.

Representative Susan Wild (D-PA)

- Dr. Shierholz and Mr. Winebrake, as we heard during the hearing, Secretary Acosta has publicly stated that the Department should consider automatic indexing. While the *Restoring Overtime Pay Act*, H.R. 3197, which codifies the 2016 salary level, includes automatic indexing, does the Department of Labor *currently* need any additional statutory authority to include automatic updates in its regulations?

COMMITTEE ON EDUCATION
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U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

June 25, 2019

Mr. Pete Winebrake
Managing Partner
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025

Dear Mr. Winebrake:

I would like to thank you for testifying at the June 12, 2019, Subcommittee on Workforce Protections hearing entitled "*Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later Wednesday, July 3, 2019, for inclusion in the official hearing record. Your responses should be sent to Udochi Onwubiko of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

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ROBERT C. "BOBBY" SCOTT
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[Dr. Shierholz's response to questions submitted for the record follow:]

June 25, 2019

Chairman Scott
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Scott:

Thank you for the opportunity to testify at the June 12, 2019, Subcommittee on Workforce Protections hearing entitled "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections." I am happy to answer the additional question submitted by Representative Susan Wild (D-Pa): "Dr. Shierholz and Mr. Winebrake, as we heard during the hearing, Secretary Acosta has publicly stated that the Department should consider automatic indexing. While the *Restoring Overtime Pay Act*, H.R. 3197, which codifies the 2016 salary level, includes automatic indexing, does the Department of Labor *currently* need any additional statutory authority to include automatic updates in its regulations?"

The Department of Labor does not need any additional statutory authority to include automatic updates in its regulations. The FLSA exemption from the minimum wage and overtime protections for EAP employees specifies that these exemptions must be "defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). As indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL would be acting entirely reasonably and within its statutory authority to adopt indexing as a means to define and delimit the EAP exemptions in a timely manner.[1] And, in the Department's current overtime proposal, it acknowledges that Congress has instructed the Department to make these determinations "from time to time."[2] Indexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming federal regulations.[3]

I am happy to answer any additional questions.

Sincerely,

Heidi Shierholz

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[1] Law Professors Overtime Comments in response to RIN 1235-AA11 (September 4, 2015) letter on DOL's authority to index the salary threshold: https://www.regulations.gov/document?D=WHD-2015- 0001-4585.
[2] 84 Fed. Reg. at 10914.
[3] The Department cites industry stakeholders' views that indexing would not account for unique economic circumstances and would be "unduly disruptive." 84 Fed. Reg. at 10914. These vague and unsubstantiated assertions are not a proper basis for the Department's determination not to index.

[Mr. Winebrake response to questions submitted for the record follow:]

WINEBRAKE & SANTILLO, LLC

August 16, 2019

Hon. Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Scott:

Many thanks to you and the members of the Subcommittee on Workforce Protections for considering my testimony at the June 12, 2019 hearing entitled "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections."

In the wake of the hearing, Representative Susan Wild (D-Pa) posed the following question:

> Dr. Shierholz and Mr. Winebrake, as we heard during the hearing, Secretary Acosta has publicly stated that the Department should consider automatic indexing. While the *Restoring Overtime Pay Act*, H.R. 3197, which codifies the 2016 salary level, includes automatic indexing, does the Department of Labor *currently* need any additional statutory authority to include automatic updates in its regulations?

I respectfully offer the following response:

In my view, it would be *beneficial* for Congress to explicitly provide the Department of Labor ("DOL") with statutory authority to index the salary level. Congressional authorization will protect DOL from activist judges who seek to "legislate from the bench" and from lawsuits brought by interest groups that are committed to challenging virtually any DOL regulation that benefits American workers.

Notwithstanding the above, I do not believe Congressional authority is *legally* required for DOL to index the salary level. In enacting the EAP exemption, Congress explicitly instructed that the exemption would be "***defined*** and ***delimited*** from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1) (emphasis supplied). Courts have historically interpreted this language as giving DOL very broad authority to define the requirements and parameters of the EAP exemption. *See, e.g., Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 608 ("The statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive . . . capacity.'"). In this regard, Congressional intent is most clearly reflected in judicial decisions issued in the years immediately following the FLSA's passage. For example, in a 1944 decision entitled *Walling v. Yeakley*, 140 F.2d 830 (10th Cir.

1944), a unanimous Tenth Circuit panel made the following observations regarding the expansive scope of DOL's authority to "define" and "delimit" the EAP exemption:

> Congress exempted employees employed in bona fide executive, administrative, or professional capacities. It realized, however, that the phrases "bona fide executive capacity," "bona fide administrative capacity," and "bona fide professional capacity" would not fix absolute standards or a definite classification within or without which particular employees would fall, and that it was desirable that such phrases be defined and delimited. Congress did not undertake itself to define and delimit such phrases, but delegated that duty to the Administrator. It did not direct that criteria should be laid down as an aid in determining what employees fell within or without the exempted employments, but that the phrases should be made certain by specific definition and delimitation. "Define" means "to state explicitly; to limit; to determine the essential qualities of; to determine the precise signification of; to set forth the meaning or meanings of." "Delimit" means "to fix or mark the limits of; to demarcate; bound." Congress chose general phrases to describe the exempted classes of employees and delegated to the Administrator the power and duty, by regulation, to define and delimit those classifications by reasonable and rational specific criteria.

Id. at 831-832.

Consistent with this expansive authority, DOL has consistently issued regulations that have "defined" and "delimited" the EAP exemption in significant respects. *See generally* Cong. Research Serv., *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)* (May 9, 2005). For example, in 2004, DOL issued regulations that profoundly altered the substance, reach, and interpretation of the EAP exemption. *See* 69 Fed. Reg. 22,122-22,274 (Apr. 23, 2004).

I am not aware of any principled legal explanation for why indexing the salary level would fall outside of DOL's Congressional mandate of "defining" and "delimiting" the EAP exemption. As a practical matter, indexing – which merely protects the salary level against inflation – is ***less*** consequential for employers and workers than many of the other changes that DOL has made to the EAP regulations over the past 70 years.

Thank you for your consideration of this matter.

Respectfully,

Pete Winebrake, Esq.

[Whereupon, at 12:12 p.m., the subcommittee was adjourned.]

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