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EXAMINING THE COSTS AND CONSEQUENCES OF THE ADMINISTRATION'S OVERTIME PROPOSAL

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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EXAMINING THE COSTS AND CONSEQUENCES OF THE ADMINISTRATION'S OVERTIME PROPOSAL

Thursday, July 23, 2015
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, D.C.

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg (Chairman of the subcommittee) presiding.

Present: Representatives Walberg, Thompson, Rokita, Brat, Bishop, Russell, Stefanik, Wilson, Pocan, Clark, Adams, DeSaulnier, and Fudge.

Also present: Representatives Kline, Scott, Jeffries, Courtney, Takano, and Bonamici.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Callie Harman, Staff Assistant; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Zachary McHenry, Legislative Assistant; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Staff Assistant; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Brian Kennedy, Minority General Counsel; Kevin McDermott, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; Arika Trim, Minority Press Secretary; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman WALBERG. A quorum being present, the subcommittee will come to order.

Good morning to each of you, and welcome, to all of our guests this morning.

I would like to thank our witnesses for joining us today to discuss the costs and consequences of the administration's overtime proposal.

Just over a month ago this subcommittee convened to discuss the need to modernize the confusing and outdated regulations implementing federal wage and hour standards. At the time, the administration had not yet released its overtime proposal, but several of our witnesses were already worried about what the proposal would look like and the consequences for workers and job creators.

Recognizing this administration's propensity for executive overreach, I shared many of those same concerns. But I was still hopeful that somehow this time might be different—that somehow the administration would listen to all of the concerns, consider all of the data, and put forward a proposal that would help do some good without doing any harm. As it turns out, the optimism was misguided, much like the rule the administration eventually proposed.

In the weeks since the administration unveiled its overtime proposal, even more concerns have been raised about the impact it would have on both employees and employers. Various studies and analyses have shown the administration's plan would result in billions of new costs for employers annually—a reality that is tough for many employers in this economy, but even tougher on small businesses and nonprofits.

Unfortunately, the proposal's anticipated consequences extend far beyond added costs and could have much more serious implications for many Americans.

Of all the concerns we have heard about this proposal, the ones I find most alarming are those that will limit flexibility and opportunity in the workplace. As employers struggle to cope with the added costs of these new overtime rules, many salaried employees will be demoted—demoted—to hourly workers with lower pay and stricter schedules.

With that shift comes fewer opportunities for on-the-job training, talent development, and managerial experience, all of which leads to fewer opportunities to advance up the economic ladder. And isn't that what America is about?

One of the most inspiring things about the American workforce is that a crew member at a fast-food restaurant can work hard, earn a spot in management, and eventually go on to become a leader at a major U.S. business. That is the American dream—one that all policymakers should work to encourage, not stifle.

I am sure Mr. Williams will have more to say on that topic. Unfortunately, if the administration's proposal has the effect many anticipate it will, stories like that of Mr. Williams will be harder to come by.

Inasmuch as the administration's proposal is flawed for what it would do, it is equally disappointing in what it doesn't do. It doesn't address the complexity of current regulations, and it doesn't reduce unnecessary litigation.

As Chairman Kline and I said when the proposal was first unveiled, it is a missed opportunity.

What we need instead, and what the American people deserve, is a balanced approach that will strengthen employee safeguards, eliminate employer confusion and uncertainty, and encourage growth and prosperity for those working hard to make a living. From what we have heard so far, the administration's proposal is not that approach.

This Committee has held numerous hearings and explored various efforts over the years to improve the rules and regulations guiding federal wage and hour standards. We have heard from employees and employers alike that the current system is too complex, burdensome, and outdated. And we have seen studies that show related litigation is on the rise.

For all these reasons, we will continue to urge the administration to improve these rules and regulations responsibly and in a way that doesn't destroy opportunities for hardworking Americans.

I look forward to hearing from our witnesses today to better understand the effects this proposal could have on our workforce.

And so, with that, I will now recognize the senior Democratic member of the subcommittee, Representative Frederica Wilson, for her opening remarks.

[The statement of Chairman Walberg follows:]

AS PREPARED FOR DELIVERY
July 23, 2015

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Opening Statement of Rep. Tim Walberg (R-MI)
Chairman, Subcommittee on Workforce Protections
Hearing on "Examining the Costs and Consequences of the Administration's Overtime Proposal"
July 23, 2015

Just over a month ago, this subcommittee convened to discuss the need to modernize the confusing and outdated regulations implementing federal wage and hour standards. At the time, the administration had not yet released its overtime proposal, but several of our witnesses were already worried about what the proposal would look like and the consequences for workers and job creators.

Recognizing this administration's propensity for executive overreach, I shared many of those concerns. But I was still hopeful that somehow, this time might be different – that somehow the administration would listen to all of the concerns, consider all of the data, and put forward a proposal that would help do some good without doing any harm. As it turns out, that optimism was misguided, much like the rule the administration eventually proposed.

In the weeks since the administration unveiled its overtime proposal, even more concerns have been raised about the impact it would have on both employees and employers. Various studies and analyses have shown the administration's plan would result in billions of new costs for employers annually – a reality that is tough for many employers in this economy, but even tougher on small businesses and nonprofits. Unfortunately, the proposal's anticipated consequences extend far beyond added costs and could have much more serious implications for many Americans.

Of all the concerns we've heard about this proposal, the ones I find most alarming are those that it will limit flexibility and opportunity in the workplace. As employers struggle to cope with the added costs of these new overtime rules, many salaried employees will be demoted to hourly workers with lower pay and stricter schedules. With that shift comes fewer opportunities for on-the-job training, talent development, and managerial experience. All of which leads to fewer opportunities to advance up the economic ladder.

(More)

One of the most inspiring things about the American workforce is that a crew member at a fast-food restaurant can work hard, earn a spot in management, and eventually go on to become a leader at a major U.S. business. That's the American Dream, one that all policymakers should work to encourage, not stifle. I'm sure Mr. Williams will have more to say on that topic. Unfortunately, if the administration's proposal has the effect many anticipate it will, stories like that of Mr. Williams will become harder to come by.

In as much as the administration's proposal is flawed for what it would do, it's equally disappointing in what it doesn't do. It doesn't address the complexity of current regulations, and it doesn't reduce unnecessary litigation. As Chairman Kline and I said when the proposal was first unveiled, it's a missed opportunity. What we need instead – and what the American people deserve – is a balanced approach that will strengthen employee safeguards, eliminate employer confusion and uncertainty, and encourage growth and prosperity for those working hard to make a living. From what we've heard so far, the administration's proposal is not that approach.

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# # #

U.S. House Committee on Education and the Workforce

Ms. WILSON of Florida. Chairman Walberg, thank you for holding this hearing today and giving us the opportunity to talk about the Department of Labor's proposed overtime rule.

As a prelude to the passage of the *Fair Labor Standards Act,* President Roosevelt made a powerful declaration: All Americans deserve a fair day's pay for a fair day's work.

This simple, powerful principle is the foundation of the historic labor law that we, as members of Workforce Protections Subcommittee, are charged with strengthening and defending. We must protect the workforce.

Implicit in this principle is the freedom from excessive work hours. Explicit in FLSA is premium pay for overtime work.

Overtime pay was established to protect workers from the excessive hours that endanger their health and well-being, prevent them from spending time with their families, and prohibit them from taking the necessary time to recover from the stresses of work, which we all need to do.

Unfortunately, the failure to update the overtime salary threshold to reflect the economic realities of today has seriously eroded FLSA's protection against excessive hours and its explicit promise of a fair day's pay for a fair day's work.

Forty years ago, nearly two-thirds of the workforce was eligible for overtime protections. Today, only 8 percent of workers are eligible for overtime protections.

We cannot possibly argue that these current working conditions for millions of Americans are fair.

It is not fair that the men and women teetering on the brink of poverty—people making $23,660 a year—are asked to work 50, 60, or 70 hours a week with no promise of extra pay. It is not fair that millions of mothers and fathers who are forced to work long hours each week find it almost impossible to give their children the time and attention they deserve, yet are still deprived of the overtime pay that could lend to the economic security of their families.

It is not fair that a worker eager to advance her career can be enticed by the promise of a promotion, a salaried position with the management title, yet be met with astonishingly similar work duties, shockingly greater hours, and in the end, pitifully smaller pay.

The Department of Labor's proposed rule promises to restore a fair day's pay for a fair day's work. The proposed rule would raise the salary threshold from the current $23,660 a year to about $50,440 a year, extending overtime protections to almost five million Americans.

The rule also ensures that the salary threshold automatically increases to keep pace with future shifts in average earnings.

These strengthened overtime protections would mean so much in the daily lives of millions of Americans. This overtime rule would allow more parents to be involved in their children's lives—something we know is absolutely critical for the development and betterment of our children.

This overtime rule would encourage employees to hire more workers instead of overworking a few, meaning more jobs for more Americans. Jobs, jobs, jobs.

The overtime rule would give part-time workers access to more hours that would help them earn more money.

I stand strong with Chairman Scott and my colleagues on this Committee in support of this overtime rule. I stand strong with the more than 150 House and Senate Democrats who sent a letter to President Obama this week to express our strong support of this overtime rule.

I want to thank the witnesses for being here today and look forward to hearing about how this proposed rule strengthens overtime protections and renews the promise of a fair day's pay for a fair day's work.

And I need to correct that: I stand strong with my Ranking Member and colleague, Mr. Scott.

Thank you.

[The statement of Ms. Wilson of Florida follows:]

COMMITTEE ON
EDUCATION AND THE WORKFORCE
SUBCOMMITTEES
HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
WORKFORCE PROTECTIONS - RANKING MEMBER

FREDERICA S. WILSON
CONGRESS OF THE UNITED STATES
24TH DISTRICT, FLORIDA

Opening Statement
Ranking Member Frederica S. Wilson
Workforce Protections Subcommittee Hearing
"Examining the Costs and Consequences of the Administration's Overtime Proposal"
Thursday, July 23, 2015

Chairman Walberg, thank you for holding this hearing today and giving us the opportunity to talk about the Department of Labor's proposed overtime rule.

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Unfortunately, the failure to update the overtime salary threshold to reflect the economic realities of today has seriously eroded FLSA's protection against excessive hours and its implicit promise of a fair day's pay for a fair day's work. Forty years ago, nearly two-thirds of the workforce was eligible for overtime protections. Today, only 8 percent of workers are eligible for overtime protections. We cannot possibly argue that these current working conditions for millions of Americans are *fair*.

It's not *fair* that the men and women teetering on the brink of poverty, people making $23,660 a year, are asked to work 50, 60, or 70 hours a week with no promise of extra pay.

It's not *fair* that millions of mothers and fathers who are forced to work long hours each week find it almost impossible to give their children the time and attention they deserve, yet are still deprived of the overtime pay that could lend to the economic security of their families.

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Thank you.

Chairman WALBERG. I thank the gentlelady.

Pursuant to committee rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses.

First, Ms. Elizabeth Hays is the director of human resources at MHY Family Services in Mars, Pennsylvania. In her role as director of human resources, she is responsible for overseeing all H.R. operations and regulatory areas, including those associated with benefits, administration, employee relations, health and safety, and policy administration.

Welcome.

Mr. Eric Williams is the chief operating officer at CKE Restaurants, Incorporated, in Carpinteria—Carpinteria, that's better—California. Mr. Williams was named COO of CKE restaurants in June 2015. Having previously served as executive vice president of operations for Carl's Jr., Mr. Williams began his career as a Hardee's crew member in 1983, advancing through the ranks with management positions in both the company and franchise operations and training.

Welcome. Go blue.

Mr. Ross Eisenbrey is vice president at Economic Policy Institute here in Washington, D.C. Prior to joining EPI, he worked as a staff attorney and legislative director in the House of Representatives and as a committee counsel in the Senate. Mr. Eisenbrey also served as policy director of the Occupational Safety and Health Administration from 1999 to 2001 and is a former commissioner of the Occupational Safety and Health Review Commission and a graduate of University of Michigan Graduate School.

Welcome.

The Honorable Tammy D. McCutchen is a principal with Littler Mendelson P.C. in Washington, D.C. She represents management clients in connection with all types of labor and employment matters but focuses her practice on complying with the FLSA and state wage and hour laws, conducting audits of overtime exemption classifications, implementing compliance programs designed to avoid wage and hour disputes, and representing employers being investigated by DOL's Wage and Hour Division. Prior to her work at Littler, Ms. McCutchen served as the administrator of the Wage and Hour Division at the Department of Labor from 2001 to 2004.

Welcome.

I will now ask our witnesses, as is the custom in this Committee, to stand and raise your right hand.

[Witnesses sworn.]

You may be seated.

Let the record reflect the witnesses answered in the affirmative, and we look forward to your testimonies.

Before I recognize you to provide those testimonies, let me briefly remind you of the lighting system. Like the traffic lights, green is go for your five minutes of testimony; yellow, caution, get ready to stop, start slowing down; red, find a way to conclude as briefly as

possible. We want to hear your testimonies and we want to make sure we also have opportunities for questioning.

And then as our Committee Chairman is known to say, we will be a little bit more firm with our Committee members—right, Mr. Chairman?—to keep ourselves at the five-minute questioning timeline, as well.

And so, having said that, I now recognize Ms. Hays for your opening five minutes of testimony.

TESTIMONY OF MS. ELIZABETH HAYS, DIRECTOR OF HUMAN RESOURCES, MHY FAMILY SERVICES, MARS, PENNSYLVANIA (TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT)

Ms. HAYS. Chairman Walberg, Ranking Member Wilson, and distinguished members of the subcommittee, my name is Elizabeth Hays and I am the human resources director at MHY Family Services in Mars, Pennsylvania. I have been in this role overseeing H.R. operational and regulatory issues since 2007. I appear before you today on behalf of the Society for Human Resource Management, or SHRM.

Thank you for the opportunity to testify today about how these proposed changes will impact not only my organization, but other employers.

Mr. Chairman, quite literally these proposed overtime regulations to more than double the salary threshold presents the risk of my organization closing its doors. As a nonprofit with tight costs, we are often unable to provide pay increases and hire additional employees.

Worst case scenario, I estimate that these changes could result in additional and unfunded costs of more than three-quarters of a million dollars. To be clear, this would be a 9.1 percent unfunded increase to our budget.

Allow me to tell you a little bit about my organization. MHY is a nonprofit organization serving youth and families by providing support and services that afford opportunities for a better life. MHY offers comprehensive residential, educational, and community-based services, responding to an array of hardships and traumas, including mental illness, behavioral issues, abuse, and neglect.

Let me highlight some specific challenges my organization would face if these proposed overtime regulations are implemented. To be clear, most of MHY's exempt employees—managers and professionals—are currently paid less than $50,000 and under the administration's proposal would become eligible for overtime.

As an underfunded nonprofit with limited flexibility in a budget, I have serious concerns about how we will cover potential overtime expenses while still providing high-quality services for the at-risk youth served by MHY. Our nonprofit's ability to provide critical services to the youth and families that we serve will be negatively impacted.

At MHY we prioritize a continuity of care model that ensures that the at-risk youth receive services and care from the same therapists and supervisors. Therapeutic services are driven by the

relationships that our employees have with the youth and families to which they are assigned.

Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of a primary professional. Under this overtime proposal, continuity of care would be undermined by limiting the ability of our employees to effectively respond to clients' clinical needs.

Changes to the overtime regulations will likely require employers to reclassify a significant number of salaried employees to hourly employees. Hourly employees, of course, are paid only for the hours that they work and often are forced to closely track their hours to ensure compliance with overtime requirements. This can lead to less workplace flexibility.

At MHY our residential program managers, as an example, are provided with workplace flexibility options. If I had to reclassify these positions they would lose their ability to leave early on calmer work days to watch their children's soccer game or take a Friday off for a long weekend, which they are currently afforded to offset long work hours on other days.

Let me turn to some of SHRM's concerns with the proposed overtime rule at this point. SHRM appreciates the administration's interest in modernizing the FLSA overtime regulations and agrees that a measured salary threshold update is, in fact, warranted. However, more than doubling the salary threshold to the 40th percentile of weekly earnings presents challenges for employers like mine, whose salaries tend to be lower.

The proposed increase to the 40th percentile sharply contrasts with historical updates to the salary threshold that represented more reasonable increases. Those increases acknowledged pay differences across sectors and in certain areas with lower costs of living.

SHRM remains concerned that the Department of Labor may still make changes to the duties test that would further exacerbate an already complicated set of regulations for employers. Further changes to the primary duties test, including a required quantification of exempt time or the elimination of managers' ability to perform both exempt and nonexempt work concurrently, would create significant challenges for employers and employees.

Should the DOL ultimately suggest changes to the duties test, SHRM believes a full comment period would be warranted.

In closing, I can't overstate how concerned I am with these proposed changes on my organization's ability to fulfill its mission to serve the youth and families in Pennsylvania. In addition, I share SHRM's concerns that changes to the FLSA overtime regulations will disproportionately impact nonprofit organizations like MHY, employers in low-cost-of-living areas, and employers in certain industries.

Mr. Chairman, thank you again for allowing me to share my experiences and SHRM's views on the FLSA overtime regulations. I welcome your questions.

[The testimony of Ms. Hays follows:]

STATEMENT OF ELIZABETH S. HAYS, MHRM, SHRM-SCP, SPHR

DIRECTOR OF HUMAN RESOURCES

MHY FAMILY SERVICES

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO

U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON

"EXAMINING THE COSTS AND CONSEQUENCES OF THE ADMINISTRATION'S OVERTIME PROPOSAL"

JULY 23, 2015

Introduction

Chairman Walberg, Ranking Member Wilson and distinguished members of the Subcommittee, my name is Elizabeth Hays and I am the Director of Human Resources of MHY Family Services in Mars, Pennsylvania. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for nearly twenty years. On behalf of more than 275,000 SHRM members in over 160 countries, I thank you for this opportunity to appear before the Subcommittee to discuss the recently proposed changes to the Fair Labor Standards Act (FLSA) overtime regulations and the potential impact on my organization and others.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of human resource (HR) professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

As the Director of Human Resources for MHY Family Services since 2007, I am responsible for overseeing all HR operational and regulatory areas including those associated with benefits administration, recruitment, employee relations, health and safety, and policy administration. I also serve as the chair of MHY's Health & Safety Committee, and I'm a member of the organization's Continuous Quality Improvement Steering Committee. In collaboration with other Leadership Team and staff members, I support training and development initiatives for all employees of MHY as a member of the Staff Development Committee.

MHY Family Services is a 501(c)(3) nonprofit organization serving youth by providing support and services that afford opportunities for a better life. Through its residential and community-based programming, MHY strives to meet the ever-changing needs of at-risk youth and their families through a holistic approach to treatment. MHY offers comprehensive residential, educational and community-based services responding to an array of hardships and traumas, including mental illness, behavioral issues, abuse and neglect. MHY has an overall budget of $8.7 million, including approximately $6.2 million from Medicaid, federal and state dollars with 81 percent of our overall budget going toward programming and delivery of services.

MHY Family Services employs 138 people, most of whom are full-time employees, including 64 exempt and 74 nonexempt employees. Most of our exempt employees—executives, managers and professionals—are currently paid less than $50,000, and under the Administration's proposal would become eligible for overtime. As a nonprofit organization with limited flexibility in the budget, I have serious concerns about how I will cover potential overtime expenses while still aiming to provide high-quality services for the at-risk youth served by MHY.

Furthermore, if the FLSA's salary threshold is more than doubled, as proposed, exempt employees may lose their exempt status and return to nonexempt status. In their eyes, the exempt classification is seen as a promotion, providing a sense of "workplace status" and greater workplace flexibility to meet work/life needs. Our supervisors will view reclassification as a demotion, causing a decline in employee morale.

In my testimony, I will explain the Department of Labor's (DOL's) recent proposal to update the FLSA overtime regulations, discuss the specific impact of these changes on organizations like mine in the nonprofit sector, and share SHRM's early thoughts on the proposal.

The Fair Labor Standards Act

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

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education."[1]

Additionally, many states, such as California, have their own laws pertaining to overtime pay. If a state's law is more inclusive or more generous to the employee than federal law, the state law will apply. If, however, the state law is less inclusive, employers are required to follow federal law. The myriad federal and state laws create additional complexity when employers are working diligently to remain compliant.

The FLSA also provides exemptions from both the overtime pay and minimum wage provisions of the Act. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, the classification of an employee as either exempt or nonexempt is determined by whether the employee is paid on a salary basis with a fixed rate of pay and by their duties and responsibilities.

Classification determinations must also be made by looking at each individual job position. Classification decisions for all positions are challenging as they are based on both objective criteria (salary basis level, salary basis test) and subjective criteria (duties test). As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt when they should be nonexempt, or vice versa.

FLSA Overtime Regulations

Regulations governing the FLSA have been revised by the Executive Branch numerous times. Since the FLSA's passage in 1938, the salary threshold has been updated seven times, most recently in 2004. In 2004, the DOL attempted to simplify the overtime regulations for employers and employees by consolidating the long and short duties tests into a single "standard" test and raised the salary threshold. Specifically, under the current regulations, individuals must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, they must be paid on a salary basis (that is, the salary cannot fluctuate) of more than $455/week ($23,660 annually); and second, their "primary duty" must be consistent with those common to executive, professional or administrative positions as detailed in section 541 of the FLSA overtime regulations or one of the other statutorily defined exemptions. Employees who meet these criteria are considered exempt from the overtime requirements of the FLSA.

On March 13, 2014, President Barack Obama directed the DOL to "modernize and streamline" the FLSA overtime regulations. On June 30, 2015, the DOL announced proposed changes to the section 541 FLSA regulations governing overtime determination and coverage.

[1] 29 U.S.C. 203(s)(1)(A)

Under the proposal, the salary threshold would be set equal to the 40th percentile of earnings for full-time salaried employees—this is estimated to be $970 per week in 2016. The proposal also raises the highly compensated salary to the 90th percentile of earnings for full-time salaried employees, or $122,148 annually. For the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. The DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the Consumer Price Index for All Urban Consumers (CPI-U), which calculates inflation by measuring the average change over time in the prices paid by urban consumers. The DOL is also seeking comment on a proposed formula to include nondiscretionary bonuses to satisfy a portion of the standard salary requirement.

In its proposed regulations, the DOL did not suggest specific modifications to the section 541 FLSA duties test. The proposal does, however, raise a series of questions focused on what, if any, changes should be made to the duties test, including specific questions on minimum requirements for primary duties, whether California's 50 percent rule should be adopted nationwide, and whether concurrent duty rules or elimination of the long/short duties test should be reconsidered. The DOL also seeks input on what types of examples to provide in the final regulation to illustrate how the exemptions may apply to specific jobs.

The proposed rule was published in the *Federal Register* on July 6, and comments are due to the DOL by September 4, 2015. SHRM is requesting additional time in order to gather member input and provide comprehensive comments on the proposal. In the meantime, SHRM is making sure its members are well-briefed about the potential implications of the rule and on how they can best participate in the regulatory process in the coming months.

As an indication of the significance of this issue, SHRM recently held the most widely attended webinar in SHRM history with over 11,000 members registering to learn about the impact of the proposed rule on their organizations. In response to record-high involvement, SHRM has created a special section in its HR Policy Action Center dedicated to content and advocacy efforts surrounding changes to the overtime regulations.

In addition, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), consisting of a diverse group of associations, businesses and other stakeholders representing employers with millions of employees across the country in almost every industry. The Partnership is the industry coalition that will be responding to the proposed overtime regulations. The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees and clarity for employers when classifying employees.

Overtime Regulations' Impact on Nonprofit Sector

Most nonprofit enterprises and their employees are covered under the FLSA because coverage under the law may be triggered either by individual coverage or enterprise coverage. According to a 2004 DOL opinion letter, there is no exclusion in the FLSA for private nonprofit organizations. Employees of nonprofit organizations are individually covered under the FLSA if, in the performance of their duties, they are engaged in interstate commerce or in the production of goods or materials for interstate commerce. In determining whether employees are engaged in interstate commerce for purposes of the FLSA, "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943). In other words, if nonprofit employees are involved in fundraising, taking credit card numbers, receiving

out-of-state checks or making telephone calls, they could be deemed as utilizing the channels of interstate commerce.

As a nonprofit organization, it is not uncommon for most of MHY's exempt employees, as executives, managers and professionals, to work more than a 40-hour workweek. Due to the nature of our programming and operations, it is common for the majority of these individuals to work 10- and 12-hour days, at times, in response to clients in crisis. This is not unique to MHY but is the reality for many nonprofit organizations across the country. Many nonprofit employees are highly experienced, possess bachelor's and master's degrees, and hold professional certifications aligned with their respective fields. In terms of the proposal's impact on MHY Family Services, consider the following:

Impact of Proposed Salary Threshold: As a result of this proposed rule, I estimate that 48 out of 64 exempt employees who directly or in a supervisory capacity support client care will be affected by the new salary threshold of $50,440. The employees in question at MHY work as operations specialists, senior therapists, front-line supervisors, program managers and assistant directors. These employees work varied schedules to provide client services (including admissions) and programming, individual and family therapy, supervisory oversight, and crisis support to direct-care employees. Based on their job duties, these employees clearly meet the duties test standard under the current FLSA overtime regulations.

MHY Family Services works hard to reward these employees with the flexibility to work a lighter schedule some days to make up for the long hours that are sometimes needed when providing therapeutic services to our clients. As is the case at many organizations, nonprofits often have a fairly flat organizational structure. As a result, exempt employees in nonprofit organizations often engage in work activities along with nonexempt employees. This happens at MHY, for example, so that we can meet the needs of our youth.

Raising the exempt salary threshold under the new FLSA regulations to $50,440 literally presents the risk of MHY closing its doors. Given our nonprofit status and tight costs, we are unable to provide pay increases and hire additional employees. I estimate that these changes could result in additional costs of $797,371.38 a year—more than three-quarters of a million dollars of additional unfunded costs on an $8.7 million budget. This assigns to MHY a 9.1 percent unfunded increase to our current budget.

Given our reliance on federal, state and local funding, MHY's service programs are not expected to receive any significant increases at this time. Unfortunately, the youth that we serve present increasingly chronic and complex mental health and trauma issues, while demands on MHY and programming expectations from stakeholders have increased exponentially. We are forced to do more with less.

Impact on Populations We Serve: At MHY, we prioritize a continuity of care model that ensures that the at-risk youth population receives services and care from the same therapists and supervisors. Consistent with best practices, developing a relationship between the youth and practitioners maximizes the opportunity for healing and effective treatment.

Therapeutic services are driven by the relationships that professionals have with the youth and families to which they are assigned. Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of the primary professional. Such measures are contrary to generally accepted effective practices in therapy and also to the expectations of our stakeholders (families, counties, insurers). Under this overtime proposal, continuity of care would be undermined by limiting the ability of therapists to effectively respond to clients' clinical needs, as well as their school and work schedules.

Furthermore, currently many exempt employees are available during non-traditional hours and overnight on a regular basis to provide crisis services or supervisory response to crisis as needed. In our residential setting, managers commonly work longer hours and shift their schedules to ensure their presence during anticipated difficult admissions and discharges or, again, if client behaviors are elevated and unsafe, in order to provide direction and support to staff members. They maintain on-call rotations during which they provide remote supervisory direction and problem solving, in separate specialized units that differ based on their clients and programming. Limiting managers' availability to their units risks jeopardizing client care and staff safety and violates state regulation. If the overtime regulations were to be implemented as proposed, MHY would likely have to decrease services because, as noted earlier, we would not be able to afford the additional overtime pay. In addition, MHY would be forced to reduce our client base and unfortunately underserve our county and family stakeholders.

Impact on Employees: If the proposed overtime rules become final, nonprofit organizations like MHY will also be forced to make difficult decisions to potentially reduce employee benefits. Pay in nonprofits, including at MHY, trends lower than in the for-profit sector. To offset the costs and to attract and retain talent, MHY tries to maintain an attractive benefits structure. Diminishing or eliminating benefits, and thereby diminishing total compensation, would only add to the significant challenges of recruitment and retention already faced by this industry. Turnover only places greater demands on managers, who spend additional time coordinating staffing, delivery of services and crisis support, resulting in longer workweeks.

As is the case for many employers, a majority of MHY employees mention the importance of workplace flexibility when deciding whether or not to take a new job with us. Changes to the overtime regulations will likely require employers to reclassify a significant number of salaried employees to hourly employees. Hourly employees are paid only for the hours they work and often are forced to closely track their hours to ensure compliance with federal and state overtime requirements, which can lead to less flexibility.

At MHY, our Residential Program Managers are provided with workplace flexibility options. For example, a manager who may work a long shift or report to campus due to a client crisis can then use flextime to attend a child's soccer game or go to a doctor's appointment. Our exempt workforce has the ability to leave early on calmer workdays or take a Friday off to offset long work hours on other days. Offering these flexibility options to our employees is an additional benefit that would be lost if we are forced to reclassify our current exempt workforce to hourly status.

SHRM's Initial Analysis of the Overtime Regulations

While SHRM continues to carefully review the proposed rule to determine its full impact, the Society has the following initial concerns:

First, SHRM appreciates the Administration's interest in modernizing the FLSA overtime regulations and updating the salary threshold. SHRM agrees that an appropriate salary threshold increase is warranted. However, more than doubling the salary threshold to the 40th percentile of weekly earnings (an estimated $50,440/year in 2016) presents challenges for employers whose salaries tend to be lower. This includes employers in certain industries; nonprofits such as MHY Family Services; and employers in certain geographic areas of the country.

DOL claims a significant increase to the salary threshold is needed in exchange for not reinstating the more detailed long duties test.

SHRM agrees that the DOL should not reinstate the outdated, more detailed long duties test which would lead to further complications for employers and employees. However, the DOL's dramatic increase to the 40th percentile sharply contrasts with previous increases to the salary threshold. In 1958, 1963 and 1970, the DOL set the salary threshold to exclude approximately the lowest paid 10 percent of exempt salaried employees in low-wage regions, taking into account employment size groups, city size and industry sectors. In 2004, the DOL set the required salary threshold at approximately the 20th percentile of salaried employees in the south region and in the retail industry.

This regulatory history reflects both Democratic and Republican administrations increasing the salary level between 10 and 20 percent of affected employees while taking into consideration regional and industry differences. SHRM is concerned that the recent proposed increase to the 40th percentile sharply contrasts with historical updates to the salary threshold that represented more reasonable increases that acknowledged pay differences across sectors and in certain areas with lower costs of living.

Second, SHRM notes that, for the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. As noted earlier, the DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the CPI-U, a measure that calculates inflation by measuring the average change over time in the prices paid by urban consumers. A robust analysis will be needed to understand the potential for salary compression (when the pay of one or more employees is extremely close to the pay of more-experienced employees in the same job or when employees in lower-level jobs are paid nearly the same as employees in higher-level jobs) and how the proposal would impact employers' compensation decisions around merit increases.

As with any employment policy, one size does not fit all. Average salary increases look very different across industries, sectors and regions. The proposed indexing model would likely present administrative challenges to employers who would need to update exemptions yearly, leading to increased legal and compliance costs. Furthermore, the automatic wage adjustments will have numerous ripple effects for HR policies, likely impacting workers' compensation, payroll taxes and employee benefits.

Third, SHRM is concerned that the DOL may still make changes to the duties test that would further exacerbate an already complicated set of regulations for employers, particularly employers in industries where managers often conduct exempt and nonexempt work concurrently. Further changes to the primary duty test, including a required quantification of exempt time or the elimination of managers' ability to perform both exempt and nonexempt work concurrently, would create challenges for employers and employees.

Today's modern workplace often means a flatter organizational structure, with fewer staff in support roles and many employees performing a combination of exempt and nonexempt work. Nonprofits, in particular, often employ a workforce that must pitch in and work at the front desk, answer client phone calls and check in on clients. If overtime regulations eliminate the ability of an employee to perform concurrent duties and maintain their exempt status, many organizations would need to be restructured in ways that diminish the services being provided. The DOL's questions about the duties test in the proposed rule suggests a potential interest in changes. But, by not proposing specific changes to the duties test the DOL places employers and employees in a very uncertain waiting period. Should the DOL ultimately suggest changes to the duties test, SHRM believes a full comment period would be warranted.

Fourth, SHRM cautions that the proposed changes to expand overtime *eligibility* will not necessarily result in a windfall of overtime income for newly classified nonexempt employees. Employers across all sectors monitor labor costs closely and will likely cap or eliminate access to overtime work or will adjust salaries to make sure that an employee's total wages remain the same even if that employee's overtime hours increase.

If the overtime changes are implemented as proposed, some employers may hire more part-time workers who usually enjoy fewer workplace benefits. Furthermore, some employers will look to identify ways to reduce labor costs, such as automating service-sector jobs. From store kiosks to online and mobile ordering, it's hard to ignore the impact of technology on service-sector jobs. Many well-known restaurants and retailers are starting to replace cashiers and service staff with electronic devices such as iPads to expedite the ordering process for customers. Automation of entry-level jobs is likely to increase as federal and state laws and regulations make it more expensive to conduct business.

Finally, SHRM believes the proposed changes to the overtime regulations will limit workplace flexibility. If the salary threshold is doubled, many employees will lose their exempt status and the workplace flexibility it affords. Employers will need to closely monitor hours to avoid potential lawsuits and carefully track employee time. Greater workplace flexibility allows employees to meet work/life needs and benefits the employer through greater employee retention and engagement.

Conclusion

In conclusion, Mr. Chairman, MHY, other nonprofits, and employers across the country are concerned with these proposed changes to the overtime rules. As I noted earlier, more than doubling the salary threshold will significantly impact my organization, our employees, and the youth and families we serve.

It is important to note that when the overtime regulations were last updated in 2004, many SHRM members reported reclassifying exempt employees to nonexempt status, resulting in lower employee morale, a sense of loss of "workplace status," and increased distrust between employers and employees. SHRM and its members are concerned that the recent proposed changes to the overtime rules will have the same result.

While SHRM appreciates the need to update the salary threshold over time, challenges arise if the increase is too high, is implemented too quickly, or fails to consider geographic and industry differences. SHRM would also caution against making any changes to the primary duty test that would include a quantification of exempt time or eliminate the ability to engage in exempt and nonexempt work concurrently.

SHRM and its members, who are located in every congressional district, are committed to working with policymakers to ensure that any proposed changes to the FLSA regulations work for both employers and employees.

Thank you, I welcome your questions.

# # #

Chairman WALBERG. Thank you.

I now recognize Mr. Williams for your five minutes of testimony.

TESTIMONY OF MR. ERIC WILLIAMS, CHIEF OPERATING OFFICER, CKE RESTAURANT HOLDINGS, INC., CARPINTERIA, CALIFORNIA

Mr. WILLIAMS. Chairman Walberg, Ranking Member Wilson, and members of the subcommittee, thank you for the opportunity to testify today on the impact of the administration's proposed overtime regulations. My name is Eric Williams and I serve as chief operating officer at CKE Restaurants, the parent company of Carl's Jr. and Hardee's restaurant chains. I also own and operate seven Hardee's franchise restaurants in and around Indianapolis, Indiana.

CKE and its franchisees account for 75,000 jobs within the United States of America. Our employees are our greatest asset and are highly valued.

As in my personal experience, our employees in our company can progress through our management ranks as high as their ambition may take them. Through hard work, determination, and the opportunities available in the quick-service restaurant industry, I have been able to enjoy a long and fruitful career.

The experience I received was very valuable. My hard work was rewarded with increased responsibility, greater pay, and opportunities to advance for a job well done.

My career development was initially a slow process. I was promoted from crew to an hourly management position limited to 40 hours per week. Once I reached our weekly maximum, I was not allowed to work additional hours. I would have gladly traded the overtime premium to gain more experience and knowledge about the business.

Shortly, I worked my way up to restaurant manager, where I was able to work a schedule that was most beneficial to the business and take off during the times that my supervision wasn't as needed. For example, local conventions provided significant business opportunities with significantly higher customer demands.

Conversely, there were also a number of times when business was slow. During this time I was able to spend additional time with my family, raise my three daughters, attend school functions, work with my church, and take vacations. As a salaried manager at a time-demanding location, I was able to earn a good living and still enjoy a good quality of life.

Over time my career accelerated and I gained greater opportunities. During my time in middle management I witnessed workers follow the same path to advancement that I followed, many of whom are still with our company today. Like myself, they have advanced in their careers and saved for the future by taking advantage of a model that encourages and rewards hard work.

As I noted a moment ago, aside from now serving as CKE's COO, I currently own and operate seven Hardee's restaurants in Indianapolis. My restaurants create jobs for 160 people who live primarily in low-income urban areas.

I offer entry-level management programs similar to the ones which provided me with the opportunities I had to advance within

our company over the last 30 years. Without these programs and the labor guidelines that allowed for them, many talented young adults will be stuck in jobs focused on time spent on the clock rather than time well-spent. They will not have the same opportunities I had because businesses just can't afford it.

It will be both lucrative and fulfilling to the employees willing to invest the time and energy to move from hourly wage crew-level positions to salaried management positions with performance-based incentives. However, the Department of Labor's proposal replaces a general manager's incentive to get results with an incentive to clock more hours.

The salaries of four of my 10 managers would be impacted by the proposal's change to the department's regulations. These four managers earn about $45,000 a year. Keep in mind that these salaries are competitive, particularly recognizing the regional economic differences across the country, and these managers are eligible for the previously mentioned performance bonuses and also receive generous fringe benefits.

To comply with the department's proposal, these restaurants would take an estimated 6 percent reduction to the already thin margins that exist in the restaurant industry. The additional overtime cost is likely to negatively impact the rest of our hardworking workforce by reducing hours, reducing salaries, or reducing bonuses, and equity incentives.

I would be forced to eliminate three salaried assistant manager positions and put them back on the clock. I can assure you that a demotion is the last thing these employees want, since it would block their career path to general manager. I would be forced to limit their hours to 40 hours per week and to schedule them on the busier shifts, which would allow for little development to grow their careers.

As for CKE-owned restaurants, under the new rule we would need to rethink how we staff and schedule our management employees. Overtime pay is a penalty employers pay for requiring employees to work extended hours. It does not increase productivity, nor does it increase revenue. It simply requires employers to pay time-and-a-half for routine work, which reduces earnings.

This is why we manage overtime very closely. Rather than staff our restaurants with salaried managers with performance-based bonuses who can earn higher pay, we would be forced to operate the business with fewer managers who would be paid less, due to a reduction in hours and bonus, and who would be limited to a 40-hour work week.

Unfortunately, operating with fewer management positions would limit the advancement of crew employees into these positions and stifle their personal growth.

As a personal example, I was promoted from a crew position to a management position because there was a position available, and this opened many doors for me. Reducing the availability of those positions because they are too expensive hurts the very people we are attempting to help.

Should the rule prevail, it is highly doubtful that we would expand our staffing much beyond current levels, primarily due to the rising cost of recruiting, training, and providing benefits to new

employees. We would first look for ways to increase the existing employee productivity at the current wage, eliminate nonessential tasks altogether, and use technology to reduce hourly positions.

While we may find the need to increase our minimum staffing levels to maintain high levels of guest service, we would primarily utilize part-time employees for limited shifts during the busiest hours of our operations. It should be clear that the biggest costs will be to all the talented people who, like me, could have advanced from cook to COO or franchise owner.

Finally, I have heard that people are concerned that to avoid paying overtime employers are calling employees managers who are just stocking shelves. However, in reality, stocking shelves or engaging in similar activities won't make you a manager and won't exempt you from the overtime requirements under federal law.

Managers may well help their employees stock shelves or perform other physical work while performing their primary duty as a manager, which is hardly something to disdain. Each manager is entitled to decide whether to perform such tasks, such as the small business owners may decide to perform non-managerial physical work to increase their profits or to show the crew that they, too, can perform these tasks. As anyone who has run a business knows, that is what effective owners and managers do.

Mr. Chairman, Ms. Wilson, subcommittee members, thank you, and I am happy to answer any questions.

[The testimony of Mr. Williams follows:]

July 23, 2015

Written Testimony of Mr. Eric Williams
Chief Operating Officer, CKE Restaurants
Hearing on:
"Examining the Costs and Consequences of the Administration's Overtime Proposal"
Before the House Subcommittee on Workforce Protections

Chairman Walberg, Ranking Member Wilson, and members of the Subcommittee, thank you for the opportunity to testify today on the negative impact on economic opportunity and job creation that would be caused by the Administration's proposed overtime regulations.

My name is Eric Williams, and I serve as the Chief Operating Officer at CKE Restaurants, the parent company of the Carl's Jr. and Hardee's restaurant chains. In this role, I manage operations for both the Carl's Jr. and Hardee's brands. I also own and operate seven Hardee's franchised restaurants in and around Indianapolis, Indiana in which I employ about 160 employees.

CKE Restaurants is a quick service restaurant company headquartered in Carpinteria, California with regional headquarters in Anaheim, California and St. Louis, Missouri. CKE operates Carl's Jr. and Hardee's as one brand under two names, acknowledging the regional heritage of both banners. CKE now has a total of 3,588 franchised or company-operated restaurants in 44 states and 35 foreign countries and U.S. territories. The Carl's Jr. and Hardee's brands continue to deliver substantial and consistent growth in the United States.

We employ approximately 10,000 people in the United States. Our domestic franchises employ roughly an additional 65,000 people. In sum, CKE and its franchises account for about 75,000 jobs within the United States of America. Our company's impact on the nation's employment rate goes well beyond the number of people we directly employ. The hundreds of millions of dollars we and our franchisees spend on capital projects, services, and supplies throughout the United States create additional jobs and generate broader economic growth.

We provide significant employment opportunities for minorities and women. More than 61% of our company's employees are minorities. Similarly, more than 61% of our employees are women. Our company-owned restaurant General Managers are 65.6% minorities and 69.3% women. We are proud of our company's diversity.

The average hourly rate for restaurant level employees is $9.30. Last year, CKE spent $329 million on restaurant level labor.

Their ages range from 22 to 65, and on average they are 41 years old. They earn a management-level salary that starts around $28,782 per year and goes as high as $59,320 per year plus benefits – the average is around $46,130 per year. They also have the potential to earn a substantial performance-based bonus in addition to their salary. As in my personal experience, employees in our company can progress through our management ranks as high as their ambition may take them.

Time well spent allows one to achieve success

Through hard work, determination, and the opportunities available in the quick-service restaurant industry, I have been able to enjoy a long and fruitful career. I was able to get my start in the industry in 1979 working as a crew person while a high school student enrolled in the Distributive Education Clubs of America (DECA) program, which was designed to provide exposure to the work world to young adults through part time employment at a local business. The experience I received was very valuable: I learned how to work as part of a team, how to respect authority, and received the satisfaction of achieving goals. My hard work was rewarded with increased responsibility, greater pay, and opportunities to advance for a job well done.

I began my career with Hardee's in 1983 at a single-unit franchise location in my hometown of Louisville, Kentucky. About a year later, I was promoted to Crew Supervisor, which was an entry-level management position. Career development, learning the business, and demonstrating my ability to lead was initially a slow process: the particular position I was in was an hourly management position limited to 40 hours per week. As a small business, overtime was a labor expense that was closely managed. Once I reached our weekly maximum, I was not allowed to work additional hours. I would have gladly traded the overtime premium to gain more experience and knowledge about the business.

In the spring of 1984, I was promoted to Assistant Manager, which was a salaried position. As a salaried manager, I was able to work the hours necessary to help the team succeed and still pursue advancement opportunities.

After completing additional management training, I was promoted to Restaurant Manager and given responsibility for managing the second location our franchise owner opened. As a Restaurant Manager, I was able to work a schedule that was most beneficial to the business and take off during the times that my supervision wasn't as needed. For example, there were several instances where local events – such as conventions – provided significant business opportunities with significantly higher customer demands, and I wanted to be able to take advantage of that opportunity for the restaurant. Conversely, there were also a number of times when business was slow; during this time I was able to spend additional time with my family, raise my three daughters, attend school functions, work with my church, and take vacations.

For a period after this success, I specialized in turning troubled restaurants into well-operating restaurants that turned a profit. As a salaried manager at these time-demanding locations, I was able to earn a good living and still enjoy a good quality of life.

In the late 1980s, my career accelerated and I was promoted into middle-management where I worked in corporate training, district-level operations, corporate project management, franchise training, and franchise operations. During my time in middle-management and as Vice President managing the Indianapolis, Indiana market, I saw a great number of young, inexperienced workers follow the same path to advancement that I followed, many of whom are still with our company or are occupying similar positons at other companies. Like myself, they have advanced in their careers, purchased homes, put their children through college, and saved for the future by taking advantage of an entrepreneurial model that encourages and rewards hard work. Because I could see the direct impact of my time at work in the results that I achieved and through my compensation, at no time did I ever feel cheated.

After operating the top region in our company for eight years, I was promoted to Executive Vice President of Carl's Jr. Additionally, my career of hard work allowed me the ability this past December to purchase several restaurants through a refranchising program. In June of this year, I was promoted to Chief Operating Officer at CKE Restaurants.

The Department of Labor's Overtime Proposal Hurts Workers and Businesses

(A) My Franchised restaurants

As I noted a moment ago, aside from serving as CKE's COO, I currently own and operate seven Hardee's restaurants in Indianapolis. My company creates jobs for 160 people who live primarily in low income urban areas. I operate entry-level management programs similar to the ones which provided me with the opportunities I had to advance within our company over the last thirty years. Without these programs and the labor guidelines that allow for them, many talented young adults will be stuck in jobs focused on time spent on the clock rather than time well spent. They will not have the same opportunities I had because businesses just can't afford it.

On average, our General Managers each run a $1.3 million business with 25 employees and significant contact with the public. They are in charge of a million-dollar facility, a profit-and-loss statement, and the success or failure of a business. Their salaries provide steady pay and they have the opportunity to significantly increase their take-home pay through performance bonuses. If the business succeeds, they benefit just as the owner of a small business would.

It can be both lucrative and fulfilling to the employees willing to invest the time and energy to move from hourly wage crew-level positions to salaried management positions with performance based incentives. However, the Department of Labor's proposal replaces a General Manager's incentive to get results with an incentive to clock more hours.

I fear the Department's proposal will severely limit hard working, talented Americans from realizing their dreams. It will also force businesses such as mine to face increased labor costs, not because business has increased but because labor guidelines have changed.

Beyond the impact to an individual salaried manager, the Department's proposed overtime rule would have a negative impact to other workers as well. For example, across the franchises that I operate in Indianapolis, we have 10 salaried managers. All of these managers currently receive a

base salary and earn a performance bonus based on achieving their operating budget and additional bonus potential for exceeding their goals. This is highly motivating. To maximize their potential, they must have the flexibility to work the schedule the business needs each week without fear that their weekly hours are at risk if business slows down. They can plan their schedules and personal time as it suits them knowing they will receive their same pay regardless of the pace of business.

The salaries of four of my ten managers would be impacted by the proposed change to the Department's regulations. These four managers earn about $45,000 per year. Keep in mind that these salaries are competitive, and these managers are subject to the previously mentioned performance bonuses and also receive generous fringe benefits. To comply with the Department's proposal, these restaurants would take an estimated 6% reduction to the already thin margins that exist in the restaurant industry.

The question then becomes how to offset that increased cost to keep our restaurants financially solvent. The additional overtime cost is likely to negatively impact the rest of our hard-working workforce by reducing hours, reducing salaries, or reducing bonuses and equity incentives. I would be forced to eliminate three salaried Assistant Manager positions and put them back on the clock. I can assure you that a demotion is the last thing these employees want since it would block their career path to General Manager. I would be forced to limit their hours to 40 hours per week and to schedule them on the busier shifts, which would allow for little development time to grow their careers. Additionally, I would have to eliminate or greatly reduce our bonus program, thus limiting the entire management team's earning potential.

(B) CKE's Company Owned restaurants that I Manage As COO

As for CKE, our salaried Managers at the company average about $45,000 annually, or about $865 weekly as their base compensation. They also receive a performance bonus that is paid quarterly based upon the earnings of the business. If the business earns more, the employee is paid more which is good for both the employee and the business. The employees has the potential to increase their total compensation beyond their base salary without diminishing the profits of the business they operate.

Under the new rule, we will need to rethink how we staff and schedule our management employees. Overtime pay is a penalty employers pay for requiring employees to work extended hours, it does not increase productivity nor does it increase revenue, it simply requires employers to pay time and a half for routine work, which reduces earnings.

This is why we manage overtime very closely. Rather than staff our restaurants with salaried managers with performance based bonuses who can earn higher pay, we would be forced to operate the business with fewer managers (reduction of management coverage during a shift) who would be paid less (due to a reduction in hours and bonus) and who would be limited to a 40 hour work week (to tightly control overtime expense). Unfortunately, operating with fewer management positions would limit the advancement of crew employees into those positions and stifle their personal growth. Young workers who could have progressed through their career as I did, would see their future success threatened by this proposal.

As an example, I was promoted from a crew position to a management position because there was a position available and this opened many doors for me. Reducing the availability of those positions because they are too expensive hurts the very people we are attempting to help. Should the rule prevail, it's highly doubtful that we would expand our staffing much beyond current levels primarily due to the rising cost of recruiting, training and providing benefits to new employees.

We would first look for ways to increase existing employee productivity at the current wage, eliminate non-essential tasks altogether and utilize technology such as pre-portioned or precut prep items and customer self-order stations to reduce hourly positions. While we may find the need to increase our minimum staffing levels to maintain high levels of guest service, we would primarily utilize part time employees for limited shifts during the busiest hours of our operations.

It should be clear by now that the very people this overtime proposal is intended to help will unfortunately be the biggest losers. Their pay will be limited, performance bonuses will be reduced or abandoned. However, the biggest cost will be all the talented people who, like me, could have advanced from a cook to COO or Franchise Owner. They may never reach their potential or realize their career dreams because of this change.

In our experience, mangers who make below the proposed threshold are satisfied with their current salary structures and incentive compensation packages, and would be disappointed to go back to being hourly employees without bonus potential or equity incentives. Instead of rewarding employees for time spent on the job, policymakers should aspire to implement policies that allow American workers and business to focus on achieving success and exceeding their entrepreneurial goals.

"Stocking Shelves"

Finally, I've heard that people are concerned that to avoid paying overtime, employers are calling employees managers who are just "stocking shelves." However, in reality, stocking shelves, or engaging in similar activities, won't make you a manger, and won't exempt you from the overtime requirements under federal law.

To qualify for the management overtime exemption, federal law currently requires that a management employee be a "bona fide executive" whose "primary duty" is "managing" the business. Managing the business must be the "principal, main, major or most important duty that the employee performs." The employee must also supervise "two or more full-time employees" and have authority to the "hire or fire" employees."

Managers may well help their employees stock shelves or perform other "physical work" while performing their "primary duty" as a manager, which is hardly something to distain. Each manager is entitled to decide whether to perform such tasks just as small business owners may decide to perform non-managerial "physical work" to increase their profits or to show the crew they too can perform those tasks. As anyone who has run a business knows, that's what effective owners and managers do.

Thank you, and I am happy to answer any questions.

Chairman WALBERG. Thank you.

Mr. Eisenbrey, I recognize you for your five minutes.

TESTIMONY OF MR. ROSS EISENBREY, VICE PRESIDENT, ECONOMIC POLICY INSTITUTE, WASHINGTON, D.C.

Mr. EISENBREY. Thank you, Mr. Chairman, and members of the Committee. I will make five points and then I will elaborate on them.

First, America's middle class has suffered through decades of wage stagnation and rising inequality that can't be corrected without changes in a range of federal policies that have worked against them.

Two, the department's higher salary threshold for exemption from overtime will help. It is long overdue and millions of struggling middle-class workers will benefit from closing this loophole, which lets employers work them long hours without pay.

Three, the rule will raise wages for some employees, reduce excessive work hours for others, and create hundreds of thousands of jobs. No one paid less than $50,000 a year should work more than 40 hours a week without being paid for it.

For the overtime law to be effective, the salary threshold for exemption must be indexed so it increases automatically without political intervention. Automatic indexing is well within the Department of Labor's authority.

Many employers, unfortunately, have gotten used to a system that lets them work people long hours without paying them for it. But that is exactly what the FLSA was intended to prevent.

Employers will adjust to this rule, as they did to the original *Fair Labor Standards Act* and every improvement in the law and the regulations since then. What seems like a big increase in the salary threshold is simply the result of employers having gotten used to a loophole in the law for far too long.

So number one, from 1979 to 2013 inflation-adjusted wages in the United States rose only 15.2 percent for the bottom 90 percent—less than 0.5 percent per year—while wages for the top 1 percent increased 137 percent. The economy and total national income grew, but most Americans were left out.

Tax policy encouraged CEOs and top executives to grab an oversized share of income, and they have. CEO pay for the 350 largest corporations grew 1,000 percent since 1978, while the pay of average workers increased only 11 percent.

Corporations have relentlessly squeezed labor costs at the expense of average workers, increasing profits and benefiting shareholders and executives with stock options. Corporate profits are at all-time highs while tens of millions of workers struggle to get by.

The decades-long push to cut labor costs has gone too far and the economy is out of balance. Too many families have too little income because their wages have been held down. They can't spend what they aren't paid, and they can't be the consumers that businesses need.

It isn't inevitable economic forces but, rather, federal policies that have reduced employee bargaining power, encouraged excessive executive compensation, worsened inequality, lowered labor

standards, and offshored jobs. Those policies should all be reversed. Overtime reform is one part of this solution.

Number two, the current salary threshold—the level above which employers can refuse to pay for overtime work—is less than the poverty line for a family of four and doesn't begin to reflect the status and financial reward that characterize true executives, administrators, or professionals, the small group that Congress originally meant to exempt. None of your constituents thinks an employee paid $24,000 a year is a bona fide executive. The current rule is indefensible.

The regulatory changes in 2004 did double harm. They inappropriately expanded the exemptions and set the salary threshold at a level so low as to be a joke.

In 1979 the salary threshold covered and protected about 12 million employees. Today it protects only 3.5 million even though U.S. employment is 50 percent greater today.

Number three, on job creation: Goldman Sachs, EPI, the National Retail Federation, and the Department of Labor all agree the rule will create more than 120,000 jobs, provide wage increases for some employees, and reduce excessive work hours for others. Those jobs are needed. Millions of Americans are unemployed, and experience here and abroad tells us that the affected employees and their families will be better off.

Number four, to prevent the kind of neglect that led to a 29-year decline in the real value of the threshold for exemption followed by another 11-year decline, it has to be indexed, preferably to the growth in compensation of salaried employees. The Department has for decades failed to carry out its statutory mandate to update the rules in a timely way, and indexing is the only way to prevent that kind of failure in the future. Nothing in the *Fair Labor Standards Act* or any subsequent enactment limits the epartment's authority to index the salary level.

Finally, five, some employers have made it their business model to work salaried employees not 40 hours a week but 60 to 90 hours a week while paying them salaries too low to meet a basic family budget. I have talked to and written to them, and I have seen scores of stories in the comments we collected on the rule, including the stories of employees worked literally until they dropped from injury or disability.

Fran Rodgers, who for many years had a hugely successful consulting business that worked with corporations on improving work-life balance, put it well in a New York Times op-ed: Employers, like all of us, tend to be careless with and waste what they don't have to pay for, including the precious time of their time-stressed employees.

The rule will make employers less careless and more efficient by making them pay for overtime. They will adapt. What seems like a big increase in the salary threshold is simply the result of employers having gotten a free ride for too long.

[The testimony of Mr. Eisenbrey follows:]

Testimony of

Ross Eisenbrey

Vice President, Economic Policy Institute

Before the United States House of Representatives Subcommittee on Workforce Protections' hearing, "Examining the Costs and Consequences of the Administration's Overtime Proposal"

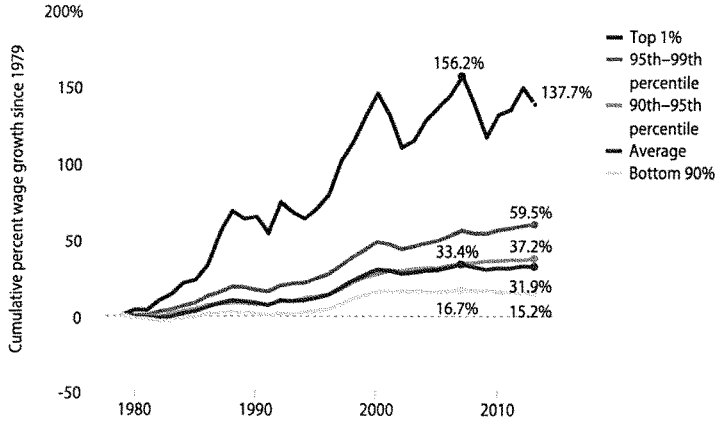
10:00 a.m., Thursday, July 23, 2015
Rayburn House Office Building, Room 2175

Updated Overtime Rules Will Help Millions of Middle-Class Workers

Secretary of Labor Tom Perez and President Obama should be applauded for the steps they have taken to restore and strengthen the Fair Labor Standards Act's overtime protections. The federal government should be using every tool at its disposal to help lift the wages of America's middle class and working class. Raising the salary threshold used to determine overtime eligibility is an action entirely within the administration's authority, one that can both lift wages and free up time for overworked middle-class Americans.

The erosion of overtime rights over the last 40 years is emblematic of the erosion of the living standards of America's middle class over the same time period. Since the late 1970s the economy has grown and top 1% incomes have soared, but the share of national income going to the middle class has fallen steadily. While middle-class wages have stagnated, the top 1 percent of earners had cumulative gains in annual wages of 138 percent between 1979 and 2013, as the figure below shows. This is far beyond any increases in productivity.

Cumulative percent change in real annual wages, by wage group, 1979-2013



Source: EPI analysis of Kopczuk, Saez, and Song (2010, Table A3) and Social Security Administration wage statistics

ECONOMIC POLICY INSTITUTE

Since 1975, when the Labor Department last significantly raised the salary threshold that is used to determine overtime eligibility, the threshold has fallen in real terms from $1,000 per week to $455. The share of the salaried workforce that earn less than the threshold—and are therefore guaranteed overtime protection on the basis of their salary alone, regardless of their job duties—has fallen from more than 50 percent to less than 10 percent. In 1979, almost 12 million salaried workers earned less than the threshold and were therefore automatically protected; today, with a 50 percent bigger workforce, only 3.5 million are automatically protected.

The department's decades-long failure to raise the threshold for the exemption of executive, administrative, and professional employees was particularly blameworthy because the pay of executives over that time increased astronomically: CEO compensation has increased 1,000 percent since 1978, while a typical worker's pay has increased only 11 percent. From 1979 to 2014, the salaries of professionals and employees with advanced degrees increased 27.5 percent more than inflation. To reflect the rising salaries of professionals, the salary threshold should be about $1,270 per week or $66,000 a year.

The loss of overtime protection for so many workers is just one of many changes in the rules governing our economy that have helped the elite and powerful at the expense of average working people. What those workers lost was not just the right to be paid time-and-a-half for their overtime, they lost the right to be paid for it at all. Workers who are exempt do not have to be paid a dime for the extra hours they work, whether it's two hours or 20. In fact, they don't even have to be paid the minimum wage, and some so-called managers have found themselves working so many hours that their effective hourly rate actually falls below the minimum wage.

The FLSA's overtime protections have always applied to salaried workers

The Fair Labor Standards Act (FLSA) sets out the rules that govern overtime pay for most American workers. Workers covered by the FLSA overtime provisions must be paid at least "time-and-a-half," or 1.5 times their regular pay rate, for each hour of work per week beyond 40 hours.

These provisions are vitally important for covered workers, including 75 million hourly-wage workers, who value having a 40-hour workweek and earning extra pay if they work overtime. But the law's overtime protections have applied to salaried workers from the very beginning and still do, because salaried workers can be overworked and underpaid just as hourly workers can be. Confronting an argument from business interests that white-collar salaried workers should be removed from the FLSA's protection, the Department of Labor wrote in a 1940 report and recommendations:

> All the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions – that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by

> proponents of the blanket exemption, that, prior to the effective date of this act, a workweek of 48 or 54 hours or even longer was common. (U.S. DOL 1940, 8)

Today, retail store managers like Dawn Hughey, who was paid a salary of less than $35,000 a year, are sometimes forced to work as many as 90 hours a week by corporations that profit from their employees' uncompensated work. A salary and a title are no protection against oppressive overwork, and never have been.

The right to a limited workweek provides time for leisure, civic participation, commuting, self-improvement, and tending to family and friends. People who work for a living, and parents especially, know that the business lobbyists are wrong: this isn't some old, tired bit of New Deal or Great Depression overregulation. The right to a 40-hour workweek or overtime pay is even more important to families today than it was 77 years ago or 50 years ago. Between 1968 and 2008, the share of children living in households in which all parents work full time doubled from 24.6 percent to 48.3 percent (Bernstein and Eisenbrey 2014). Parents have a hard time balancing work, commuting, getting kids to and from school, supervising their kids after school, and all of their other obligations. The balancing act is no easier for a bookkeeper earning $35,000 a year than it is for a bookkeeper or a carpenter making the same money who's paid hourly.

The law does not protect everyone. It provides to employers an exclusion or exemption from the duty to pay time-and-a-half for overtime with respect to bona fide executives, administrators, and professionals, or in the exact terms of section 13(a)(1) of the FLSA, to "any employee employed in a bona fide executive, administrative, or professional capacity." The law leaves it to the Secretary of Labor to "define and delimit" those terms "from time to time," and the department's July 6 Notice of Proposed Rulemaking (NPRM) is a long overdue effort to carry out that responsibility.

Principles of OT coverage

The fundamental idea behind overtime coverage is to maintain a basic norm about how long employees should work for their employer each week. Under certain market conditions, for example when unemployment is high or workers hold especially low levels of bargaining power, employers could require employees to labor long hours without receiving additional compensation. This was, in fact, the case prior to the passage of the FLSA. Congress decided that this was a market failure based on the asymmetrical bargaining positions of affected workers and employers, and thus enacted the OT rules to discourage employers from subjecting employees to excessive work hours. Rather than banning overwork, Congress chose to make it more expensive, requiring time and a half pay for every overtime hour worked.

But who should be covered by such protections? 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. But from the first draft of the bill that became the FLSA, the legislation exempted executives as a class that did not need protection, followed in subsequent

drafts by administrative employees. They were, after all, the bosses, managers, and administrators who set the rules and policies that governed the workplace.

The FLSA OT regulations designate hourly workers as entitled to OT in virtually all cases because hourly pay is not characteristic of the high-level employees Congress originally intended to exempt. In the Department of Labor's first report on the FLSA's overtime provisions in 1940, Presiding Officer Harold Stein wrote, "The shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period and hourly paid employees should not be entitled to the exemption." Hourly-wage workers are also subject to having their wages reduced when they are absent from work for short periods, a condition that does not fit with the workplace reality of executives, administrative employees, and professionals.

The department recognized that rules were needed to prevent employers who sought to avoid time-and-a-half payments from simply designating every salaried employee as an executive or in another exempt category. Thus, the regulations laid out a set of tests intended to prevent gaming of the rules.

Broadly speaking, there are two tests for exemption: a duties test and a salary test. The duties tests changed over time, as I explain below. The salary test, on which the Department of Labor has focused in the current rulemaking, is straightforward and based on the notion that an employee's salary level is itself an indicator of exempt status, and that workers paid below a threshold salary level should be paid overtime, regardless of their duties.

Brief history of white-collar OT exemptions and their salary tests

Executive, administrative, and professional employees, along with "outside salesmen" (salespersons who work outside the office), have always been excluded from both the minimum-wage and overtime protections of the FLSA, but the definitions of each excluded group have always been left to the determination of the Secretary of Labor. Section 13(a)(1) of the FSLA states that "the provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, or professional capacity… ."

It is noteworthy that the exclusion is preceded by the modifier "bona fide," a signal that not just anyone with a corresponding title is to be excluded from the act's protections. Congress knew from experience with exemptions under the National Industrial Recovery Act's industrial codes and the President's Reemployment Agreement (which in 1933 began setting maximum work hours and minimum wages) that employers would try to avoid coverage by misclassifying ordinary workers as managers, executives, or other kinds of exempt "bosses." The National Recovery Administrator had felt compelled to declare that the exemption would be limited "to those who exercise real managerial or executive authority" and warned employers that paying anyone less than $35 per week created an irrebuttable presumption that the exemption did not apply. (Linder 2004, 268–269)

The 1940 amending regulations

Under the first FLSA regulations issued by the Department of Labor in 1938, the definition of exempt executive and administrative employees included duties tests and a salary test of only $30 a week, $5 less than the industrial codes had required several years earlier.

When the Roosevelt administration amended its overtime regulations in 1940 and kept the salary test for executives at $30 per week, it took pains to explain why it had adopted "such a low requirement" (U.S. DOL 1940, 21). According to the DOL report that explained the regulatory changes, the low salary threshold was counterbalanced by the ease of determining the bona fides of executive function based on the fact of supervision and departmental authority, and by the compensating advantages that could be found in the nature of executive employment: the opportunities for promotion, and greater security of tenure. The FLSA's goal of spreading employment was not especially well served by providing overtime protection to bona fide executives because, by its very nature, "the executive's work cannot be shared," the report said. And crucially, there was less need for a high salary threshold for executives because, by denying the executive exemption to any employee who spent more than 20 percent of his time on nonexempt duties, the amended regulation made it easier to identify bona fide executives.

The 1940 regulations also separated the executive and administrative exemptions (which had been merged into a single exemption in the original implementing regulations), provided a less stringent duties test for administrative employees (one with no specific limit on time spent in nonexempt duties), and required a much higher salary level to satisfy the administrative exemption—$200 per month, the equivalent of about $40,000 a year today. The report stated, "It is believed that the employees in the administrative group are so heterogeneous in function that it would present a disproportionately weighty problem in administration to determine what constitutes nonexempt work. However, when this valuable guard against abuse [a strong duties test] is removed, it becomes all the more important to establish a salary requirement for the exemption of administrative employees, and to set the figure therein high enough to prevent abuse" (U.S. DOL 1940, 26). The new threshold of $200 a month was both 1.67 times higher than the $30 per week executive salary test and about 3.1 times the minimum wage.

The department further explained its choice of a $50-per-week salary level by examining the pay of a group of office employees whose duties consisted overwhelmingly of routine clerical work (stenographers, typists, and secretaries) and who therefore clearly fell outside of the exemption. The correct salary threshold level would act as a proxy for a more detailed duties test, disqualifying nonexecutive employees by disqualifying employees with lower pay. Because less than 1 percent of the nonexempt employees examined earned more than $2,400 a year, the department determined that the $200-per-month requirement was adequate to guard against abuse. A $35-per-week salary requirement could exempt almost 32 percent of bookkeepers and a $40-per-week salary requirement could exempt 20 percent; in contrast, a $50-per-week salary requirement could exempt only 8 percent of bookkeepers, an occupation that was undoubtedly nonexempt.

Most interesting, the department determined that a $50-per-week requirement would exclude about 50 percent of accountants and auditors, a group "whose work, while related to that of bookkeepers, requires in general far more training, discretion, and independent judgment." The Roosevelt Labor Department found it appropriate and desirable to set the salary requirement at a level that would deny the exemption to more than half of accountants and auditors, presumably because their pay would reflect their employers' understanding of their actual duties and responsibilities.

In 1940, the professional exemption's salary test was set at $200 a month as well, though the "traditional" professions of theology, law, and medicine had no salary test at all. The Department of Labor's 1940 report determined that $200 was the dividing line between subprofessional and fully professional employees, based largely on the federal government's pay schedules.

The report constituted the first full explanation of the thinking behind the department's regulatory choices in implementing the FLSA; it likely accurately reflects the understanding and goals of the Roosevelt administration, which proposed the FLSA, including section 13(a)(1), as well as those of Secretary of Labor Frances Perkins, who championed the act.

The 1950 regulations

The next major change in the regulations came in 1950, following an extensive set of hearings and another presiding officer's report and recommendations (U.S. DOL 1949). The 1949 report outlining the regulations recommended a somewhat unfortunate innovation, the "special provisos for high salaried executive, administrative, or professional employees" (U.S. DOL 1949, 22). In essence, the regulations adopted two versions of the duties tests for each exemption category; the two versions became known as the long test (virtually identical to the 1940 regulations) and the short test (a new, simpler version with fewer elements to satisfy, accompanied by a much higher salary level requirement). The new short test of executive duties, for example, dropped requirements that the executive exercise hiring and firing authority over at least two employees and dropped the 20 percent limit on nonexempt duties. The salary level was set at $100 per week, as opposed to $55 for the long test. Thus, an employer willing to pay a high enough salary could meet the requirements for exemption without having to keep meticulous track of the employee's time to demonstrate that the 20 percent limit had not been surpassed.

The 1950 regulations made a major change in the duties test for administrative employees, adding a requirement (similar to the 1940 requirement for the executive exemption) to what would become known as the long test that no more than 20 percent of the exempt administrative employee's time could be spent on nonexempt duties. As the department's report explained, "An 'administrative' employee whose more important duties do not take up all his time may typically be assigned a routine function, such as keeping one of the ledgers or making up payrolls. While it is entirely reasonable to exempt an employee who performs a small amount of such unrelated clerical or other low-level work, it would be contrary to the purposes of section 7 and 13(a)(1) of

the act to extend the exemption to such employees who spend a substantial amount of time in such activities" (U.S. DOL 1949, 59).

Nevertheless, despite an emphasis on limiting nonexempt duties to prevent undeserved exemptions, the regulations set up a higher salary threshold in the short test for the executive and administrative exemptions as a trade-off for eliminating the employer's obligation to enforce and document the time limitation on the exempt employee's performance of nonexempt duties.

Changes from 1959 through 2003

In 1959, DOL again amended the white-collar regulations, following a report and recommendations by Presiding Officer Harry Kantor, written in March 1958. Kantor determined that the salary tests should be set "at about the levels at which no more than about 10 percent of those 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." These levels worked out to $80 per week for executives and $95 per week for administrative and professional employees. To keep the previous ratio to the long test, Kantor recommended a short-test salary of $125 per week, or about $900 in today's dollars. (U.S. DOL 1958, 10)

The Ford administration updated the salary tests in 1975, choosing not to fully index them to changes in the consumer price index as a concession to concerns of the Council of Economic Advisers about inflation. The 1975 update—the last increase until 2004—set the short-test level at $250 a week, the long-test level for executive and administrative employees at $155 a week, and the long-test level for professional employees at $170 a week.

In 1980, the outgoing Carter administration issued a final rule that would have raised the salary-level thresholds substantially, but the rule never took effect and was withdrawn by the Reagan administration. The 1975 salary threshold levels were left untouched by the Reagan, Bush, and Clinton administrations. The passage of 29 years without an adjustment made the salary levels obsolete and irrational: by 2003, a full-time minimum-wage worker paid $5.15 an hour had weekly earnings above the white-collar long-test salary thresholds.

The 2004 OT rules and their legacy of complications

When the George W. Bush administration finally amended the white-collar overtime regulations in 2004, it eliminated the long tests and created tests with a uniformly low and wholly inadequate $455-a-week salary test—barely more than the poverty threshold for a family of four. The 2004 rule also created a new, even more abbreviated version of the short tests with an annualized salary level of $100,000.

In addition, the 2004 rule made numerous changes to the duties tests for each exemption category. None of these changes to the duties tests strengthened overtime protection for workers,

and virtually all of them weakened overtime protection. In my view, these changes have led to more confusion and ambiguity, and, even worse, to the unjustified exemption of salaried workers who, under the spirit of the law, should be covered, including, for example, an ill-defined class of "team leaders," certain embalmers and mortuary employees, and athletic trainers.

Under the current OT rules, salaried workers earning less than $455 per week automatically qualify for the OT wage premium. Prior to 2004, the long-test weekly salary levels were $155 for executive and administrative employees and $170 for professional employees, and the short-test level was $250 for all three categories, where it had stood since 1975. Had the $250 weekly salary level simply kept pace with inflation since 1975, it would be $1,000 today.

There is no cogent economic reason not to adjust this salary cap for wage growth or inflation. Certainly, the spirit of the law is vitiated if a covered worker becomes exempt simply because of nominal earnings gains that have no bearing on the actual purchasing power of her paycheck.

Today, employees earning between $455 and $1,923 in weekly salaries (or $23,660 and $100,000 in annual pay) are at high risk of being unjustly exempted from coverage. The law requires the application of complicated duties tests that no longer provide accurate answers to the questions they were meant to address, such as: Does the worker control her own schedule, something hourly workers typically do not? Does she manage others? If so, is that a small or a large part of her job? Does she control her workflow? Does she make important and independent decisions? What credentials must she have to perform the work?

Making these determinations has always been complicated, but the regulatory changes in 2004 made them more so. One of the most exhaustive analyses of the problems with the duties tests as amended in 2004 is by Fraser, Gallagher, and Coleman (2004). The next section summarizes some of their findings.

The 2004 rule creates an illusion of preserving the long test but in reality, it replaces it with the old short test while attaching a too-low version of the long test's salary level.

Fraser and co-authors write, "In fact, however, the Department's new rule expands the classes of exempt employees by applying, for the vast majority of workers, a rule matching a variant of the old 'easy' duties with the new 'low amount' salary. And – presto! – the worker finds a walnut shell with no overtime under it, and the employer is now able to qualify many more employees as exempt than the existing regulatory structure ever contemplated" (Fraser, Gallagher, and Coleman 2004, 14).

The abandonment of the 50 percent rule has the potential to exempt workers who perform even a tiny amount of exempt duties.

The original regulations issued within months of the FLSA's passage required that to be an exempt executive, an employee could do "no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." In its enforcement, the Department of Labor's Wage and Hour Division treated work in excess of 20 percent of an employee's time to

be "substantial" enough to deny the exemption, and employers generally conceded the fairness of that threshold and the need for a sufficiently definite rule. Thus in 1940, when the Roosevelt administration amended the regulations for the first time, it added a fixed limit on nonexempt work of 20 percent.

A new, high-compensation proviso added to the regulations by the Truman administration in 1950 introduced a more expansive allowance for nonexempt duties, one that did not have an explicit time limit; however, this permissive treatment applied only to relatively highly paid employees.

Over the years, that looser test became conflated with the determination of the employee's "primary duty," which was codified as a 50 percent "rule of thumb": "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time." In other words, while the 20 percent limit on nonexempt duties did not apply under the short test, it was effectively replaced by a rule that half of the exempt employee's time had to be spent performing an exempt primary duty.

The 2004 regulations went even further and abandoned any serious notion of time limitations on nonexempt duties, a change Fraser and co-authors called "a grievous loss." (Fraser, Gallagher, and Coleman 2004, 14) The new rules defined "primary duty" as the "principal, main, major or most important duty," thereby essentially eliminating the relatively more objective factor of how the employee actually spends his or her time. Instead of a rule that only exempts an employee if she spends at least half her time performing an exempt activity, the regulations now state that she may be exempted if the duty the employer considers most important is an exempt duty.

In contrast with an examination of what the worker actually does all day, what her employer deems "most important" is subjective. Imagine, for example, a salaried assistant manager at a clothing store who spends a few hours training new hires in the course of a week. If her employer considers that training to be her most important duty, she could be an exempt executive even though virtually all of her time is spent assisting customers and running a cash register. And as Fraser and his co-authors point out, the employer's choice will tend to be biased: "an employer, if called upon to state which of several duties of an employee is primary, will likely choose the one which results in the employee's exemption from the requirements of the law (thereby effectively reducing labor costs)" (Fraser, Gallagher, and Coleman 2004, 14)

Administrative exemptions are too broad

Under the 2004 rules, office or nonmanual employees whose work is directly related to management policies or general business operations and who exercise any "discretion and independent judgment with respect to matters of significance" can be denied overtime pay. This is now an arbitrary classification that has lost all connection to the original administrative exemption, which required the employee to be responsible for a function of the organization, if not of subordinate employees, and required him to be engaged in the business operations as a staff person rather than as a production or line employee. When the administrative exemption

was first conceived as separate from the executive, in 1940, the department's report stated, "The term 'administrative' can . . . be reserved for persons performing a variety of miscellaneous but important functions in business. This latter group is large in modern industrial practice, and includes typically, such persons as personnel managers, credit managers, buyers, supervisors of machine tools, safety directors, claim agents, auditors, wage-rate analysts, tax experts, and many others" (U.S. DOL 1940, 24). The Roosevelt/Perkins DOL could not have envisioned automobile claims adjusters, for example, qualifying for the exemption, although employers routinely classify them as "administrative" for purposes of the OT provisions.

As with the executive exemption, the 2004 rules make no reference to the allocation of the exempt administrative worker's time. For example, an administrative assistant might have the authority to independently decide whether she should refer certain "cold calls" to her supervisor. Though this happens only a few times a week, it could be considered grounds for exemption under the current rules. In contrast, the original administrative exemption contemplated exemption only of workers fully engaged in managing a function—personnel managers, credit managers, supervisors of machine tools—but not of someone only occasionally involved in an important task.

The 2004 duties tests permit employers to game the rules and deny overtime to workers who should not be exempt. The "team leader" provision, for example, assumes managerial responsibilities for team leaders on "major projects" and grants exemptions when those responsibilities are deemed sufficiently important to the employer—a completely subjective determination. Likewise, the 2004 duties tests allow exemptions for workers with various credentials or licenses, again with no reference to actual managerial, supervisory, or independent responsibilities.

Principles to apply in setting a salary threshold

Several important principles emerge from this review of the regulatory history of the so-called white-collar exemptions.

Bright-line, objective tests regarding duties are preferable to the ambiguous and ill-defined subjective tests that have replaced them. Explicit limits on the time that exempt employees may spend performing nonexempt duties would provide far more guidance than vague tests based on the employer's subjective feelings about the importance of one duty compared with another. In the first years after passage of the FLSA, when the law and its purposes were freshest in the minds of the Department of Labor officials who had advocated for and helped draft the act, the regulations reflected an understanding that an exempt employee should do no substantial amount of nonexempt work, and should in no case devote more than 20 percent of her time to such duties.

Clarity and simplicity are aids to administration and to compliance by employers. For example, if employees cannot understand whether they exercise sufficient independence or judgment in

their work, or make decisions about sufficiently important matters, to be exempt, they cannot demand their rights. The more employees and employers can rely on objective tests, the better.

Although it would be reasonable to restore the original requirement that an exempt executive may not perform any significant amount of work of the same nature as that performed by nonexempt employees, and in no case may such work involve more than 20 percent of an exempt employee's time, the highest priority should be proper adjustment of the salary threshold.

Updating the salary level: DOL's proposed salary level is at the low end of what's reasonable

In a paper we submitted to the Department of Labor in November 2013, Jared Bernstein of the Center on Budget and Policy Priorities and I recommended that the 1975 salary threshold of $250 per week be adjusted for inflation since that year. The adjusted level is $1,000 per week, somewhat higher than the level of $933 chosen by DOL.

We stressed that the salary level has become increasingly important over the years as a bright-line indicator of which employees are clearly exempt and which are not. However difficult it might be to judge whether an employee's primary duty is truly that of an executive or exempt administrative employee, an employee and her employer can easily determine the level of the employee's pay. The salary level is the clearest, most easily applied test of exemption.

It is also true, as the department declared in 1940, that "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." Or, as the department said in its 1958 hearing report and recommendations, "[i]t is an index of the status that sets off the bona fide executive from the working squad leader, and distinguishes the clerk or subprofessional from one who is performing administrative or professional work" (U.S. DOL 1958, p.2)

To be commensurate with the status and prestige expected of exempt managers and executives, the salary level should be well above the median wage paid to the typical production, nonsupervisory employee. When the Ford administration raised the weekly salary threshold in 1975, it was 1.57 times the median wage. The median weekly wage today is $802. Were DOL to update by that same ratio—1.57 times the median weekly wage—the short-test threshold would be around $1,259 on a weekly basis and $65,468 on an annual basis, suggesting that DOL's $933 proposed weekly threshold is well on the low side.

On the other hand, the relationship between the original salary-level-test threshold and the minimum wage was 2.73-to-1. When the administrative test was established as a separate category of exemption and given its own salary level, its ratio to the minimum wage was 3.1-to-1. And in 1975, before the 29-year period when the department failed to increase the salary

levels, the short-test salary level was set at a ratio of approximately 3-to-1, close to the ratio (3.2-to-1) of DOL's proposed level to the current minimum wage of $7.25 an hour.

The salary level for exemption must also be, according to the Department of Labor's 1949 report, "considerably higher" than the level of newly hired "college graduates just starting on their working careers." As the report explained, "[t]hese are the persons taking subprofessional and training positions leading eventually to employment in a bona fide professional or administrative capacity" (U.S. DOL 1949, 19). Entry-level wages and salaries for college graduates in 2013 were $21.89 per hour for men and $18.38 per hour for women. Using the Department of Labor's reasoning in 1949, the salary level for exemption should be "considerably higher" than $42,000 a year, a view that is again consistent with DOL's proposed $933 per week threshold. The 1950 rule set the level 25 percent above the college entry-level wage; applying that same ratio today would yield a salary of about $1,000 a week.

The following, additional evidence supports the conclusion that the DOL's proposed threshold is not too high:

- The Bureau of Labor Statistics publishes data of supervisory workers by occupation and median weekly earnings (U.S. BLS National Compensation Survey). For management occupations, the BLS breaks out four levels of supervisory responsibilities, and the median weekly earnings range from $1,520 to $3,995. Thus, by this metric, $933 is well below a level associated with supervisory, and presumably exempt, duties.

- Among all jobs in management listed by the BLS, only preschool education administrators and lodging managers earned a median hourly wage less than $23.33 per hour ($933 per week), and mean earnings for every management occupation were above that level.

- BLS grading of occupations by leveling factors (scores given to each occupation based on its demands for skills, knowledge, and responsibilities) reveals that an hourly wage of about $24 is consistently below level 7 (out of 15), consistent with nonsupervisory (nonexecutive) responsibilities.

In light of these lessons, although Jared Bernstein and I recommended a higher level, DOL's proposed $933 weekly salary level for exemption is clearly reasonable and within the historic range. Going forward, DOL has proposed to index the level to the 40th percentile salary or to adjust the 40th percentile salary in 2016, which is estimated to be $50,440, to inflation. Either method would be a crucial step in preserving overtime protections for middle-class working Americans, though as a matter of economics it makes more sense to peg the salary test to salary increases rather than to prices.

The impact of raising the salary threshold

What are the likely job-market effects of extending OT coverage to all of the estimated 13 million to 15 million salaried workers whose full-time weekly earnings are between $455 and $933? As the Department of Labor predicts in its very thorough discussion in the NPRM, there would be a combination of effects:

- Employees who don't work overtime would not experience any adjustment in their hourly rate of pay.
- Employees who earn near the new threshold would likely receive salary increases to move them over the threshold, allowing the employer to continue allocating them the same number of work hours. Those workers, obviously, would be better off.
- Employees earning close to the minimum wage but currently exempt would either work fewer hours or receive time-and-a-half for their overtime. They, too, would obviously be better off.
- Many employees in the mid-range between the current threshold salary of $23,660 and the new threshold would have their hours reduced so the employer can avoid paying the OT premium: their overtime work would be given to hourly employees paid at a lower rate. They would be better off.
- Other mid-range employees might be converted to hourly and have their compensation reduced so that when they work the same overtime as previously, their compensation would be unchanged.
- Somewhere between 120,000 and 300,000 new hourly jobs would be created as the hours of the mid-range salaried employees were reduced. Goldman Sachs makes an estimate at the low end, but the National Retail Federation's study, *Rethinking Overtime Pay*, predicts that about 110,000 jobs will be created in its sector of the economy alone. Retail and restaurant employment is less than 20 percent of all employment, so the economy-wide effects might be several times greater.

Very little empirical research has been done on the effects of overtime regulation, but labor economists employ two basic models with quite different implications.

The employment contract model posits that employers have a rough sense of how much they want to pay for a given worker, including any time-and-a-half overtime costs, and will adjust their "straight-time," or base wage, offer down to a level that will make the total hourly wage, including OT costs, equal to their intended rate of pay.

Under this model, wage offers adjust to hold labor costs constant. Assuming the employer's estimate of the number of OT hours is roughly correct, the contract model predicts little change to labor costs or employment. An exception would be for workers with earnings near the minimum wage, since employers cannot adjust wages below the minimum.

The other model simply assumes no adjustment (NA), maintaining that OT rules increase the marginal cost of an hour of labor by covered workers beyond what employers planned when they hired them. This would lead to a decline in their OT hours, as well as to an increase in hiring of additional workers to complete the necessary work without invoking the OT premium. In fact,

one motive for enactment of the FLSA was that by increasing the relative cost of OT labor, employers would have an incentive to increase hiring rather than pay time-and-a-half. As we know, the FLSA worked, and the standard workweek did, in fact, become 40 hours.

Anthony Barkume (2008) finds evidence for both effects, and estimates that employers will only partially offset the additional costs imposed by the rule on overtime labor. In correspondence with Jared Bernstein, Barkume reports that he supports overtime regulation and doubts that the employment contract model reflects reality because it wrongly assumes enough worker bargaining power to negotiate a real bargain. Workers at the low salaries affected by the NPRM do not have significant bargaining power.

Lifting the salary threshold will cover millions of workers who are now exempt, so employers would have to lower their base wages to make the adjustments suggested by the contract model. That is much easier to do with new wage offers than with existing workers (nominal wages are rarely lowered), so it seems likely that the more standard NA would apply initially. Over time, base-wage adjustment dynamics could take hold if employers provide fewer and smaller raises than they would otherwise provide.

Conclusion

A review of the history of OT regulations dating back to their inception in the FLSA of 1938 leads me to conclude that weak and inadequate duties tests—which are also often confusing and ambiguous—in tandem with salary thresholds that are too low have left far too many salaried workers uncovered by time-and-a-half protections. I support both raising the salary threshold to $50,440 in 2016 and adjusting for wage growth going forward.

While many possible threshold levels could be defended and are undoubtedly legal, the proposed salary threshold is the minimum necessary to prevent abuse and effectively prevent the exemption of workers who are not bona fide executive, administrative, or professional employees.

This change will extend overtime protection to at the very least 7 million—and almost certainly a much higher number—of workers who do not currently enjoy overtime protection, and will clarify and thereby strengthen protection for the remaining workers who earn below the proposed threshold and already enjoy overtime protection currently. In one way or another, all of the 15 million salaried workers who DOL identifies as earning more than the current salary threshold but less than the proposed salary threshold will benefit from the NPRM.

More comprehensive reforms of the OT regulations would improve or repeal most of the 2004 changes in the duties tests, including by, for example, removing language that exempts team leaders, removing athletic trainers and licensed embalmers from the exempt professional occupations, and restoring the primary duty test to measure the duty an employee performs during most of her work time, while eliminating the notion that one can be an executive while performing menial duties.

However, while we urge the Department of Labor to undertake such comprehensive reforms, we recognize that the reforms will be complex and time consuming. Raising and indexing the salary threshold is a simpler reform that can be accomplished in the very near term.

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Chairman WALBERG. Thank you.

I now recognize the Honorable Tammy McCutchen for your five minutes of testimony.

TESTIMONY OF HON. TAMMY MCCUTCHEN, PRINCIPAL, LITTLER MENDELSON P.C., WASHINGTON, D.C. (TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE)

Ms. MCCUTCHEN. Thank you, Mr. Chairman. I would like to spend my time today talking about the salary level, based on my experience of being at the Department of Labor during the last set of changes to these regulations in 2004.

Since the early 1940s the DOL has consistently stated that the purpose of setting the minimum salary threshold for these exemptions is to provide a ready method of screening out the obviously nonexempt employees. This is not a minimum wage for exempt employees. In fact, exempt employees are exempt from the minimum wage and the overtime requirements.

DOL's proposal of a $50,000 salary level does the opposite of screening out the obviously nonexempt, and instead excludes from the exemption many employees that are obviously performing exempt duties and, in fact, many, many hundreds and thousands of employees that the DOL itself and federal courts have found perform exempt duties.

I want to be clear, there is no—at the U.S. Chamber of Commerce, who I am representing today, there is no one in the business who is claiming that it is not time for a salary increase. From 1938, when the FLSA was passed, to 1975, the salary level was increased every five to nine years. It has now been 11 years since the last increase in 2004.

So it is time for a change. The question is, how high? And the Department of Labor's proposal of using the 40th percentile of all salaried earners to get to that $50,000 is just unprecedented in the regulatory history in the 77 years of the FLSA.

In 1948—1958—in setting the salary level, DOL looked at the 10th percentile of employees and the salaries earned by exempt employees in lower-wage businesses, lower-wage geographic areas, and in small businesses. In 2004 we adopted that 1958 methodology, doubled it, and we looked at the bottom 20th percentile of salaried earners in the South and in retail, where wages and cost of living are lower.

The Department of Labor proposes to set the salary level at the 40th percentile, but not looking only at rural areas, small businesses, and lower-profit margin businesses. They are using a data set that includes all salaried employees. It also includes doctors, lawyers, sales employees, and federal employees, who all, of course, earn a lot more than most exempt employees and, by the way, are not even subject to the salary level tests in the regulations.

This $50,000 level—the—I guess the best way to demonstrate how high it really is, is that it is actually higher than the salary levels that are required for exemption under New York law and California law. Just like the minimum wage, states have their own exemptions from overtime and can set their own salary levels.

In New York that salary level is around $34,000 a year. And in California, employees who are earning more than $37,000 a year

can be classified as exempt from overtime. That number is going to be going up to $41,000 in 2016.

So the Department of Labor's proposal is $10,000, $15,000 higher than the minimum salary level for exemption in New York and California, arguably the two highest cost-of-living states and higher-salary states. This is like applying the San Francisco $12.25 minimum wage in Biloxi, Mississippi. It just won't work and will have a disproportionate impact on economies in our rural areas, and particularly in the South and in the Midwest.

If you go back through the historical salary levels from 1938 to the present and correct those numbers for inflation, also the $50,000 level is simply not supported. I actually used the BLS inflation calculator to create the chart that is in my written testimony, and what that shows is that if you correct for inflation all the salary levels under all tests on the entire 77-year history, the average is about $42,000.

So $50,000 is at least $10,000 higher than any possible justification that you could have.

Before my time expires I also want to talk briefly about the duties tests. The Department of Labor has not proposed any specific regulatory changes to the text of the duties tests.

However, they have also stated in an e-mail, in response to a question from the publication Law360, that they do not have to propose specific statutory—regulatory text in order to make significant changes to the duties test. In their opinion, all you have to do under the *Administrative Procedures Act* is to propose issues for discussion.

I would like to suggest that words matter in statutes and in regulations. A comma placed one place versus the other can really make a difference about how that interpretation is—how the regulation is interpreted by DOL or the courts.

Yet, if there are changes—if DOL goes through with making significant changes in the duties test—for example, adopting the California rule on primary duty that employers have to establish employees spend more than 50 percent of their time performing exempt duties—we will not have an opportunity to actually review and comment on the statutory text, and I do—in my opinion, that is not in the spirit of the *Administrative Procedures Act* and giving the public a sufficient time and a meaningful role in the regulatory process.

Finally, I do want to talk about the impact. You have heard about that from some of the other increases.

There are advantages and disadvantages to being classified as exempt. And the biggest advantage for being exempt is you have a guaranteed salary, a salary that cannot be reduced because of the quality of your work or the quantity of your work. An exempt worker who works even an hour during a work week must be paid their entire salary.

This is where the flexibility comes in. As an exempt worker you can go home early. I have heard Secretary Perez himself talk about how important it has been in his life to have jobs that give him the flexibility—gave him the flexibility to attend his son's sporting events.

With this regulation, with potentially five million employees being reclassified, you are taking that flexibility, which is so important, away from those 5,000 workers. Instead, as a nonexempt employee you just get paid for the hours you actually worked. So if you need to take time off to go to a PTA meeting you really have to think, "Can I afford this? Because I am not going to be paid for these hours that I am taking off."

The other differences between exempt and nonexempt that I would ask you to consider is—and I think we heard Mr. Williams talk about this—availability for bonuses and incentive pay. Nonexempt employees generally do not have—generally do not get the opportunity to earn bonuses and incentive pay because if you pay those bonuses you also have to pay overtime on the bonuses.

That calculation is complex. It is easy to make mistakes, and if you make a mistake you could face massive liability.

[The testimony of Ms. McCutchen follows:]

Statement of the U.S. Chamber of Commerce

ON: **Examining the Costs and Consequences of the Administration's Overtime Proposal**

TO: **House Education and the Workforce Committee's Subcommittee on Workforce Protections**

BY: **Tammy D. McCutchen, Esq., Littler Mendelson P.C.**

DATE: **July 23, 2015**

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.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Testimony of

Tammy D. McCutchen, Esq.

Before the

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

Hearing on

"Examining the Costs and Consequences of the Administration's Overtime Proposal"

July 23, 2015

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to speak with you today regarding the U.S. Department of Labor's (DOL) proposed revisions to the "white collar" overtime exemption regulations at 29 CFR Part 541.

Currently, I am a principal in the Washington D.C. office of Littler Mendelson, P.C. where my practice focuses on helping employers comply with the Fair Labor Standards Act, including conducting internal audits on independent contractor status, overtime exemptions, and other pay practices. I also represent employers during wage-hour investigations by the U.S. Department of Labor and have served as an expert witness in wage-hour collective and class actions, including being retained by the U.S. Department of Justice in *Nigg v. United States Postal Service*, a case alleging that the Postal Service had misclassified postal inspectors as exempt from the FLSA overtime requirement.

I also serve as VP & Managing Director, Strategic Solutions for ComplianceHR, which develops compliance applications that guide employers through key employment decisions including whether to classify employees as exempt from overtime requirements.

Perhaps of most relevance to the topic of this hearing, I served as Administrator of the DOL's Wage and Hour Division from 2001 to 2004. During that time, I oversaw DOL's 2004 revisions to the overtime regulations, the first major changes to the regulations in 55 years.

I am appearing today on behalf of the U.S. Chamber of Commerce. I am also a member of the Small Business Legal Advisory Board of the National Federation of Independent Business, a Policy Fellow at the ACU Foundation, and Chair of the Federalist Society's Labor & Employment Practice Group.

Mr. Chairman, I request that the entirety of my written testimony and its attachments be entered into the record of this hearing.

I. A Brief Regulatory History

The Fair Labor Standards Act requires covered employers to pay employees at least the minimum wage for all hours worked and overtime at one and one-half the employee's regular rate of pay for hours worked over 40 in a workweek. However, the FLSA also contains 51 separate partial or complete exemptions from the minimum wage and/or overtime requirements. The hearing today focuses on the exemptions for executive, administrative, professional and outside sales employees, codified at 29 U.S.C. § 213(a)(1).

These exemptions, sometimes called the "white collar" exemptions, were included in the FLSA when the Act was passed by Congress in 1938. The FLSA itself includes no definitions of the terms executive, administrative, professional or outside sales. Rather, the Act provides that these terms are to be "defined and delimited from time to time by regulations of the Secretary."

The Secretary of Labor first issued such regulations to define the white collar exemptions on October 20, 1938, at 29 C.F.R. Part 541. The original regulations, only two columns in the Federal Register, set a minimum salary level for exemption at $30 per week and established the job duties employees must perform to qualify for the exemptions.

The duties tests were significantly revised in 1949, including the addition of "special proviso[s] for high salaried" executive, administrative and professional employees – known as the "short tests." Except for revisions in 1992, at the direction of Congress, allowing certain computer employees to qualify for exemption,[1] the duties tests in the Part 541 regulations were unchanged for 55 years, from 1949 until the DOL significantly revised the regulations in 2004.

From 1940 to 1975, the DOL raised the minimum salary level for exemption every 5 to 10 years. The 1975 salary levels set forth below remained in effect until 2004:

- $155 per week for executive/ administrative
- $170 for professionals
- $250 for the short test

In 2004, the DOL eliminated the "long" and "short" test, instead adopting one standard test with a minimum salary of $455 and a test for highly compensated employees with total annual compensation of at least $100,000.

In its Notice of Proposed Rulemaking (NPRM), published in the Federal Register on July 6, 2015, the DOL proposes to increase the minimum salary level for exemption and has requested comments on possible changes to the duties tests.

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[1] In 1992, at the direction of Congress, DOL revised the duties tests to allow computer employees to qualify as exempt professionals. In 1996, Congress enacted a separate exemption for some computer employees in 29 U.S.C. § 213(a)(17), incorporating some, but not all, of DOL's regulations in the Act itself. Unlike the Section 13(a)(1) exemptions, however, Congress did not give DOL authority to issue regulations on Section 13(a)(17).

II. Salary Levels

In the NPRM, the DOL proposes to increase both the minimum salary level for the "white collar" exemptions and the salary level for highly compensated employees. Additionally, the DOL proposes to adopt a mechanism for automatic annual increases to the salary levels.

A. Minimum Salary Level

The DOL proposes to set the minimum salary threshold, using data from the Bureau of Labor Statistics (BLS), at the 40th percentile for all non-hourly paid employees. Currently, according to the DOL, this methodology would result in a minimum salary level of $921 per week or $47,892 annually. When a Final Rule is published in 2016, the DOL expects that the minimum salary level based on the 40th percentile will increase to $970 per week or $50,440 annually – more than doubling the current requirement of $455 per week or $23,660 per year.

The DOL's methodology and the amount of the increase are unprecedented in the FLSA's 77 year history.

In the past, the DOL has used information regarding employee salaries to set the minimum salary levels for exemption, but never used a salary level even close to the 40th percentile. In the 1958 rulemaking, for example, the DOL used data on actual salary levels of employees which wage and hour investigators found to be exempt during investigations conducted over an eight-month period. Based on this data, the DOL set the minimum salary required for exemption at a level that would exclude the lowest 10th percentile of employees in the lowest wage region, the lowest wage industries, the smallest businesses and the smallest size city. If the 1958 methodology were applied today, the resulting minimum salary level would be $657 per week or $34,167 annually (NPRM at Table 12). Similarly, in 2004, using BLS data, the DOL set the minimum salary level to exclude the lowest 20th percentile of employees in the lowest wage region (South) and industry (Retail). The DOL doubled the percentile used, from 10 percent to 20 percent, to account for changes to the duties test made in the 2004 Final Rule. According to the NPRM, if the 2004 methodology were applied today, the resulting minimum salary level would be $577 per week or $30,004 annually (NPRM at Table 12).

Thus, DOL's proposed methodology of setting the minimum salary level at the 40th percentile of all non-hourly-paid[2] employees results in a minimum salary for exemption which is $20,000 higher than the salary level if the DOL applied the 2004 methodology, and $15,000 higher than the salary level if the DOL applied the 1958 methodology. The DOL justifies the jump from the 20% of lower wage regions and industries used in 2004 to its proposed 40% of all non-hourly-paid employees by asserting it made a "mistake" in 2004 in not accounting for changes in the duties tests. But, the DOL did account for those changes in 2004 by increasing the percentile from 10% to 20%. Further, even applying the 40th percentile, the DOL has not explained its failure to use salary levels in the lowest wage regions, the lowest wage industries, the smallest businesses and the smallest cities – or to include earnings data of lawyers, doctors

[2] "Non-hourly-paid" employees include employees paid on a salary basis, but also include employees paid on a fee basis, by commission and any other arrangement which is not hourly pay.

and sales employees who are not subject to the Part 541 salary requirements. The DOL's data set also include salaries of federal workers, who generally earn wages higher than employees working in the private sector.

The $50,440 wage level is also unsupported by looking to historical salary level increases or by adjusting for inflation. The table on the following page shows the history of salary level increases in the Part 541 regulations, calculates the percentage of increase from the prior levels, and shows what the salary level would be today if corrected for inflation (applying the BLS inflation calculator available at http://www.bls.gov/data/inflation_calculator.htm).

Historically, with only a few exceptions, the DOL has increased the salary levels at a rate of between 2.8 percent and 5.5 percent per year. The DOL's proposed increase to $50,440 represents an increase of 10.29% per year. Over the last decade, salaries did not increase by over 10% annually. The DOL has never before doubled the salary levels for exemption in a single rulemaking, let alone more than doubled the salary levels as has been proposed here. Further, in applying inflation to historic salary levels, only the short test levels for 1958, 1963 and 1975 would exceed $50,000. If adjusted for inflation, the average salary level under all tests for all years is $42,236.23.

Since 1949, and in the 2015 NPRM, the DOL has consistently stated the purpose of setting a minimum salary threshold is to provide a "ready method of screening out the ***obviously*** nonexempt employees." After all, in Section 13(a)(1), Congress exempted white collar employees from both the minimum wage and overtime requirements of the FLSA. Thus, to implement Congress' intent, the DOL should not set the minimum salary threshold at a level that excludes many employees who ***obviously meet*** the duties tests for exemption. Or, put another way, DOL should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what the DOL proposes in this rulemaking. Particularly in the retail, restaurant, hospitality, and health care industries – and in the public sector – there are many, many employees earning below $50,440 annually who have been found exempt under the duties tests both in DOL investigations and by the federal courts.

Perhaps most telling, the DOL's proposed minimum salary level of $970 per week, $50,440 annually, is higher than the current minimum salary levels for exemption under California and New York law. Just like the minimum wage, States may set higher standards for exemptions from state overtime requirements. In New York, the minimum salary level for exemption is $34,124 -- $16,320 ***lower*** than what the DOL has proposed on a national level. In California, the minimum salary level is currently $37,440 annually -- $13,000 ***lower*** than the DOL's proposal. Although California's minimum salary will increase to $41,600 in 2016, California's minimum will remain almost $9,000 lower than the federal. Thus, the DOL's proposed salary level of $50,440 is $9,000 to $16,000 higher than the salary level required for exemption under California and New York, arguably the two states with the highest income and cost of living. How can the DOL's proposed salary level possibly reflect the local economies in the rural South and Midwest?

The DOL is also seeking comments on the possibility of allowing nondiscretionary bonuses and commissions provided to exempt employees to satisfy up to 10% of the standard salary level. Although this proposal would provide some relief, the DOL's intention to limit the credit to commissions and bonuses paid monthly or more frequently negates most of this relief. In my experience, the bulk of bonuses earned by exempt employees are only paid quarterly or annually.

Year	Salary Level		Percentage Increase		Adjusted for Inflation	
			Total	Per Year	Weekly	Annual
1938	$30	All Exemptions			$505.97	$26,310.44
1940	$30	Executive	0.00%	0.00%	$509.58	$26,498.16
	$50	Administrative, Professional	66.67%	33.33%	$849.30	$44,163.60
1949	$55	Executive	83.33%	9.26%	$549.55	$28,576.60
	$75	Administrative, Professional	50.00%	5.56%	$749.39	$38,968.28
	$100	Short Test	New Test		$999.18	$51,957.36
1958	$80	Executive	45.45%	5.05%	$658.28	$34,230.56
	$95	Administrative, Professional	26.67%	2.96%	$781.71	$40,648.92
	$125	Short Test	25.00%	2.78%	$1,028.57	$53,485.64
1963	$100	Executive, Administrative	25.00%	5.00%	$777.14	$40,411.28
	$115	Professionals	21.05%	4.21%	$893.71	$46,472.92
	$150	Short Test	20.00%	4.00%	$1,165.71	$60,616.92
1970	$125	Executive, Administrative	25.00%	5.00%	$766.12	$39,838.24
	$140	Professionals	21.74%	3.11%	$858.06	$44,619.12
	$200	Short Test	33.33%	4.76%	$1,225.80	$63,741.60
1975	$155	Executive, Administrative	24.00%	3.43%	$685.13	$35,626.76
	$170	Professionals	21.43%	3.06%	$751.43	$39,074.36
	$250	Short Test	25.00%	3.57%	$1,105.04	$57,462.08
2004	$455	All Exemptions	82.00%*	2.83%*	$572.80	$29,785.60
2015	$970	All Exemptions	113.19%	10.29%		

*Increase over 1975 short test

B. Automatic Annual Increases to the Salary Levels

The DOL has proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (the 40th percentile for the white collar exemptions, the 90th percentile for highly compensated employees) methodology or inflation (CPI-U). Such annual automatic increases also would be unprecedented in the 77 year history of the FLSA. Historically, Congress has consistently rejected automatic annual increases to the minimum wage. Also in 1996, when amending the FLSA to add the Section 13(a)(17) exemption for computer employees, Congress set the minimum hourly wage for exemption at $77.63 (6 1/2 times the 1990 minimum wage) without providing for automatic increases of that amount. Thus, it seems unlikely that Congress intended the DOL to impose automatic annual increases for the salary-based exemption from the FLSA's minimum wage and overtime requirements. Further, as far back as 1949, the DOL rejected requests from stakeholders to impose automatic annual increases to the salary levels. Although acknowledging that it should update the salary level on a regular basis, previously, the DOL stated that salary levels should be adjusted when the wage survey data and other policy concerns support the change.

As stated in the 2004 Final Rule, the Department has repeatedly rejected requests to rely mechanically on inflationary measures when setting the salary levels because of concerns regarding the impact on lower-wage industries and geographic regions. The same reasoning applies to automatic annual salary increases based on inflation. Using the percentile methodology to trigger automatic annual increases is equally troublesome, and will lead to rapidly increasing income thresholds, effectively punishing the business community for increasing salary levels. If the DOL implements the 40th percentile threshold indexed to the weekly earnings of all full-time salaried workers nationwide, this will result in an accelerated upward movement of the threshold as previously salaried workers are reclassified to hourly or have their incomes increased to be over the new $50,440 threshold.[3] Currently, the pool includes all workers down to the salary level just above the current $23,660 annual level. Once the new threshold is implemented, a 40th percentile level will necessarily be substantially higher going forward since there will no longer be exempt employees earning less than $50,440. The threshold will continue to move upward rapidly as the pool of employees being taken into account continues to skew towards higher salary levels with the result of creating a ratchet effect that could soon, as a practical matter, eliminate the white collar exemptions entirely.

III. Duties Tests

In addition to earning the minimum salary level paid on a salary basis, an employer cannot classify an employee as exempt unless the employee also meets one of the duties tests for exemption. The Part 541 regulations establish different duties tests for executive, administrative, learned professional, creative professional, computer and outside sales employees. Many employees earn above the minimum salary level, but cannot be classified as exempt because they

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[3] While the Department devotes considerable commentary in the NPRM to this methodology, the actual proposed regulatory text is silent on what method the Secretary will use to update this threshold annually. See proposed Section 541.600, Amount of Salary Required, 80 Fed. Reg. 38610 (July 6, 2015).

do not supervise employees, are not involved with managing the business or do not hold professional degrees – engineering technicians, who often earn $80,000 or even $100,000 annually depending on the industry, are a good example.

There is much confusion and concern in the business community regarding what changes the DOL intends to make to the duties tests. In the NPRM, the DOL stated that it "is not proposing specific regulatory changes at this time" and that the agency "seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted."

Instead, the DOL raises "issues" for discussion that seem to indicate that the agency is considering some very significant and unprecedented changes:

- What, if any changes, should be made to the duties test?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum be?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Or, should the Department reconsider our decisions to eliminate the long/short duties test structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are lower-level executive employees performing nonexempt work?

The DOL also is requesting comments regarding what additional occupational titles or categories as well as duties should be included as examples in the regulations, especially in the computer industry.

The NPRM contains no proposed changes to the regulatory text describing the duties that employees must perform to qualify for exemption. However, the DOL's failure to propose specific changes to the regulatory text does not mean that the Department will not make any changes to the duties test in the final regulations. Traditionally, under the Administrative Procedure Act, the DOL would be effectively precluded from making changes because they will not have given the public notice and the opportunity to comment. But, the DOL has not foreclosed that possibility. To the contrary, in an email responding to a question from the publication Law360, the DOL stated, "while no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead."

Of course, the Chamber and other business groups will provide comments on these issues. In fact, we are deeply concerned that the DOL will implement the California over-50% quantitative rule for primary duty. The California example is instructive as the implementation of the quantitative rule, rather than the qualitative standard that has been the test for exemption under the "white collar" exemptions since 1949, has resulted in considerably higher levels of litigation in California; plaintiffs' attorneys understand the difficulty for employers of proving the amount of time that employees spend on exempt versus non-exempt tasks.

Similarly, employers are equally concerned that the "issues" raised in the NPRM suggest the DOL will eliminate the concurrent duties provision in the final rule. Currently, exempt employees such as store or restaurant managers are permitted to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity. If this "concurrent duties" provision is eliminated, it could mean the whole-sale loss of the exemption for both assistant store managers and store managers, particularly in smaller establishments.

Finally, returning to the "long test" – a test effectively inoperable since the early 1980s – seems to be a radical change, but cannot be ruled out.

DOL's failure to provide specific regulatory text for any of these "issues" is perhaps the most alarming aspect of the NPRM. Perhaps the DOL plans to rely on the "logical outgrowth" doctrine that allows regulators to issue final regulations that are a "logical outgrowth" of the proposed regulations. But "outgrowth" implies *something* to grow out of. Words matter. Specific word choices, and even the placement of a comma, can make a significant difference in how a regulation is interpreted and applied by the DOL itself and federal courts. Yet, apparently, the DOL is signaling that it plans to make changes to the specific text of the regulations without giving the public any chance to review and comment on that language. Even if the DOL has a colorable argument that it need not propose specific regulatory text, making significant changes to the Part 541 regulations without first doing so, flies in the face of Congress' intent in passing the Administrative Procedure Act to allow the public a meaningful role in rulemaking, and also contradicts the Administration's promise to bring more transparency to the federal government's policy-making process.

IV. Impact on Employees

Not only will these proposed changes create problems for employers, but employees will very likely be disadvantaged as well. Because the new regulation will cause many employees to be reclassified from exempt to non-exempt, employees will lose various advantages many currently enjoy because they are paid on a salaried basis rather than hourly. Among these are workplace flexibility and the ability to structure their hours around personal needs; career opportunities; preferred benefits; and status and morale. Furthermore, merely because an employee is eligible for overtime does not necessarily mean he or she will earn overtime—employers are likely to be very careful about monitoring hours worked.

If employees are reclassified to hourly workers, they will only be compensated for those hours they work. Exempt employees, however, must be paid a guaranteed salary every week in which they perform any work, regardless of the number of hours worked. Yes, non-exempt

employees receive overtime pay for working more than 40 hours in a workweek, but they also lose pay if they work less than 40 hours. Exempt employees do not receive overtime for working more than 40 hours in a workweek, but do not lose pay if they work less.

This means that instead of being able to structure their day around child care needs, children's school meetings, doctor's appointments and other personal needs without losing pay, non-exempt employees have to think carefully before taking time off work, "Can I afford to take this time off." The administration and the Secretary have been very aggressive about promoting mandated paid leave as a way to help employees balance their work and personal lives, yet with this proposal they are effectively consigning millions of exempt employees who currently enjoy the benefit of being able to leave work early to attend a daughter's soccer game without losing pay to an entirely different work life tied to being on the clock.

These employees will also have less flexibility with respect to where they work. Employers will no longer be able to allow employees to work from home or other locations removed from the central workplace since doing so will not allow the employer to reliably and accurately track the hours worked. This may even go so far as employers ceasing to provide electronic devices since using them beyond the specified work hours would require the employee to be compensated.[4]

A sizable increase in the minimum salary level would also eliminate many part-time exempt positions where the employees value the flexibility. For example, currently a full-time salaried employee making $60,000 could have the opportunity to reduce his or her position to half-time to allow more family time and still be exempt at $30,000. If the salary threshold level is increased to above $30,000, this employee would no longer be exempt. The change to the hourly status may make the position far less flexible with respect to both when and where the employee works. Employers also may be reluctant to allow part-time work that is otherwise exempt to be performed by hourly employees, and thus the change could reduce the number of part-time work opportunities for salaried employees.

Changes to the overtime regulations could reduce career opportunities and prevent employee advancement as employees may need to forgo workplace training or other career-enhancing opportunities because the employer is not able to pay overtime rates for that time. Just being reclassified to an hourly employee may mean the employee may not be considered for certain positions that are intended for professional, salaried employees.

When employees have been reclassified from exempt to non-exempt, there is very often a decline in employee morale, as this change is generally seen as a loss of "workplace status." Employees often believe they are being punished or demoted, and some even lose trust that their employer sees them as professionals.

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[4] The DOL has indicated it will be issuing a Request for Information in August to determine how much work is done using these devices outside the workplace and normal work hours, and may adopt more stringent rules regarding paying non-exempt employees for such time.

"Non-exempt" does not necessarily mean that employees will be paid more due to a windfall of overtime hours; eligibility for overtime does not necessarily mean earning overtime. Employees will still have to work more than 40 hours in a given week. Employers must always carefully manage labor costs to remain in business, and there is no reason to believe that they would not do so here as well.

Employees who lose exempt status also may find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime for hourly workers, many incentive payments must be included in a non-exempt employee's "regular rate" (i.e., overtime) of pay. Faced with the difficult recalculation of overtime rates—sometimes for every pay period in a year—employers often simply forgo these incentive payments to non-exempt employees rather than attempt to perform the calculations.

V. Enforcement Issues

Because these new regulations, if finalized, will create tremendous uncertainty among employers, just as most of issues surrounding the last revisions of these regulations have been resolved, there will be a critical need for the Wage and Hour Division (WHD) to make sure its approach to enforcement is reasonable and even-handed. The Chamber recognizes that to have effective regulations, the Department must—at the same time—have effective enforcement and mechanisms to drive compliance. However, the Chamber believes that the Department can improve its approach to enforcement to be more reasonable and even-handed.

The Wage and Hour Division's approach to FLSA enforcement, and specifically enforcement of overtime requirements and classification of employees, has become increasingly focused on merely punishing the employer rather than seeking balanced resolutions—regardless of whether the agency is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether there is a clear violation or ambiguity in allegations. In order to achieve and maintain regulatory compliance, WHD must be willing to provide employers with meaningful compliance assistance and to support those employers who evaluate their wage and hour practices and seek to correct any mistakes with DOL supervision of any back wage payments. Instead, WHD's current practice is to offer negligible compliance assistance, refuse to supervise voluntary back wage payments, and to aggressively pursue maximum penalties regardless of the employer's compliance history. This position helps no one, least of all the employees.

Further, utilizing certain investigatory tactics – conducting unannounced investigations, threatening subpoena actions if overbroad documents requests are not responded to within 72 hours, and imposing civil money penalties and liquidated damages in almost every case – have impeded resolution and hindered cooperation. [5] In many cases this has forced employers to

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[5] At the June 10 hearing before this subcommittee on "Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards" Chamber member Leonard Court presented testimony describing several examples and patterns of WHD enforcement tactics that serve no purpose except to put employers at a disadvantage and force them into one-sided settlements.

contest these actions which only delays employees receiving their compensation. While the WHD should punish bad-faith employers who willfully and/or repeatedly violate the law, not every employer with a wage and hour violation, or misclassified employee, should be handled the same way. Such an approach is counter-productive for good-faith employers who express a willingness to take corrective measures or redress mistakes. Without incentives for voluntary remediation, and given WHD's limited investigation resources, an all-stick-no-carrot approach cannot effectively accomplish the agency's key mission to ensure our nation's employees are paid in compliance with the FLSA.

To have an effective enforcement program, an agency must have an effective compliance assistance program that provides employers with meaningful assistance regarding the compliance challenges posed by the FLSA in an era of rapidly changing technology. This will become an even more pressing need if these new regulations are finalized. Recently, WHD's compliance assistance efforts appear focused primarily upon assisting employees and their advocacy groups in pursuing litigation against employers rather than helping employers achieve compliance through voluntary means short of litigation.

WHD should develop programs to recognize and reward good faith employers seeking to improve their compliance with the FLSA. One approach could be a Voluntary Settlement Program where employers who self-disclose a violation to WHD can agree to pay 100% of back wages, but are not subject to a third-year of willfulness back wages, liquidated damages or civil money penalties, and are issued WH-58 forms to obtain employee waivers. This would expedite payments to employees and discourage employers from contesting citations. It would also help WHD preserve their resources for those cases where they can be used most effectively.

Another new wrinkle to the WHD's enforcement activities just surfaced with the new Administrator's Interpretation (AI) further defining the terms "suffer or permit to work" in the context of classifying workers as either employees or independent contractors.[6] This new AI shifts the focus of analysis from the question of whether the employer controls the actions of the worker/employee to more emphasis on the "economic realities" test which revolves around inquiries such as "whether the worker is really in business for him or herself (and thus is an independent contractor) or "is economically dependent [on the business for which he or she provides services] (and thus is its employee)." This new AI will tip the balance in favor or plaintiffs' attorneys looking for employee misclassification cases. The result of this new interpretation will be to increase the chances that a worker will be found to be an employee rather than an independent contractor. Even if the result was not as favorable to one side, it will still mean that employers will have to reevaluate how they classify workers/employees and will introduce uncertainty and exposure to liability. As many of these investigations are triggered by questions of whether the worker was properly compensated under the overtime requirements, the addition of this new AI will further increase the number of overtime enforcement actions.

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[6] See, Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors," Issued by Administrator David Weil, July 15, 2015.

Interplay with Executive Order 13673, "Fair Pay and Safe Workplaces"

As noted above, revising the regulations for defining who is exempt and non-exempt for overtime compensation purposes will trigger many new enforcement actions as employers work to come into compliance. While these actions will create problems for any employer, coupled with the requirements for reporting of "violations" under the proposed Federal Acquisition Regulations Council regulations implementing President Obama's Executive Order 13673, the impact could be potentially severe. Under that proposed regulation, as specified by the E.O., companies bidding on federal contracts, contractors, and their subcontractors will be required to report violations under an array of 14 different labor and employment laws and executive orders, including the Fair Labor Standards Act.

Under the proposed regulation, contractors will be required to report "administrative merits determinations" within the last three years which are defined as the initial step in an enforcement process. Contractors will have to report these "violations" even before they have had any chance to challenge them, settle the charges, or have the allegations dismissed.

These reported violations are then to be taken into account by the contracting officer in making the critical determination of whether the contractor, or bidding company, has sufficient integrity and business ethics to be considered responsible. The flaws and problems in the E.O. and the proposed regulations and guidance issued by the DOL are myriad and too extensive to go into in this statement. The important point is to recognize that the new overtime regulations, and AI on classification of employees, will not operate in a vacuum and will have significant spillover effects under the requirements of E.O. 13673.

VI. Conclusion

The Department of Labor's proposed revisions to the regulations defining the statutory "white collar" exemptions for executive, administrative, and professional employees would increase the salary level out of proportion to any previous increases. The new $50,440 annual/$970 weekly salary threshold would be out of synch with regional and local economies and various industries. It would even be higher than two of the states with the highest current salary thresholds, California and New York.

The Department's proposal to index the salary threshold (and that for highly compensated employees as well) is also not in keeping with historic practice. Both Congress and previous administrations have explicitly declined to include automatic increases. The Department's approach would result in a rapidly escalating salary threshold by skewing the pool of employees included to those with higher salaries.

By increasing the salary threshold so dramatically, the likely result of these changes will be that millions of employees will be reclassified from exempt to non-exempt. Where this has already happened, employees often feel they are being demoted and do not see this as beneficial. Among the reasons they see this as against their interests are: loss of flexibility in their work arrangements both in terms of hours worked and locations where they can perform their work; loss of professional opportunities as they may have a harder time taking classes or no longer be

considered for certain positions that are intended for salaried employees; and lower morale and sense of accomplishment.

Despite not proposing changes to the duties test, the Department is signaling that it intends to make some modifications such as adding a quantification requirement similar to California's where an employee must be performing exempt duties more than 50% of their time. The Department is also suggesting it may eliminate the "concurrent duties" provision that lets an exempt employee also perform non-exempt tasks without jeopardizing their exemption. Without providing proposed regulatory text for these changes, the Department is not giving affected parties an adequate opportunity to understand what changes may be made and provide comments on them. This is counter to basic principles of fairness embodied in the Administrative Procedure Act regarding appropriate rulemaking procedure, and the administration's own claims of conducting transparent policy making.

New regulations will necessarily mean more enforcement as employers will need time to become familiar with the new requirements and come into compliance, yet the current attitude of the Wage and Hour Division is to routinely seek maximum punishment rather than look for ways to find reasonable settlements or allow employers the opportunity to correct their errors. The WHD would be better served by adjusting its approach to expedite payments to employees and conserving resources for those cases where they are truly needed.

The expected increase in enforcement activity will be particularly problematic for federal contractors or companies bidding to be federal contractors or subcontractors. These companies will have to report any violation, even those still being adjudicated, under the FLSA within the last three years. Just as the dust is settling on the changes to these regulations put in place in 2004, these new regulations will start the enforcement process *de novo* creating considerable difficulties for those companies involved in federal contracting.

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

Chairman WALBERG. I am going to have to start paying you overtime——

Ms. MCCUTCHEN. I am sorry.

Chairman WALBERG. Here soon, so——

Ms. MCCUTCHEN. I am sorry. I——

Chairman WALBERG. I think there will be plenty of time for questions on this, and you are a walking textbook——

Ms. MCCUTCHEN. Thank you.

Chairman WALBERG. As each of our witnesses are.

So, having said that, I will now recognize for first round of questioning, or first five minutes of questioning, Mr. Bishop, of Michigan.

Mr. BISHOP. Thank you very much, Mr. Chairman.

And thank you, to the panel. Thank you for your time. This is a very important issue.

We appreciate your testimony. I know it is frustrating to have only five minutes to say what you want to say. This is an important subject and we would like to hear more from you.

One of the biggest concerns that I get from my constituents in the businesses that I represent as I travel across my district is the growing administrative burden, the costs of these new regulations that have been descending upon small business in particular for quite some time.

And it is becoming more and more stifling, to the point where many businesses feel like they have an entire wing of their business whose sole purpose is to deal with regulation and compliance. And it is really choking off small business.

It is a big issue, and it is one that I think a lot of us are going to spend some time to find a solution for. But I am told that the department has estimated that this particular regulation in the first year alone is expected to cost $600 million, which to me seems unbelievable. And I am interested in hearing from all of you, of course, and I wish that I could, but in particular I would like to hear from Mr. Williams.

Sir, you bring incredible perspective to this, given the fact that you were an employee, a middle manager, and now the CEO—COO of a major American business, and I am very interested to hear your perspective on this. You have seen it. You are inclined to want to do whatever you can to enhance the employment environment in this country, to advance the economy.

Do you view this as a positive change to—what are the impacts—fiscal, administrative? Any negative impacts that this might have on a business such as yours? And is this an—are there many unintended consequences that we are seeing today that can be avoided?

How can we better address this issue? I know you had a lot of testimony and I know you hurried through it, so I would like to hear more from you if I could please, sir.

Mr. WILLIAMS. Mr. Bishop, I do believe that this will have a negative impact on the work environment. I also believe that it will make administrative costs go up because now we will—just basically, managers that now are salaried managers will—they will be reduced back to hourly managers. There is no way to avoid that.

Now, in my own business in Indianapolis I have four managers that are assistant managers—that are managers that are below the

proposed rate, and those managers, I will have to move those salaries up to the proposed rate. And there are three managers that are below the proposed rate that I will have to put them back on the clock. This will be a very demoralizing effect, which is an unintended consequence that this regulation will bring.

When I first took over that business one of the things that I saw in some of those employees was the potential to be general managers, the potential to be district managers or multi-unit supervisors. But they were being held back because we had to limit their hours to 40 hours per week.

Businesses just can't afford to pay overtime week after week after week, and so, unfortunately, when the business goes away they have to get off the clock. So it will not be a positive change, and I have seen where managers have been taken from salaried positions to hourly positions so that the business could thrive, and it is not viewed very positively by the managers or the people that are impacted by that, as well.

I do not view this as being positive.

Mr. BISHOP. So, sir, am I correct in assuming, then, based on your testimony, that a regulation such as this will actually have a negative impact to the extent that businesses like yours would be less inclined to hire, would be less inclined to advance their employees to a management level, and in fact, it has an effect of negatively contracting your business so that you are less likely to grow and be more prosperous?

Mr. WILLIAMS. That is correct. Under the guidelines now, we would staff a restaurant with additional management personnel. Those manager personnel that are not the restaurant manager, they have an opportunity to grow. And so you would have maybe a couple of managers on the shift that would all supervise an area or they would all supervise employees.

Under this guideline, those managers—we would not be able to afford those managers, and so we would have less management positions available. So the management position that I advanced into would no longer exist because we just simply couldn't afford it.

So yes, it would have a contracting effect and ultimately could not only reduce the earnings of a business, but it could have an impact on guest service and sales because there is less supervision available to manage the business.

Chairman WALBERG. The gentleman's time is expired.

Mr. BISHOP. Yield back.

Chairman WALBERG. I now recognize the gentlelady from Florida, Ranking Member, Ms. Wilson.

Ms. WILSON of Florida. Thank you, Mr. Chair.

My question is for Mr. Eisenbrey.

According to the Economic Policy Institute, in 1975 nearly two-thirds of salaried workers were eligible for overtime pay. Now only 8 percent of salaried workers are eligible. What effect has this shift had on wages and on the average number of hours worked? Would you elaborate?

Mr. EISENBREY. Well, it is not clear overall what it has had on the number of hours worked. If you look at the BLS surveys, I think that they show fairly steady weekly hours. But if you look at Gallup Polls and public policy opinion polls, the General Sur-

vey—General Social Survey, they all are showing that salaried workers are working longer and longer hours, to the point of the average being, in some of these surveys, as much as 49 hours a week.

So I would say—there is no question, I think everyone at the table would agree, that salaried workers who don't have to be paid overtime will work longer hours than people for whom overtime has to be paid. That is what Mr. Williams just said.

So the effect of exempting people obviously is to increase their hours, and when they don't get paid anything more for it, all it does is increase the stress in their lives without compensation.

Ms. WILSON of Florida. Thank you.

In your testimony you mentioned a woman named Dawn Hughey. You say, "Retail store managers like Dawn Hughey, who was paid a salary of less than $35,000 a year, are sometimes forced to work as many as 90 hours a week." You go on to say that "a salary and a title are no protections against oppressive overwork and never have been."

Is that story an isolated one? Is this something that happens often? If so, why don't the workers just refuse to work all those extra hours?

Mr. EISENBREY. Well, workers can't refuse to work the extra hours because they will be fired by their employer, the corporation that employed them, whether it is Dollar General or Duane Reade, whoever it is. We have heard stories from dozens—scores of workers who say that they, at very low pay, make—when you make $35,000 a year and you work 60 hours a week your pay is reduced to about $12 an hour.

When you work, as Dawn Hughey did, 90 hours a week, your pay actually falls to below the minimum wage. And she had no life at all because she was working all the time for the corporation that employed her—until she was finally injured, until she was basically worn out and couldn't work any longer.

But that is not an isolated story, and I would be happy to share stories that we have received in the comments with the Committee.

Ms. WILSON of Florida. Can you go on to discuss why overtime protections are even necessary for salaried workers? If workers are making a salary instead of hourly wages, why should they be entitled to overtime?

Mr. EISENBREY. Well, they have always been entitled to overtime under the *Fair Labor Standards Act*. We didn't have a 40-hour work week in America until the New Deal, when President Roosevelt and the Congress passed this law. And people who had been working 50 and 60 hours a week suddenly had a standard work week of 40 hours.

The fact that they were salaried—the stories in the Department's reports of white-collar workers being paid $17 a week and working 60 hours are the very reason that we had the *Fair Labor Standards Act*.

You can be a blue-collar worker—a carpenter making $60,000 a year and your hourly wage will be 150 percent when you work more than 40 hours in a week. A salaried worker making $25,000 a year who is held to be exempt under the rule as it is now gets

nothing for the extra 20 hours a week. Nothing. Zero. Not time-and-a-half, not straight time, not one penny.

Ms. WILSON of Florida. How did the Department of Labor come up with the proposed salary threshold?

Mr. EISENBREY. Well, they went through the long history of the Act and looked at all the different possibilities. Tammy McCutchen mentioned one that the Dpartment has used. In 2004 they did something different from what had ever been done before. So there is no set rule in the statute about how the Department approaches this.

I think that they chose the 40th percentile because it is—of salaried workers because they understand that the rule is meant to exempt a small number of top people—the bosses, the people who can control their own time. It was never intended to be something that exempted low-level accountants and people in—you know, clerks in insurance companies, first-line supervisors. All of those people were intended by the law to be covered.

Ms. WILSON of Florida. Thank you.

Chairman WALBERG. Gentlelady's time is expired.

Now I recognize for five minutes of questioning Mr. Kline, Chairman of Ed and Workforce Committee.

Mr. KLINE. Thank you, Mr. Chairman, for the courtesy of recognizing me for questions and for holding this hearing.

Ms. MCCUTCHEN, it is good to see you again. Welcome back.

There seems to be a difference of opinion here that at least I am hearing between Mr. Eisenbrey's view of the 40th percent threshold—percentile and yours. And you were making a point, Ms. McCutchen, in your testimony about how this is unprecedented to go to the 40 number instead of 10th and 20th percentile, which had been more normal.

And you started to say—in fact, you had about one sentence worth or so in here—that you were comparing New York and California, but I think you picked Biloxi but we could pick a whole lot of other places. Can you take a minute or two here and talk about what that difference means—the difference in economies, the difference between rural America and places like San Francisco and Manhattan?

Ms. MCCUTCHEN. Certainly. It does make a difference, because in 2004 we looked at salary levels in the rural Midwest and the rural South. We looked at salary levels in different industries.

And I guess the best way to put it is where I grew up in the Quad Cities, Illinois—Moline, Illinois; Davenport, Iowa—you can buy a house for less than it costs you to park a car in New York City, right? And so a $50,000 salary level in some place like Indianapolis, Indiana, for example, is a very, very good living because—a salary, and it is among the top of the salaries in that area because of the low cost of living.

And so trying to apply something that, yes, maybe $50,000 works—well, I was going to say maybe it would work in California, but not even California thinks $50,000 would work in California since their level is $37,000. So I am not sure where this works outside of San Francisco and New York City themselves, but what it does is it is just not in line with local economies and the realities of local economies.

And that is what DOL has always tried to do is to look at the actual salary levels that are reflected, to draw that line between—to exclude only the obviously nonexempt. And if you think about, for example, your own staff who are earning less than $50,000—from the duties they perform there is going to be a lot of them that are not obviously performing nonexempt duties even though they earn below $50,000 a year.

Mr. KLINE. Yes. Thank you. It concerns me—we are always worried about a one-size-fits-all, and in this case you were talking about what the purpose was.

Mr. Eisenbrey has said this is to affect the boss's boss kind of thing, and you were making the point that no, that was never what this was really designed to do, to go back to the very beginning. And so you were talking about where you looked and where to set that bar based on what seems to be a different criteria than what we had heard about.

Can you just touch on that again? You had it in your testimony but I want to get that clear.

Ms. MCCUTCHEN. Well, the salary is not the only test for exemption, right? Employees who are paid by the hour who earn below the minimum salary level must be paid overtime, but if you earn more you still have to meet the duties tests, which are quite substantial, right?

And that is why the purpose is to drawing the line is to exclude the obviously nonexempt—the employees who, just based on their salary alone, are unlikely, in the department's view, to ever be able to meet the duties tests. And so it is not—this is not a minimum wage debate, right?

And so this is not about increasing and cutting—you know, getting rid of wage stagnation is not the goal here. The goal is to have rules that will allow at least some bright-line judgments, in the Department of Labor's eyes, about who earns a salary that is low enough that they are obviously nonexempt even if the duties tests are applied.

Mr. KLINE. And then when you—once you get past that obvious line, then you are going to get into the duties tests, which we haven't——

Ms. MCCUTCHEN. That is correct.

Mr. KLINE. Yet seen in this thing.

Ms. MCCUTCHEN. Which we don't really know——

Mr. KLINE. Which we don't know yet.

Ms. MCCUTCHEN. Right.

Mr. KLINE. Right. Exactly.

Okay. Thank you very much. I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And now I recognize the gentleman from Virginia, Ranking Member of the full Committee, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. McCutchen, you mentioned someone who would be entitled to their salary even if they worked one hour a week. Is it your testimony that somebody showing up one hour a week can expect to receive their salary on any kind of ongoing basis? Is that your testimony?

Ms. MCCUTCHEN. Yes. That is called the salary basis test. That is a third test for exemption. And what the salary basis test is—was——

Mr. SCOTT. Well, I just asked you, if somebody is showing up one hour a week——

Ms. MCCUTCHEN. Yes.

Mr. SCOTT. It is your testimony that they can keep their——

Ms. MCCUTCHEN. They are——

Mr. SCOTT. That they can keep their job?

Ms. MCCUTCHEN. Well, I have done it and I haven't lost my job——

Mr. SCOTT. Okay. Well, we just receive the testimony as it is given.

Ms. Hays, most people think of full-time work as 40 hours a week. How often do you require employees to work more than 40 hours?

Ms. HAYS. The need to work 40 hours or more than 40 hours a week would be dependent on what is transpiring in the course of delivery of services. We don't mandate that our exempt employees work any specific number of hours, but we do have children very often who are in crisis during the course of any given day—or night.

Mr. SCOTT. Right. And when you ask them to work more than 40 hours, what compensation do they get for the hours after 40?

Ms. HAYS. For exempt employees they don't receive additional cash compensation. They can flex their schedules——

Mr. SCOTT. Okay. Now, if they don't get any compensation over 40 what—is there any limit to the number of hours you can ask someone to work for no compensation—no additional compensation?

Ms. HAYS. We don't assign a limit, but MHY is committed to something called self-care as part of the sanctuary model. We preach regularly the need to balance work and life as part of a model of treatment and care that takes into consideration both the safety and needs of clients as well as our employees.

Mr. SCOTT. Well, Mr. Eisenbrey, if someone is required to work more than 40 hours a week what, in most cases, when the employer says, "We need you to work 50 hours this week," what happens if they don't show up?

Mr. EISENBREY. Well, there is no proscription against mandatory overtime, and that employee could be fired.

Mr. SCOTT. Okay. Now let's go through a couple of scenarios. Somebody is making $10 an hour and they work 40 hours a week. If they were to work a few extra hours, how would they be compensated for that—for those extra hours?

Mr. EISENBREY. Well, if they are hourly they would be paid time-and-a-half, 150 percent of their regular rate. If they were salaried they wouldn't be paid anything more.

Mr. SCOTT. If they were salaried under the threshold?

Mr. EISENBREY. If they were salaried under the threshold then they would not be exempt. They would be entitled to overtime.

Mr. SCOTT. So somebody making $10 an hour, about—full-time, $20,000 a year, they would get time-and-a-half?

Mr. EISENBREY. They would, yes.

Mr. SCOTT. Okay. Now, if somebody is making $15 an hour and they work the additional—more than 40 hours—they are paid $15 an hour on an hourly rate, they would get overtime—time-and-a-half. Now, if you converted that to $30,000 a year, what kind of compensation would they get for the extra hours?

Mr. EISENBREY. If they were hourly?

Mr. SCOTT. No, if you called it $30,000 a year salary.

Mr. EISENBREY. If they were in an exempt position they wouldn't get—they would have no right to any overtime pay at all.

Mr. SCOTT. Any right to overtime pay or any extra pay at all?

Mr. EISENBREY. Any pay beyond the $30,000.

Mr. SCOTT. So if you are making $15 an hour you get time-and-a-half over 40. If you are making essentially the same, $30,000—if you call it $30,000 a year then you not only don't get the right to over time time-and-a-half, you don't get any extra salary at all.

Mr. EISENBREY. You don't have the right to a penny for the extra hours. That is right.

Mr. SCOTT. Can you say a word about how the new rule will reduce litigation involving overtime?

Mr. EISENBREY. Well, you know, in 2004 the rule was put out and—with the promise that it would reduce litigation. And since then, litigation has tripled. So I think changing the duties tests, as they did, led to a lot of litigation.

This rule, by contrast, as it has been proposed, is as simple as it could be. It just tells an employer, "If you pay a salary less than $50,440 a year, the person is entitled to overtime pay." I mean, that could not be clearer, and it will affect about 15 million people who otherwise might be subject to litigation because they don't know whether they are—and their employers aren't sure whether they are exempt or not.

Chairman WALBERG. The gentleman's time is expired.

I now continue with the state of Virginia and recognize Mr. Brat for his five minutes of questioning.

Mr. BRAT. Thank you, Mr. Chairman.

I think it is first of all important to note that I think everyone in the room here has the same goal. We would all like people to be richer and do better and have happier lives with the family and the kids.

The only problem with this proposal—and it is important to look at this proposal. Everyone is nibbling around the edges, right, about certain groups of people and certain kind of moves around—in the short run around wage rates and pay and hours and this kind of thing.

I think it is important to go back to the long run to show that this kind of procedure—at the macro level these kinds of policies will fail, right? And so in the long run—I made a very high-tech graph here; it is just a straight line going up—in the long run your wage rate is, roughly speaking, the same thing as your productivity, and there is no cheating that. We would all like to just announce to the world that everyone can make $500 an hour, et cetera.

So just do that thought experiment. Any students out there? Let's just pay everyone $500 an hour. Is that possible?

No, it is not possible. Everyone knows that, because wages have to track productivity.

And so instead of dealing with the underlying issue that matters in this country—enhancing productivity—we tried to do an end run with clever little procedures that in the short run may enhance wage rates or hours worked, you know, and that is a little wrinkle in this nice line. But over the last 200 years, economies that don't focus—and countries. Our country has had phases of time where we let Rome rule, right, the central planners up here, and we don't do as well as a country.

And so at a time where we should all be talking about productivity growth, because that is the only thing that gives the next generation of kids a good life, we are still doing this little nickel-and-diming around the edges.

And so, as my colleague brought up before, when we go around door to door and talk to the vast number of small businesses, and the CEOs in the room, and the folks that are speaking on the economy, we hear the opposite is going on. Instead of enhancing productivity we find small business talking about the regulatory burden.

I think for the country as a whole it is about $1.5 trillion. Per employee, I think it is $10,500 per employee in regulatory costs that go on to every small business.

We have the *Affordable Care Act*. Obamacare is crushing small business and making it harder to pay people. The EPA overreach, regulatory burden, et cetera.

And what we are missing, in some of the testimony we started hearing hints at what is really going to happen. What is really going to happen in the short run, too, is people are going to get fired. And we don't pay attention to them.

They are off. They are not in the labor force anymore, right? So we don't look at them, but they are going to lose their jobs. Firms are going to substitute capital for people and hire more little smart screens instead of people.

And so it is nice to have all these clever little ideas in mind, but in the long run the bottom line is any country that over the long run tries to run their economy from Rome and from central government land is no longer a nation, right?

And you have the perfect case study with Greece going on right now, right? They have moved in this direction. I think the youth unemployment rate is 50 percent, right, youth out there. If you want 50 percent unemployment rate for the youth, go towards centralized planning.

And so I would just question for Mr. Williams or the Honorable McCutchen: Can you comment in the business world on how we can be more effective at enhancing—at getting to this goal by increasing productivity and just what we can do to really make progress? Because I think we all have that goal in mind.

And, Mr. Williams, if you want to lead off?

Mr. WILLIAMS. With respect to productivity—and I have heard the testimony of some of the other witnesses that talk about 90 hours and 100 hours. In those scenarios that is very low productivity. And even as being a manager myself for years and years and years, I have investigated those kinds of comments and those kinds

of claims, and what we find is very low productivity if not some embellishment, in terms of, you know, what that person is really doing with their time.

So yes, I would agree with you that low productivity will be enhanced because an individual will now just ride the clock. If I have an opportunity to enhance my pay by working 50 or 60 hours then that becomes my bonus and I enhance my pay that way.

The manager that is salaried that realizes what the goals are of his job now becomes the more productive manager because they recognize that I am going to get paid my salary whether I work 30 hours or whether I work 40 hours.

I think the thing that we have missed here is that—and I think one of the questions was, do I—would I expect to get a check for one hour? Yes. And I have gotten a check for one hour before.

I come in, I count inventory, I leave, and I go home. And that was my job for that day and that was my job for that week, and I did it and I got paid. So I was very productive with that, and I will yield the rest of my time to——

Ms. MCCUTCHEN. Well, I think——

Chairman WALBERG. The gentleman's time is expired. And you really are a professor, aren't you? Yes. Yes. Thank you.

Now I recognize the gentleman from Wisconsin, Mr. Pocan.

Mr. POCAN. Sure. Thank you, Mr. Chairman.

Well, you know what? I will pick up on that, on the productivity question, because here is the number I am looking at: Since 1973 productivity has gone up 74 percent. The hourly compensation for a typical worker in the same period has gone up 9 percent. The average CEO pay during that same period, 937 percent.

Something doesn't quite add up on all those numbers when you look at that.

And then I am looking at this rule and specifically the fact that only 8 percent of the people are currently, you know, covered under this area, and we are trying to get to the 40 percentile, when in the past we have been up to 62 percentile back in 1975.

I am a small business owner. I have been since I had hair. Since I was 23 years old I have run a small business, and I will tell you, I just look at it differently. I look at my employees as my partners, not as a line on my budget. And unfortunately, this conversation so seems like we are talking about employees as simply a line on the budget, as some end sum game.

I think, Ms. McCutchen, you made a comment about the benefit of having a guaranteed salary. You know what you are going to make no matter what your productivity is. Kind of doesn't work in the real world.

I don't know if you have ever had a small business and had employees where this ever affected you but, you know, it is not a benefit to know you are only going to make so much even if you work 60 or 70 hours a week. And, quite honestly, if someone is not productive we are not keeping them on anyway. We are not keeping someone on if they are not productive just because we have the benefit of giving them this salary.

And then we talked about how they are less likely, if they are nonexempt, to get a bonus. That is not true either in the real world.

I think people still can get bonuses in a lot of different business structures. There is no rule that says you don't have to. You are saying simply because they will pay overtime on it, but maybe they should be paying overtime instead of having their employee work for free after making $24,000.

So here is the question I have, since we brought up Biloxi and we brought up San Francisco: If you are making $23,660 that is take-home, before tax, $1,971 a month. The median rent in this country according to Zillow, I looked it up, is $1,350 a month.

Can anyone make a strong case how that makes sense? $1,971 a month, overtime you are not going to get any extra pay, but the median rent is $1,350 before your utilities, before any kind of car, before any kind of cable, food, entertainment, et cetera.

You want to talk about San Francisco? Even under that new dollar amount they are coming into in 2016, they are going to now be having $3,416 a month. You are right, it is different in different parts of the country. But that median rent is $3,055. It is still lopsided. The worker gets screwed over every time no matter how you do it.

Let's go to Biloxi, all right? Biloxi, you are right, it is lower cost of living. But you know what? In Biloxi that median rent is $813—40 percent of your gross salary.

So the problem we are having is we need to talk about how you affect a real employee, real wages, so you have got a productive employee. And quite honestly, keeping them at poverty level and making them work for extra hours for free and not being able to even get by much past the rent doesn't make any economic sense.

Let me ask a question, Mr. Eisenbrey. One of the things that has come up over and over and over is this benefit that you can take a Friday off or leave work an hour early after you have worked 60 hours a week under this scenario.

What is the real benefit to this flexibility for an employee? Because I still look at it, if they are working 60 hours a week that is 1,000 extra hours a year they are not getting paid for that you don't see your family so you can get that Friday off. To me, I don't see the benefit—cost-benefit ratio, but if you could share a little bit from your research.

Mr. EISENBREY. Well, we did a report on this. Lonnie Golden, a professor at Pennsylvania State University, used the General Social Survey to see what happens in terms of flexibility, asking employees who are salaried and hourly who make less than $50,000. Actually, the survey asked between about $25,000 and $50,000, so it was perfect for this rule.

And he found that you are actually more—somewhat more likely as an hourly employee to be able to take off an hour or two during the day than a salaried worker. It is not common that anyone can do that. Salaried workers don't generally have that right, but there was actually no more flexibility in that range.

Once you get up to a real executive salary, you know, to Tammy McCutchen's or my salaries, then people start to have the ability to actually take the time off, but it is not——

Mr. POCAN. Thank you.

And real quick—I have very little time—Ms. McCutchen, a quick question: Do you think 150 percent is the right number? Should it

be higher or lower? What kind of number should we have at that rate?

Ms. MCCUTCHEN. I want to make clear, I am in agreement that it is time for a salary level——

Mr. POCAN. Yes. My question, though, is on the 150 percent. If you could very quickly, I am on the yellow light. The only reason I am asking——

Ms. MCCUTCHEN. On the overtime, time-and-a-half has been the way it has been in the FLSA——

Mr. POCAN. So you don't have a problem with that?

Ms. MCCUTCHEN. No.

Mr. POCAN. Okay.

Thank you. I yield my time back.

Chairman WALBERG. Thank the gentleman.

I recognize now for five minutes of questioning the gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Thank you, chairman. Appreciate the opportunity for this hearing.

Ms. Hays, I want to say welcome. As a fellow Keystone State person, I wanted to welcome you to the hearing and also thank you for your role in providing critical support services—at-risk youth, all the things that your agency does.

Having worked, well, my—as I like to say, when I had a real job it was really—a lot of that time was spent working with nonprofits, and recognize that the workforce that we need, you know, is based on the, you know, the level of—the types of services they are providing, the intensity, and it is cyclical sometimes. And having that flexibility. So my question—flexibility in terms of how do we deploy that workforce, as well, so that it works well for the employee and, quite frankly, fulfilling the mission.

And so I really do have a vast appreciation for nonprofit organizations and their admirable missions.

And, given your experience overseeing such an organization, can you elaborate on how the administration's overtime proposal will impact nonprofit employees and their relationships with those that they are serving, to be able to fulfill that mission?

Ms. HAYS. I think one of the biggest concerns that we have is around continuity of care. With an increase like that which we are discussing today, it would be a priority to be able to move individuals around who are professionals—therapists, as an example—to avoid overtime costs—again, unfunded overtime costs.

In terms of continuity of care, you spend a very long time, as I said in my testimony, developing relationships with the clients that we serve, with their families, with the case workers that we work with within the counties. There is a lot of time dedicated to developing those relationships and that rapport and that trust, notably with the clients, first and foremost.

You can't just switch out therapists to offset time worked to avoid additional overtime costs. It diminishes continuity of care. There is not the same level of communication with those clients as with the primary caregiver—with the primary support services.

That would be a significant concern for us. For MHY it would be paramount to control significantly what—who are now exempt professionals and managers, the amount of time that they are putting

in to handle crisis, to support staff who are handling crisis, and again, to provide direct care services both on our residential campus as well as out in the community services field, where we have several therapists who have a great deal of autonomy in when they meet clients, when they meet with schools, social workers, caseworkers, the families, get them all together. There would be a great deal of controls on that, and another level of bandwidth that we can't afford to administer that.

Mr. THOMPSON. Very good. Thank you.

Ms. McCutchen, the Department of Labor proposes to automatically increase the salary threshold annually based on either the 40th percentile of salaries or inflation, which would lead to rapid increases in the threshold. As your testimony points out, Department of Labor has repeatedly rejected automatic increases due to concerns regarding the impact on certain regions and industries.

What problem do you see in automatically increasing the salary threshold? Was it Congress' intent in the law for the salary threshold to increase automatically?

Ms. MCCUTCHEN. I question whether it was Congress' intent. Congress itself has often rejected proposals to index the federal minimum wage for annual increases in inflation. And in 1996, when Congress enacted the exemption for computer employees at an hourly rate, they did not increase that—have any indexing of that hourly rate for inflation.

And the problem with using the 40th percentile is it is going to have a ratcheting effect. In 2006, as employers increased some people's salary in order to get them over that 40 percentile level, that means the next time you look at the data set it is going to be higher salaries. And so the 40 percent level keeps moving up and moving up, ratcheting in geometric levels, until there is virtually no nonexempt—people who qualify for this exemption.

And I, contrary to Mr. Eisenbrey, this exemption has been in the FLSA since 1938. It has always been the largest exemption.

There is actually over 50 exemptions in the FLSA, partial or total, from the overtime and minimum wage requirements. So I don't see any evidence that it was ever intended to be a tiny exemption.

Mr. THOMPSON. Thank you, Chairman.

Chairman WALBERG. Gentleman's time is expired.

And I now recognize the gentlelady from Ohio, Ms. Fudge.

Ms. FUDGE. Thank you very much, Mr. Chairman.

I thank you all for your testimony today.

I guess maybe I am one of the few people that really lives in the real world here. Hiring is based on need. People hire people because they need them; they don't hire them out of the goodness of their heart. And so if you don't need a person, you don't hire them.

You are making it seem, to me, that you are doing them a favor by hiring them and then making them work a lot of hours and not paying them. That is not how this business works.

It is supply and demand. That is just basic, simple economics.

Mr. Eisenbrey, is there any data that you are aware of that supports the premise that higher wages causes job loss?

Mr. EISENBREY. No. I think that one of the big problems with our economy right now is that wages have been held down so long that

the power of consumers has been reduced and, therefore, businesses are not hiring. They don't have the customers they need.

And that is what every survey of small business says, by the way, that the problem is not regulations. That is not the first thing that they say.

Ms. FUDGE. Correct.

Mr. EISENBREY. Their first problem is, "We don't have the customers we need."

Ms. FUDGE. Thank you very much.

And so Mr. Williams' premise that overtime pay is a penalty—and I believe I wrote down exactly what you said—is actually not accurate, is it?

Mr. EISENBREY. Well, in a sense he is right. It is a penalty on employers who work their employees excessive hours.

Ms. FUDGE. That is what I thought.

Mr. EISENBREY. It makes it more expensive for them to do that.

Ms. FUDGE. Thank you.

Mr. Williams, you say you have about 75,000 employees. First, let me congratulate you for working your way up. I think that that is the American dream. I appreciate that.

I started working at McDonald's. I understand the process.

You have 75,000 employees. Approximately how many of them are management employees?

Mr. WILLIAMS. It would probably be about 30 percent.

Chairman WALBERG. The microphone.

Ms. FUDGE. So 30 percent of your employees are management employees. You don't mind paying the other 70 percent overtime, correct?

Mr. WILLIAMS. That is correct. If they work over 40 hours they get time-and-a-half.

Ms. FUDGE. And so what is the responsibility of a manager, just a regular line manager? What are their duties, as a general rule?

Mr. WILLIAMS. Exempt or nonexempt?

Ms. FUDGE. Exempt.

Mr. WILLIAMS. Well, an exempt manager has to pass the duties test, and so they would have to be a bona fide executive. They would have to have the responsibility of hiring and firing. They would have to be the person that manages the business according to the duties test of the Department of Labor.

Ms. FUDGE. Okay. So basically, you have very trusted employees, people that do a great job, just as you do with your people that work with your children—and I think that is a great thing that you have people that you trust, that you believe in, that you trust with the lives of kids. But you guys don't want to pay them. That is what I don't understand.

You have these valued employees in which you have put a lot of time and a lot of money, a lot of energy, you trust them, and then you want to restrict their pay when you make them work 60, 70 hours a week. It just doesn't seem to mesh to me that you value your employees if you don't want to pay them.

Mr. EISENBREY. Ms. Fudge, may I just correct the record on something?

Ms. FUDGE. Yes.

Mr. EISENBREY. It has been said that this is the biggest increase, you know, that we have ever had in the salary threshold. I just want the record to reflect that it has been 11 years since the last increase. From 1938 to 1949 was 11 years and the increase in the salary threshold for administrative employees went from $30 to $75 a week, which was 150 percent. So that is not true, and I think that we need to keep it in perspective.

Ms. FUDGE. Thank you. At least I, you know, I very much appreciate Ms. McCutchen talking about the fact that it is time for a wage increase. I appreciate that, because it is. The very people that you all represent, low-income people—they are the ones who need it the most.

I appreciate that you hire young people in communities of need, but they are the people who need the increases more than anyone else. So yes, you are helping them in one respect, but you are holding them down in another.

So I just want to thank all of you for your testimony. I am hopeful that as we go forward we can find some way to come together to try to help the people that all of us, I believe, want to help.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentlelady.

I now recognize the gentleman from Indiana, Mr. ROKITA.

Mr. ROKITA. Thank you, Mr. Chairman. I appreciate you holding this hearing.

I appreciate the witnesses' testimony.

Mr. Williams, I appreciate you operating a business in Indiana, where I am from. Thank you for what you do in the community and the experience you give employees at various different levels, some of them whom it is a first-time job experience, some have a part-time job experience, so that they can offer better lives for themselves and their families, which I think is part of the American way.

First off, do you have any further response to my colleague, Ms. Fudge's, comments or anything that she said? Anything you want to add for the record?

Mr. WILLIAMS. Well, I just want to make sure that—I want to, I guess, tie two thoughts together. One, the thought on productivity. The more productive managers get better results, and so that is ultimately how you measure whether or not a person is productive: What did you get done?

And to say that a more productive manager or a person that works more hours, that we don't want to pay them just really isn't reality.

Mr. ROKITA. Right. Because for one thing, they can go somewhere else, right?

Mr. WILLIAMS. One, they——

Mr. ROKITA. With the experience that you gave them, that they learned from you, they can walk right away. And that is—there is a cost to that, isn't there?

Mr. WILLIAMS. Absolutely. And businesses, over time, have recognized the value of their employees, like our business. We recognize the value of the employees.

And so what businesses have done to reward employees that—particularly salaried employees, is they put performance incentives

together so that that employee—that a more productive employee has an opportunity to actually earn more money than they would by logging additional hours.

And that is the incentive process that we have in place both at the company I own and CKE that we manage. And it is common throughout the industry.

Mr. ROKITA. Right. Well, thank you for that.

I associate with Ms. Fudge when she says, you know, this is not done out of the goodness of hearts or the businesses to be run and all these kind of things, and she mentioned supply and demand. I think that is exactly right. It is another way that I describe the free market, and that you can freely go to another job, or not, or stay and have that kind of relationship with your employer.

The 90-hour example, where this person—this worker was seemingly forced to work 90 hours and not compensated for it, I want, Ms. Hays, you and, Mr. Williams, you to comment on that.

I will switch over to Ms. Hays for a minute. In your experience have you ever met someone who worked 90 hours like that and was so productive that couldn't get a job somewhere else if they wanted to or—any comment on this whole situation? It seems odd to me.

Ms. HAYS. The short answer——

Mr. ROKITA. Is your mic on? Yes.

Ms. HAYS. Forgive me.

The short answer is no. You know, if folks are working 90 hours a week in an exempt capacity there certainly are alternatives if an employer is not recognizing that, either by way of compensation or flex time or some other method that would offset the balance of that.

Frankly, I think the folks that we have who work probably the most hours in any given week are, in fact, our direct care staff who earn time-and-a-half.

Mr. ROKITA. But yes, so you are either compensated for it——

Ms. HAYS. Correct.

Mr. ROKITA. You know, or——

Ms. HAYS. That is correct.

Mr. ROKITA. You have some other——

Ms. HAYS. Right.

Mr. ROKITA. Avenue.

Mr. Williams, anything to add there?

Mr. WILLIAMS. I agree with Ms. Hays that the managers that work more hours generally are not as productive, and generally if you have a manager that is working that many hours it is generally a crisis situation and it is very isolated.

Mr. ROKITA. So there is a productivity situation——

Mr. WILLIAMS. There is a productivity issue.

Mr. ROKITA. Certainly if you want to have that kind of lifestyle and you can be productive you would either be compensated for it appropriately or you would soon be somewhere else——

Mr. WILLIAMS. Or your——

Mr. ROKITA [continuing]. For a more appreciative employer.

Mr. WILLIAMS. Your results would demonstrate that productivity and would be rewarded by the benefits that you have achieved within the business, whether it be bonus or additional flex time or

employees that are developed to take your place, those sorts of things.

Mr. ROKITA. And again, the simple law of supply and demand that Ms. Fudge rightly points out handles this.

Mr. WILLIAMS. Absolutely.

Mr. ROKITA. Everything you are describing right now. Thank you.

Mr. WILLIAMS. Absolutely. I would agree with that.

Mr. ROKITA. Ms. Hays, the President's March 2014 memorandum to the Secretary of Labor directed him to, quote: "simplify the regulations to make them easier for both workers and businesses to understand and apply."

As an H.R. professional, do you think this rule succeeds in simplifying the FLSA's overtime regulations or do you see this rulemaking as really a missed opportunity to help employers comply with the law?

Ms. HAYS. We don't generally have a great deal of difficulty with the overtime regulation in that respect, as it relates to the memorandum. We are managing it fine.

We are a very flat organization. Nonprofits tend to be so. So, you know, there isn't a lot of creative interpretation that we have to manage to assign exempt versus nonexempt status.

Mr. ROKITA. Okay. Thank you.

My time is expired, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentlelady from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you, Ranking Member, for allowing me to participate even though I do not serve on the subcommittee, but I am on the full committee and this is an important issue.

Thank you, to all of our witnesses, for being here today.

And this hearing is about the administration's proposal to update overtime rules. And it is going to be important to actually hear from the Department of Labor about the proposed rule and why it is needed, and I look forward to those conversations. But I am glad we are having this discussion today.

I want to sort of—I am a big-picture person and I want to point out that the issue, as I see it, people are working hard. Too many people are working hard and barely making ends meet.

They are worried about whether they can save for their kids to go to college, retirement security, whether their children will do better than they did. I mean, that is everybody's dream that, you know, their kids will be able to do better. People are worried about that now because there are too many families that are just barely making ends meet even when they are working full time.

So it is important that we have this discussion not only about overtime but also about other workplace policies that have not kept up with our changing workforce—things like fair scheduling practices, paid sick leave.

You know, hourly workers often face unpredictable and irregular work schedules, and in many cases they have very little say about the dates and the times that they work. We have heard about employees getting to work and then being told that they are not needed but they don't—they have cleared their day and then they don't

get compensation for that. This all adds to the challenges that working families have trying to balance their responsibilities at home and at work.

I am proud to be a cosponsor of the *Schedules that Work Act*, that give workers more of a say in scheduling and provide more predictability in scheduling practices and certainty and financial security for families. I want to note that there have been advances in technology that really make that feasible now, more so than it has been in the past.

My home state of Oregon has been a leader. Legislature just passed a comprehensive paid sick leave law that allows workers to earn sick time that can be used not only for their own but for immediate family's illness, preventive care in instances of domestic violence.

I mean, those are important policies. We don't want people coming to work sick. We don't want people stressed out and sending their sick kids to school.

Family-friendly policies like this actually help businesses recruit and retain. They have good, loyal employees, and it decreases turnover and the costs associated with that.

There is a young man in Oregon who told a quick story. He said he is in high school in the 12th grade. He said, "I live with my mom and three siblings. Whenever one of my siblings gets sick I have to stay home and take care of them because my mom has to go to work to provide us with what we need."

He said, "It is my last year in high school, and having to skip school and stay home to take care of siblings affects me. I need to complete all my homework and projects. I want my mom to be allowed to have paid sick days so I can complete all my work as a student."

That is just an example about the need for our updated policies. That kind of situation is unacceptable.

Paid sick leave will help his family and others like theirs, just like the overtime proposal will help working families across the country. It is past time that we update the rule to keep pace with our changing economy, our changing workforce.

Mr. Eisenbrey, I wanted to ask you to discuss the—what you see as the effect of this rule on workers' hours and wages. Now, there was a suggestion in some of the testimony that workers may be reclassified from salaried to hourly, and then as a result see their pay reduced if they need to take time off. For example, if they are not in a place where they have paid sick leave or if—they want to attend a school function with their child, for example.

Do you see this rule being used to actually change salaried employees to hourly, and then they may lose pay because they need to take time off?

Mr. EISENBREY. All of the studies that have—that I have seen so far—the National Retail Federation, Goldman Sachs, the Department of Labor's analysis, and our own—suggest that employers will respond to this in different ways.

You know, Mr. Pocan, as a small business person, would just give the people overtime pay who are earning less than the threshold. Other employers will, as Mr. Williams said, probably convert some of their people to hourly, people who were salaried. And when

those people now work overtime, if they do, they will be paid time-and-a-half.

People who are close to the salary threshold will have their salaries raised. So if you are making $48,000 a year and the threshold is $50,000, an employer—it will be in the employer's interest to raise your salary to be above the threshold so they can continue to work you overtime hours without time-and-a-half pay.

It is certainly the case—all of the studies suggest that employers will convert some salaried people to hourly. Most importantly, they will shift hours from people who are currently managers, let's say working 20 hours a week extra.

If they had to pay time-and-a-half to them they will say, "No, I will switch those hours to new people—to part-timers, to people who are on my payroll now working reduced hours." The hours will be shifted to them.

The Goldman Sachs suggests 120,000 jobs will be created through that process. The Retail Federation said over 110,000 jobs—just in their sector, and they are only 20 percent of American employment. So you can imagine that—and the Department of Labor is closer to Goldman Sachs.

But I think hundreds of thousands of jobs are likely to be created——

Ms. BONAMICI. Thank you. I see my time——

Chairman WALBERG. The gentlelady's time is expired. Appreciate it.

I now recognize the gentlelady from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman. I yield my time to you, Chairman Walberg.

Chairman WALBERG. Oh. Thank you. I certainly can use it.

Let me continue on with that statement by Mr. Eisenbrey.

Mr. Williams, it is indicated Goldman Sachs and others indicate increased jobs. Does that bear out in your life experience that this change in rule on overtime rules would increase jobs in your business? And how would it, if it does?

Mr. WILLIAMS. Well, it could increase lower-level jobs at the low——

Chairman WALBERG. Lower-pay, lower-level jobs.

Mr. WILLIAMS. Lower-pay, lower-level jobs, yes.

Chairman WALBERG. With less opportunity?

Mr. WILLIAMS. With less opportunity. Because after the 20 hours that was mentioned—it has to pass through the test of, is there anything in those 20 hours that we can get rid of? Is there anything in those 20 hours that we can outsource? Is there anything in those 20 hours that we can move to employees to make them more productive by eliminating those same things out of their jobs?

So after you have passed through that test then what is left might be those lower part-time jobs at the lower—in the lower pay scale.

Chairman WALBERG. Ms. Hays, would you concur?

Ms. HAYS. I would absolutely——

Chairman WALBERG. With your employees?

Ms. HAYS. I would absolutely concur with that. You know, the trick to this is that either way in the nonprofit sector—notably, in the human services sector—we have to be afforded increased fund-

ing to support additional jobs, be they manager-level positions in one case, or, as Mr. Williams is discussing, the front-line positions.

You know, most human services organizations, and ourselves—MHY included, don't have that luxury. We can't just add positions. We can barely fill the positions that we have right now.

So, but, you know, they would be front-line jobs, by and large, to relieve managers of anything that we could in their job responsibilities.

Chairman WALBERG. Could this impact on MHY's mission of promoting safety, health, education, spiritual well-being of the youth and families under your care?

Ms. HAYS. Yes. Significantly so around safety. One of the things that our managers and supervisors are so good at—and what they have been—their experience brings to the table is when we have crisis situations with our kids, their leadership, their experience, their education, their training helps to de-escalate those situations a great deal. Now, certainly our staff are trained in those areas as well, but they don't have the experience that a manager line does.

Diminishing their ability to stick around on, you know, really dicey days to help manage new admissions and the emotions and the behaviors that come with that, or a bad family visit in which, you know, kids could spend the rest of the evening in an escalated state and be very unsafe to themselves, to the other clients on the unit, or to the staff, really is enhanced by a manager's presence. So safety would be a significant concern.

Chairman WALBERG. Mr. Williams, you mentioned ambition rewarded. In your experience as well as those people that you have had the opportunity to manage and move up along the chain, how does this impact on ambition rewarded, or I guess I would say ambition frustrated?

Mr. WILLIAMS. The reduction in the number of management persons, as Ms. Hays said, creates a vacuum. So in other words, you would not have those management positions available for those who are ambitious and want to see their careers rise. They would have to wait until those other positions were vacant, and by that time they may find other employment or may find something else to do.

But the ability to accelerate through an organization would be stifled as a result of that because you just couldn't afford it.

Chairman WALBERG. Thank you, and I yield back my time.

The gentlelady's time is expired. Thank you.

I now recognize Mr. Russell, the gentleman from Oklahoma.

Mr. RUSSELL. Thank you, Mr. Chairman.

And thank you for your testimony here today. It is a very important issue.

As a small business owner I find myself in not having flexibility for people that could be salaried, to give them the opportunity to work for a mission, to get something accomplished, and then later be compensated for time, which they consider valuable, to take care of their families or their needs. Many times these labor laws that we cite as protecting the worker I would argue many times put business owners in a difficult position because they cannot give the workers the flexibility that they need in a modern age.

Mr. Eisenbrey, I would like to ask you a few questions. Does salary make a person more efficient or less on the job, as opposed to workers with overtime?

Mr. EISENBREY. I don't think it really makes a difference, that a worker will be as productive as, you know, his or her desire and skills.

Mr. RUSSELL. So, but you contend here in your testimony that salaried workers are being unfairly compensated because they work more hours than if they were on some hourly wage with overtime. Is that correct?

Mr. EISENBREY. Absolutely.

Mr. RUSSELL. Okay. Well, with that in view, do you think working long hours on a set salary is unfair? And if so, do you think it makes the business more effective and workers more effective, or does it make them less effective?

Mr. EISENBREY. Well, you know, the stories that I have heard from people like Dawn Hughey are that they worked 90 hours a week sometimes and there was nothing good about that. I mean, the store was productive but her life was ruined by it.

Mr. RUSSELL. So nothing good about it, and you said in your testimony that government should use every tool at its disposal to help America's working class. Do you realize that every uniformed worker in the military is salaried? So their life just must be miserable, and that organization must be very inefficient because it is filled with salaried workers. Is that your contention?

Mr. EISENBREY. It is not my contention.

Mr. RUSSELL. Well, then why do you think that the President, who has not provided raises to our military—in fact, the numbers that you cite are really greater than what the President has provided in raises to the military when he is asking them for all kinds of missions that we send across the globe and new missions that are unfunded with the dollars that we have at hand. And yet he has even threatened that he will veto the National Defense Authorization, which calls for raise for these salaried workers. Well, if you think that the President's initiative is so good, then how do you account that he doesn't care about the salaried workers that he can control?

Mr. EISENBREY. I don't think that that is true. You know, I don't know all of the details of the budget negotiations, but they probably involve, you know, a compromise that one side now wants to break and have more money for defense and not more money for the enforcement of environmental regulations, and health, and welfare, and education. I imagine that that is what is going on, and if the President had the ability to increase the budget and increase taxes to pay for it, he would give salary raises——

Mr. RUSSELL. Well, he has that ability. In fact, when you look at the cost of free cell phones, and the cost of his free Internet proposal, and the cost of so many other things, why that could be put directly into the wages of privates and our seamen and airmen that are out there on the front lines.

But yet, he thinks that these entitlements are far more important.

And what I would offer to you is that salaried worker in a company that they take pride in, such as Carl's Jr., or Hardee's, or

something where they have a path to work their way up, or they enjoy it—I served 21 years in the military. I didn't get rich off of that. I moved 15 times in 21 years and raised five kids in uniform. That is not a way to the rich house, I can assure you.

But there wasn't a time that I didn't take pride in my job, and I was a salaried worker. And as a commander, a 90-hour work week? I would have welcomed that. I would have welcomed that.

And so what I offer to you is that you need to take a step back and look at that the salaried workers are not out there to punish employees. They are not out there to somehow make their life draconian and exact slave labor and sweat and blood out of these workers. It is giving them opportunities to grow.

And I am sure we have illustrations and testimonies today where people started as a fry cook and ended up as franchise owners and highly successful people. And so I tend to disagree with the whole premise of your testimony today on salaried workers.

And with that, Mr. Chairman, I yield back my time.

Chairman WALBERG. I thank the gentleman. With a little fear and trepidation I mention that the commander's time is expired, but thank you.

I now recognize myself, since I am a nonexempt, for my five minutes of questioning.

And I appreciate the witnesses being here today.

Let me ask Ms. McCutchen just to think through your background experience, your understanding of the issue a bit, and dream a little bit. How would you structure the duties test for the 21st century workplace?

And also, speak to what suspicions you might have concerning the Department of Labor's intentions on the duties test subsequent to their questioning.

Ms. MCCUTCHEN. Thank you. I think we did a pretty good job in 2004, and I think we heard today from one of the witnesses——

Chairman WALBERG. Is your mic on, or maybe closer? Yes.

Ms. MCCUTCHEN. Let me move it closer.

I think we did a pretty good job when we updated the duties test in 2004, and we have—I have heard from my own clients and we have heard from the witnesses today that employers are able to apply those rules. The concern is that when and if we have another major change to the duties test we will see even more litigation as employers adjust and try to apply new ones.

In particular concern is the executive exemption, where the Department of Labor has suggested that they might adopt a California rule, to require 50 percent of an exempt employee's time to be spent only in exempt work, which is not the realities of the workplace today.

We are not in a 1930s industrial economy where you have union work and nonunion work. We have exempt employees who, for employee morale and to make sure that businesses are running effectively, pitch in and do nonexempt work, and you shouldn't lose the exemption when you walk to the copy machine and do your own photocopies rather than asking your secretary to do it.

So those types of changes I think would be very concerning and not reflect the modern workplace if there are changes.

I am concerned that we have not seen any regulatory language. In 2004, when we did our comments, you know, we would take out a word here and there that we thought were not—didn't add any meaning; we would change—drop a comma for grammatical purposes. And in the comments what we heard was, "No, dropping that word is significant. You can't drop it. Moving the comma is significant. You need to put it back in."

And because DOL has not given us any regulatory text to react to, we cannot be meaningfully engaged in——

Chairman Walberg. Give us a little more example on what that comma might mean.

Ms. McCutchen. Right. Right. It could, well, or an "and." If you change a word from "or" to "and," that is significant. And since we are not going to be able to see the regulatory text before the final rule, there is—the process—the rulemaking process is not—won't function like it should in giving the public an opportunity to tell the Department of Labor that they have moved the—they shouldn't have changed it to "and," or they have moved the comma inappropriately.

Chairman Walberg. Ms. Hays, you mentioned in your opening comments and your testimony that scary phrase, "This could put us out of business." Could it?

Ms. Hays. I am going to go back——

Chairman Walberg. Or is that hyperbole?

Ms. Hays. No. I am going to go back to my testimony and use the words quite literally. We have approximately 50 employees who fall into an exempt status that would be affected by this regulation change—professionals; therapists, largely; and managers.

To deliver services to the extent that we are obligated to and contracted to, at the rate of which we are funded, with this imposition on our ability to deliver those services and be required to restrict so that we could stick to a budget that is, again, already underfunded, is almost an impossibility.

Therapists and these managers need to have the ability to deliver services in a manner in which we are obligated per regulation and in compliance with requirements from third-party insurers to Department of Human Services.

So, you know, it is going to be very difficult for an organization like MHY to make good on its commitments—its continuity of care obligation—without going over those 40 hours for people who are making $40,000, $45,000, $50,000 a year. We are borrowing from our foundation right now just to keep the lights on.

Chairman Walberg. So we are talking here about not only potential loss of employment, but significant loss of service to people who need it who aren't connected with overtime issues or duties issues, but simply need the care that you receive.

Ms. Hays. We serve approximately 1,000 clients a year in our education program, our residential program, and our community services program. Like I said, if we are fully employed we employ about 160 people. More realistically, we employ about 140 jobs in Mars, Pennsylvania.

Chairman Walberg. Okay. Well, thank you.

My time is expired, and I appreciate so much the questioning of my subcommittee as well as the answers, the comments that have

been made all across the spectrum today. And it is an important issue. We take it seriously here.

And so now I will recognize the Ranking Member for her closing comments.

Ms. WILSON of Florida. Chairman Walberg, I want to thank you again for holding this hearing and giving us an opportunity to discuss the Department of Labor's proposed overtime rule.

I want to thank the witnesses for being here today.

And every time we have these hearings I want to remind my colleagues that what we discuss during these hearings affects the lives of working people in our districts. These proposed overtime rules will truly change the lives of millions of Americans and make good on the promise of a fair day's pay for a fair day's work.

This proposed rule will mean more mothers and fathers will have time to care for their children and be involved in their lives. Think what that will mean for the next generation of children for them to have their parents home just a little more to help them with their homework; teach them to throw a baseball; to give them the discipline, the supervision, the support, and the love they need to grow into strong, smart citizens.

This proposed overtime rule will mean more American workers will find a new job because employers will be encouraged to hire more workers instead of overworking a few. It will mean more part-time workers will find more hours as employers spread around hours.

Think what that will mean for our economy if more workers had jobs and more money to spend. Think what it will mean for our country if we get one step closer to guaranteeing a fair day's pay for a fair day's work for all Americans.

This overtime rule is for the millions who struggle under the circumstances we have heard discussed today—who work excessive hours with no extra pay, who are tormented by the impossible choice of keeping the job with absurdly long hours or being unable to provide for their families. For all those who are trying as hard as possible to make ends meet and to get ahead, this proposed overtime rule is for you.

We are the Workforce Protections Subcommittee. Our job is to protect the workers who are the workforce.

And I want you to know that the Democrats on the Workforce and Education Committee, more than 150 Democratic members of Congress, and many advocates and organizations represented here today will fiercely and fervently fight to defend this much-needed update to overtime protections. We will fight to ensure that this proposed overtime rule reclaims the fairness owed to millions of American workers.

We will not only fight for this rule, but fiercely defend against attempts to erode any existing overtime protections. We will fight against efforts to strip workers of their overtime pay that takes the insidious form of comp time.

Allowing employers to give workers paid time off or comp time in lieu of overtime may sound great but for the fact that it is the employer who gets to choose when and if the employee can take that time off. Bills like this amount to more work and less pay for

families who are struggling to make ends meet because comp time can't pay the bills, buy bread, or help build our economy.

Mr. Chairman, I ask unanimous consent that letters from the following organizations be entered into the hearing record: the Center for American Progress, the Center for Economic and Policy Research, the National Employment Law Project, the National Partnership for Women and Families, the United Steelworkers 9to5. These letters express support for the Department of Labor's proposed rule to increase the overtime salary threshold.

[Additional submissions by Ms. Wilson follow:]

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July 22, 2015

Congresswoman Frederica S. Wilson
208 Cannon House Office Building
Washington, DC 20515

Congresswoman Wilson:

The Center for American Progress (CAP) strongly supports the U.S. Department of Labor's (DOL) proposal to raise the overtime threshold from $455 per week ($23,660 per year) to $970 per week ($50,440 per year).

Expanding overtime protections is a major step by the Administration to address stagnant incomes and growing inequality. The evidence is clear that raising the overtime threshold for salaried workers will help raise incomes for both low-wage and middle-class workers. More money in the pockets of these workers means more spent at local businesses, boosting our economy.

Low wages are one of the drivers of the current weak recovery. A CAP analysis of the U.S. Securities & Exchanges Commission filings of major retailers found that two-thirds cited stagnant or falling incomes as a "risk factor" for their stock price, double the share in 2006.[i] Indeed, the International Monetary Fund (IMF) released a study in April 2015 that the shortfall of business investment in the U.S. is a result of the lack of demand for goods and services.[ii] Overtime reform will put money into the pockets of the customers that these businesses rely on, giving them a reason to invest and hire.

Raising the salary threshold will also honor the hard work of millions of Americans who are working harder but have less to show for it. This action will help ensure they are paid what they have earned for their work. This most basic of protections will help provide that security and help millions of American families get a little closer to living the American dream.

This letter is intended to help the Committee understand three key realities behind overtime reform.

Reality 1: Overtime Reform Is a Job Creator

Employers face perverse incentives when it comes to salaried employees who do not receive overtime—they must pay employees for the first 40 hours of work but work after the 40th hour is free. Employers thus have a good reason to work exempt employees more than 40 hours per week instead of hiring an additional worker since $0.00 per hour is lower than even the current $7.25 minimum wage. These

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incentives are perverse not only because they leave the exempt employee overworked and underpaid, but they actually cause employers to hire fewer workers.

Some opponents of overtime reform fear that it will eliminate jobs, but that is literally opposite the case. The National Retail Federation (NRF), one of the main opponents of overtime reform, has admitted that they "do not expect the new rules to trigger job losses" and that a salary threshold of $984 per week ($51,000 per year) would create 117,500 in the retail industry alone.[iv] Goldman Sachs has estimated that the new rule would create 120,000 jobs in 2016.[v] Fear of job losses is not a serious reason to oppose DOL's proposed rule.

Reality 2: Yes, Overtime Reform Will Give Workers a Raise

The more sophisticated argument against overtime reform is that employers will make adjustments so that the rule does nothing for workers, but it is based on misreading the academic literature on overtime. The argument is that employers will pay the overtime, but will reduce the employees' base wage enough so that weekly earnings and hours are unaffected. This argument is based principally on the work of Anthony Barkume,[v] a retired economist at the U.S. Bureau of Labor Statistics who supports raising the overtime threshold.[vi] Barkume finds that employers certainly *try* to reduce base pay to avoid paying higher wages, but overtime still raises weekly earnings. The DOL's Notice of Proposed Rulemaking incorporates Barkume's partial adjustments in calculating that American workers will receive a raise of $1.2 to $1.3 billion from a higher salary threshold.[vii]

There are several reasons why employers cannot completely adjust employees' wages downward. One reason is that employers cannot cut employees' base wages below the minimum wage, reducing their room to adjust wages downward. Similarly, overtime-exempt employees must be supervisors or professionals and employers presumably have to pay them more than entry level employees. Again, this serves as a floor below which employers cannot reduce base pay. Another reason is that wages are "sticky" in the short run and employers cannot reduce them in nominal terms without reducing morale and productivity.[viii] Thus the effects of overtime reform are going to be especially strong in the short run.

Point 3: Not Updating Overtime Rules Is a Death Sentence for Overtime Rights

Perhaps most importantly, failure to raise the salary threshold is not a decision to keep the status quo—it is a decision to produce a new status quo where guaranteed overtime rights disappear completely.

The salary threshold for overtime is not tied to inflation and it covers fewer workers with each year that passes. The Congressional Budget office projects that prices will increase 27.8 percent between 2014 and 2025, which means the already low $23,660 salary threshold will have a real value of $18,500 in

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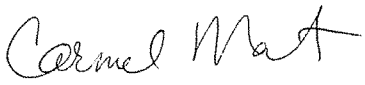
2025 if DOL does not raise it.[ix] Such a low salary threshold would exist only on paper. A previous CAP analysis has shown that, if current trends continue, the salary threshold will disappear completely by 2026 without adjusting the threshold.[x]

Opponents of raising the salary threshold have thus staked out a radical position: in effect, they oppose the right of any workers to receive overtime pay based on their salary.

Sincerely,



Carmel Martin
Executive Vice President, Policy

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[i] Brendan and Ike Lee, "Retailer Revelations," (Washington, DC: Center for American Progress, 2014), available at https://www.americanprogress.org/issues/economy/report/2014/10/13/98040/retailer-revelations/

[ii] International Monetary Fund, "Private Investment: What's the Holdup," April 2015, available at http://www.imf.org/external/pubs/ft/weo/2015/01/pdf/c4.pdf

[iii] National Retail Federation, "Rethinking Overtime," 2015, available at https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf p. 33

[iv] Eric Morath, "Overtime Rules Seen Boosting Low-Wage Hiring," The Wall Street Journal, July 19, 2015, available at http://www.wsj.com/articles/overtime-rules-seen-boosting-low-wage-hiring-1437333807

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July 20, 2015

The Honorable Tim Walberg
Chairman
House Education and Workforce Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515-2207

The Honorable Frederica S. Wilson
Ranking Member
House Education and Workforce Subcommittee on Workforce Protections
208 Cannon House Office Building
Washington, DC 20515-0924

Dear Chairman Walberg and Ms. Wilson:

I am writing to you regarding the upcoming subcommittee hearing entitled "Examining the Costs and Consequences of the Administration's Overtime Proposal," which is to be held on July 23, 2015. I strongly support of this proposed update to the federal regulations regarding the exemptions from minimum wage and overtime pay.

As a labor economist with over two decades of research on the effects of public policies and company practices on outcomes for companies and workers, I have found that the incentives to overuse resources that are free are almost irresistible. Time is a limited and precious resource to most workers, but when everything over 40 hours per week for millions of employees is free to the employer, there is little incentive for employers to make efficient use of employees' time.

Restoring the right to overtime pay to millions of middle-income workers with few of the attributes of true executives will increase incomes and/or reduce the stress on working families, and will provide employers with incentives to more efficiently utilize their workforce.

In addition, I would like to highlight the fact that the Fair Labor Standards Act's "white collar" exemption was radically changed in 2004, when the Department of Labor implemented a new definition of "executive" employee. This new definition dropped the decades-old requirement that an executive employee must exercise discretion and sharply reduced the amount of time an employee had to spend in managerial or executive duties in order to be considered exempt. Under the new definition, any salaried employee that spent as little 20 to 30 percent of their time doing managerial work could be classified as an executive exempt from overtime protections.

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These relatively recent changes to the overtime rules made it possible for employers to misclassify millions of workers as "executives" exempt from overtime pay. A promotion to "manager" for low-wage workers in retail or food service can lead to a smaller paycheck, as they no longer receive premium pay—or any pay—for working late at the cash register or getting ready for the next day's customers. It is apparent that the current standard duties tests are not working as intended to screen out employees who are not bona fide exempt employees. Rather, the current duties test has made the misclassification of millions of workers possible, and has unfairly denied them overtime pay.

Estimates at the time were that employers could move as many as 6 million workers from hourly pay to salaried and deny them pay for hours worked above 40 in a week. The new overtime rules also increased the salary level for getting overtime pay from $8,060 a year (less than a minimum wage worker earned in 2004) to $23,660, but failed to index it to average wages or inflation, guaranteeing that it would cover fewer and fewer workers with every passing year. It covered just 8 percent of salaried workers in 2014, compared with 62 percent in 1975.

Today, an annual salary of $23,660 ($455 a week) is below the poverty line for a family of four. This salary threshold is too low to protect workers from losing overtime pay, no matter how many hours they are required to work. It is disgraceful that workers earning poverty wages can be denied overtime compensation if their employers classify them as exempt "executives."

That is why I fully support the Administration's new proposal to remedy this perverse situation by adjusting the salary threshold for inflation. The new proposed overtime threshold, which would be $970 a week, or $50,440 a year for a full-year worker, and automatically updated in the future by linking it to the average wage or to inflation, provides a bright line rule that assures that middle-income workers with limited discretion and few managerial responsibilities will be fairly compensated for the time that they work.

Thank you for your consideration of my viewpoints.

Sincerely,

Eileen Appelbaum, Ph.D.
Senior Economist, Center for Economic and Policy Research, Washington, DC
Visiting Professor, Department of Management, University of Leichester, UK

Christine L. Owens
Executive Director

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July 23, 2015

The Honorable Tim Walberg
Chairman, House Education and Workforce Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515-2207

The Honorable Frederica S. Wilson
Ranking Member, House Education and Workforce Subcommittee on Workforce Protections
208 Cannon House Office Building
Washington, DC 20515-0924

Dear Representatives Walberg and Wilson:

On behalf of the National Employment Law Project (NELP), a non-profit organization that for over 45 years, has sought to ensure that America upholds for all workers her promise of opportunity and economic security through work, I ask that this letter be made part of the record of the July 23, 2015 hearing of the Subcommittee on Workforce Protections entitled "Examining the Costs and Consequences of the Administration's Overtime Proposal."

For too long, America's workers have been spending more hours at work but bringing home less pay. By announcing proposed reforms to make more workers eligible for overtime pay, the Obama administration has taken a crucial step toward remedying decades of neglect in maintaining overtime-pay protections and reversing decades of wage declines that have hammered America's middle class.

NELP applauds the Labor Department's proposal to raise the overtime salary threshold to $970 per week in 2016, or $50,440 in full-time earnings. Workers earning less than that would be automatically entitled to time-and-a-half overtime pay when they work more than 40 hours per week.

The updated threshold level is long overdue. The current threshold of $455 per week, or $23,660 per year, has fallen badly out of date. It is so low that workers earning less than the poverty level for a family of four may be excluded from overtime-pay protection. In addition, far fewer workers are eligible for overtime pay today than in the past. In 1975, 62 percent of workers earned less than the overtime salary threshold and were therefore automatically eligible for overtime pay; in 2014, only 8 percent of workers fell below the threshold, according to the Economic Policy Institute. Raising the overtime salary threshold to $970 per week will ensure that at least 44 percent of America's workers are automatically covered by overtime-pay protections—a share of the salaried workforce that seems entirely consistent with the purpose and goals of the Fair Labor Standards Act's overtime requirement and its narrow exemptions.

We also stress how important it is to make sure this proposed regulation is finalized as quickly as possible. Workers have seen their overtime protection continuously erode since the late 1970s, the last time the regulation was regularly updated to ensure that there was a sufficiently robust salary level. And the 2004 revisions did far too little to restore the lost value of the salary threshold by setting it too low even for that time, and significantly weakened the duties test, stripping even more protection from workers. Thus, for more than a decade, too many workers have been forced to work too many hours essentially for free. We cannot allow them to continue to suffer such abuses any longer than necessary. Similarly, the spreading of excess hours that will occur once the new regulation is finalized will provide much needed relief to the far too many under-employed and unemployed workers in our economy.

Though some will urge an extension of the already ample notice and comment period, as part of a campaign to simply delay implementation of these regulations beyond the end of the Obama Administration, the requests for any such extension lack merit.

On March 13, 2014, President Obama issued a Presidential Memorandum directing the Department of Labor to update the regulations defining which white collar workers are protected by the Fair Labor Standards Act's overtime standards. Upon issuance of this Memorandum, the Department undertook an extensive effort to reach out to all types of stakeholders, conducting listening sessions with, among others, workers, employers, employers' advocates and business associations, workers' advocates, unions, state and local governments, and small businesses. At each session, stakeholders were asked to opine on the salary threshold, the duties test, and how the regulation could be simplified. Indeed, employer groups such as the National Restaurant Association **publicized** these sessions to their members, in order to drive member attendance.

Nearly 16 months after the issuance of the Memorandum, during which time interested stakeholders both supportive of and opposed to revising the regulation continued to meet with officials from both the Wage and Hour Division as well as the Office of Management and Budget, DOL officially issued the Notice of Proposed Rulemaking (NPRM) on July 6th, 2015.

All interested stakeholders have thus had a more-than-ample period of time to prepare their arguments, and to mobilize their members and allies to comment when the NPRM was issued. Just as thinly-resourced workers' rights organizations have been planning for the release for over a year, employer associations have been doing the same with their members as well.

During that 16 month period, some of the nation's leading advocates for employers issued significant reports, letters and recommendations about how the Department should revise, or not revise, the regulations. Though not a comprehensive list, some of the publications include: (1) a 16-page **letter** from the Human Resources Policy Association; (2) a 30-page **report** from the National Retail Federation; (3) an 8-page **report** from the Heritage Foundation; and (4) 6 pages of data **analysis** from the National Association of Home Builders.

These and other employer-generated materials address salary threshold levels comparable to what the Department has proposed, and include extensive comments about the duties test.

Based on all these factors, claims that the 60-day comment period is insufficient time to respond and coordinate one's members to respond ring hollow. The substance of the NPRM was not much of a surprise to anyone who has been following this issue for the last 16 months, except perhaps for the

Department's suggestion that it may refrain from proposing any changes to the duties test at the current time. This, if anything, makes the process of preparing comments easier, rather than more difficult.

The public overwhelmingly supports the proposed rule, there is strong Congressional support, it is well within the Department of Labor's power to issue a new overtime rule, and as described above, those now requesting an extension had ample opportunity and every reason to anticipate the proposed salary threshold.

We applaud the administration's persistent efforts to improve jobs and raise wages for America's workers—through this overtime proposal, its strong support for raising the minimum wage, and its extension of minimum wage and overtime protections to home care workers. In an era of unrelenting concern about low wages and economic inequality, the Obama administration's actions demonstrate what government can do when it has the political will and the commitment to put the interests of America's workers and their families first.

Thank you for your attention to this matter and for including NELP's letter in the record for the July 23, 2015 hearing on the proposed overtime regulations.

Sincerely,

Christine L. Owens
Executive Director

July 23, 2015

The Honorable Tim Walberg
Chairman, House Education and
the Workforce Subcommittee on
Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515-2207

The Honorable Frederica S. Wilson
Ranking Member, House Education and
the Workforce Subcommittee on
Workforce Protections
208 Cannon House Office Building
Washington, DC 20515-0924

Dear Chairman Walberg, Ranking Member Wilson and Members of the Subcommittee:

The National Partnership for Women & Families strongly supports the U.S. Department of Labor's (DOL's) Notice of Proposed Rulemaking (NPRM) raising the overtime salary threshold to $50,440 annually in 2016 and establishing a mechanism to automatically update the threshold. The rule would extend overtime protections under the Fair Labor Standards Act to nearly five million salaried workers, boosting economic security for working families across the country. We commend the Department of Labor for taking this important step and urge Congress to support the rule and facilitate its swift implementation.

The National Partnership is a non-profit, nonpartisan advocacy organization with more than 40 years of experience promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. Since our founding as the Women's Legal Defense Fund in 1971, we have fought for every significant advance for equal opportunity in the workplace, and we continue to advocate for meaningful safeguards that prevent discrimination against women and families.

Right now, salaried workers must be paid poverty wages to qualify for overtime pay in this country. That is wrong and terribly harmful to workers, families and our economy. Currently, to be eligible for overtime, salaried workers must be paid less than $23,660, which is below the poverty level for a family of four. The proposed rule raises the salary threshold to a reasonable level. Updating the rule demonstrates a commitment to and a keen understanding of what working people and our economy need.

The proposed rule will make overtime eligibility and protections clearer for millions of women and mothers who are their families' breadwinners. Unfair pay, including outdated overtime rules, has substantial consequences for all workers, and especially for the two-thirds of women who are key breadwinners for their families. These are women who too often cannot put food on the table, mothers who too often cannot buy shoes for their children, and grandmothers who too often cannot buy gas for their cars even though they work long hours. They would benefit from this new rule, as would the children who rely on them.

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Expanding overtime protections will guarantee employees fairer wages and hours. Not only is the current salary threshold unacceptably low and outdated, but low-wage employees are too often misclassified as managers and then forced to work long hours without overtime pay. The new rule will help to keep millions of workers from being denied the pay they rightfully deserve and their families desperately need. Employers who have been relying on their employees' free labor now will have to acknowledge the value of the 40-hour workweek by either limiting workers to 40-hour workweeks, thus giving them more time with their families, or compensating them for the extra hours worked.

Raising the overtime salary cap is tremendously popular. According to a recent national survey, nearly eight in ten Americans support raising the threshold above $23,000 per year, and 65 percent support raising it to $75,000 – far higher than the level proposed in the new rule. Nearly two-thirds of Americans (64 percent) are more likely to support a candidate who supports substantially increasing the overtime threshold.

The National Partnership for Women & Families applauds DOL for proposing a strong rule and urges Congress to allow the regulatory process to proceed without interference or delay. It has been three decades since the regulations that govern overtime pay have been updated in a meaningful way. Working families cannot wait any longer. We urge Congress to work with DOL in ensuring swift finalization and full implementation of the final rule.

Sincerely,

Debra Ness
President

July 22, 2015

VIA EMAIL
U.S. House of Representatives
Education and Workforce Committee
Washington, D.C. 20515

Dear Chairman Kline & Ranking Member Scott:

Thank you for allowing the United Steelworkers (USW) this opportunity to submit a statement for the record of the September 24, 2015 hearing: "Examining the Costs and Consequences of the Administration's Overtime Proposal". The USW strongly supports President Obama's proposed update of the nation's Fair Labor Standards (FLSA) regulations, which, when enacted, will restore overtime protections to millions of workers.

This revision to the FLSA is long overdue, but will not significantly impact the USW's 850,000 U.S. members – **because they have the benefit of collective bargaining**.

For more than 30 years the average worker's wages have been stagnant or even declined, while executive salaries and benefit packages have sky rocketed to obscene levels. According the Economic Policy Institute, the average CEO now makes 300 times more than the average worker. That same report shows that between 1978 and 2014 the average CEO's received a 997 percent increase, while the average non-supervisory worker received only 10.9 percent wage increase, adjusted for inflation. This is why raising the minimum wage and increasing the FLSA salary threshold are critical governmental interventions to help U.S. workers keep pace with rising energy, housing, and consumer prices.

For those who oppose governmental intervention of this nature, there is an alternative. When workers have the ability to form and join unions to collectively bargain with their employers, wages and benefits increase. Since the passage of the National Labor Relations Act (NLRA) the union difference is staggering because when workers can bargain wages, hours and working conditions they have a greater likelihood of:

- Annual salary increases in addition to cost of living -- union members' pay is $200 per week higher when compared to non-union workers;
- Pensions and health care;
- Overtime or compensatory, sick and vacation benefits, and union workers are more likely to have paid parental leave;

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- Full participation in health and safety rules;
- Women working with a union contract earn more than their non-union male counterparts;
- Union members are paid for the work they perform, and not subjected to discriminatory pay and benefits; and
- Grievance procedures that resolve complaints and reduce employment law suits.

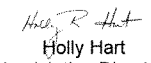
The ability to collectively bargain with employers is the best private sector alternative to government regulation and a critical element to lowering income inequality and workplace discrimination.

For example in March of 2015, USW reached an agreement with Shell Oil Company setting a standard for industry wide bargaining including annual wage increases and maintaining the existing health care cost sharing ratio at over 60 refineries. The FLSA sets only the floor for overtime. Shell Oil and USW workers collectively bargain eligibility and rates of overtime pay, which far exceed the Administration's proposed rules. In addition, it is important for USW members to improve the safety records in U.S. petro-chemical plants that experience unacceptable worker fatalities. It is only through collective bargaining that workers have a real voice to improve and fully participate in workplace safety and health, especially in extremely dangerous industries such as refineries, chemical and paper plants, other manufacturing, and mines.

The Administration's proposal when enacted will help millions of workers who are misclassified by their employers as supervisors or managers to avoid overtime. By raising the income threshold from $23,660 to $50,440 by 2016 it will ensure millions of workers receive a much needed raise. It will create jobs, because employers not wanting to pay overtime will hire more workers at less cost.

Unions are the private sector non-governmental solution to improving the wages, hours and working conditions of U.S. workers. Absent more unions, we strongly support the Administration's efforts to address the growing economic inequality in the U.S. economy. Thank you again for allowing us to submit this letter for the record.

Sincerely,



Holly Hart
Legislation Director

cc: House Education and Workforce Members

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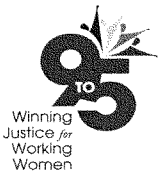

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July 22, 2015

The Honorable Frederica S. Wilson
Ranking Member, House Education and Workforce Subcommittee on Workforce Protections
208 Cannon House Office Building
Washington, DC 20515-0924

Re: U. S. Department of Labor Docket ID#: WHD-2015-0001, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees - SUPPORT

Dear Representative Wilson:

On behalf of 9to5, National Association of Working Women and our members across the country, I am writing to express our strong support for the U. S. Department of Labor's plan to strengthen overtime protections.

9to5 is a national membership organization of women working in low-wage jobs, founded in 1973. We work to improve policy on fair employment, equal opportunity and economic security issues that directly affect our members and constituents. Access to fair wages and overtime standards is among those issues.

Reforming overtime standards is one of the most important steps we can take to support working families who are struggling to get ahead. Fair overtime standards are to the middle class what the minimum wage is to low-income workers – not everything, but an indispensable labor standard essential to protecting income.

In 1975, more than 65 percent of salaried American employees earned time-and-a-half pay for every hour worked over 40 in a week. Because the threshold for overtime pay—the salary level up to which employers are required to pay overtime—hasn't been updated in 40 years, it's now less than the poverty line for a family of four. The percentage of salaried workers covered by overtime protections has shrunk to just 11%.

Women and working mothers will especially benefit from raising the overtime salary threshold because women make up a much bigger share of the workers in the jobs that will be covered.

This includes women like Jennette Wilfong, a 9to5 member from Cape Girardeau, Missouri, who worked in a group home for adults with developmental disabilities. She worked 50 to 60 hours each week, and was on call 24/7 Monday to Friday, as well as some weekends and holidays.

As a salaried employee, making $500 per week ($26,000 annually), Jennette never earned any overtime pay for all her hard work. "Sometimes if a staff member didn't show, I'd have to pick up an overnight shift and then keep working my full shift the next day. I was never compensated for any of those extra shifts or late-night emergencies," she says.

When employees put in extra hours and work harder to try to get ahead and provide more economic security for their families, they should be paid for that work. It's a matter of basic fairness. It's also good for the economy. Strengthening overtime protections, along with policies like raising minimum wage, boosts wages for workers and strengthens the middle class. More money in employees' pockets means more customers for businesses, more job creation and a stronger economy for everyone.

For all of these reasons, 9to5 supports immediate implementation of the U. S. Department of Labor's overtime plan, and we urge your support for this very important measure.

Sincerely,

Linda Meric, National Executive Director
9to5, National Association of Working Women
(303) 628-0925 x15
Lindam@9to5.org

Ms. WILSON of Florida. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady. And these letters have already been received and part of our record.

Well, again, thank you for this hearing. Thank you for the input that you all put in.

In closing, I would just say that we, as well, are committed to making the workplace of the 21st century something that is growing and expanding of opportunity.

I am not going to use the words that we will fight for it. I want to work with all sectors and both sides of the aisle, as well, to make sure that we have a workplace that is expanding and growing for opportunity—with opportunity for people; that we have certainly ambition rewarded and not frustrated; that we have a workplace that encourages people with all aspects of their life.

But understanding the realities, that means we must work together. We can't have a one-size-fits-all plan. That won't work. Doesn't work in my marriage, I can tell you that. Doesn't work with my kids or grandkids. We have to have the flexibility that moves us forward.

The duties test. I would hope that the Department of Labor would give us a stronger indication—in fact, I would hope and will be making strong suggestion and request that they extend the time of implementation; that they take time to listen to what was said here today, and read the information put in our other hearings as well and look to the reality of what is going on.

Sixty, 70 hours without overtime is a vast overstatement if you just take in the context that was pushed out today in so many ways, and I hope without intention. But that is the rarity. That is not every week. But it deals with the realities of what the workplace entails.

With an economy that has been very sluggish—with a work growth economy that has been very sluggish and is aimed toward low income, minimum wage, and not the living wage that we want to see take place as a result of the growing economy that is done by government getting out of the way as much as possible and letting the grass roots grow what can and has grown in this country in the past.

Employers will adjust. A statement was made here today in testimony. Yes, employers will adjust. We know that. That happens.

But how will they adjust? Will they adjust by expanding opportunity for more people to grow and find their sweet spot? No. They will adjust to meet the needs of staying alive and viable, and that doesn't always work in the best way.

And so then the next question ought to come: Will employees adjust? Be much more difficult for them if they don't have the job, if they don't have the opportunity to expand.

And so I promise to my ranking member as well as my committee and all in the room that we will work toward finding a solution and encouraging the Department of Labor to take a second look at a solution that is not a one-size-fits-all, that doesn't go beyond the reality of the workplace and the workforce in the world today and in this country, and to make sure it fits; and we move forward, but we move forward in a way that doesn't break but rather expands opportunity.

We will talk about this in the future, I am sure, and we look forward to that.

Having no further business to come before this subcommittee, it is adjourned.

[Additional submissions by Chairman Walberg follow:]

July 23, 2015

The Honorable Tim Walberg
Chair, the Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Frederica Wilson
Ranking Member, the Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of the American Hotel & Lodging Association (AH&LA), I write to thank you for holding the hearing entitled "Examining the Costs and Consequences of the Administration's Overtime Proposal" on July 23, 2015. The Department of Labor's (DOL) proposed rulemaking, published in the Federal Register on July 6, 2015, will have significant consequences for the hospitality industry, and we appreciate the Subcommittee's attention to this important issue.

The American Hotel & Lodging Association is the sole national association representing all sectors and stakeholders of the U.S. lodging industry, including owners, REITs, chains, franchisees, management companies, independent properties, suppliers, and state associations. The lodging industry is one of the nation's largest employers with nearly 2 million employees in cities and towns across the country. It's particularly important to note that this industry is comprised of 92 percent of small businesses, with more than 55 percent of hotels having 75 rooms or less.

The lodging industry generates $155.5 billion in annual sales from 4.9 million guestrooms at 52,529 properties nationally. Its growth, sales, and employment base are key reasons that lodging has helped lead our nation's economic recovery with nearly 70 months of growth. The lodging industry is a valuable contributor to the local and national economy, creating well-paying jobs and career opportunities for millions of people. Hoteliers strive each day to make sure those opportunities continue to grow.

AH&LA and its member organizations have serious concerns with the Department of Labor's proposed rulemaking that alters the exemptions for executive, administrative, professional, outside sales, and computer employees (the "white collar exemptions") under the Fair Labor Standards Act. AH&LA believes the proposed changes will result in a decrease in flexibility and career advancement opportunities for employees and an increase in confusion and litigation for employers trying to understand the new requirements.

In its proposal, the Department has recommended increasing the minimum salary level for the white collar exemptions from the current level of $455 per week, or $23,660 per year, to $970 per week, or $50,440 per year. This is an increase of over 100 percent and will be an enormous and burdensome cost to the hospitality industry. Public opinion does not support such a change. The polling company,

inc./WomanTrend conducted a nationwide study in February 2015 that found 21 percent of adults surveyed would not increase the overtime salary threshold at all, and a 65 percent-majority believed the salary limit should not be increased by no more than 50 percent, or to $35,490 per year. The Department is clearly out of step with public opinion and is greatly overestimating employers' ability to absorb costs and burdens associated with this dramatic change.

The Department estimates four million individuals will be reclassified to non-exempt, overtime-eligible employees because of the proposed increase. While DOL lauds this change, non-exempt workers generally have less flexibility and fewer career advancement opportunities than their exempt counterparts. Employers are required to track non-exempt employees hours carefully. As a result, non-exempt employees generally have less flexibility with, and control over, their schedules and have fewer options to work remotely, as tracking hours in such circumstances can be complex. In addition, employers will be more reluctant to allow employees to attend training sessions designed to further their knowledge of the business or industry if that time will result in overtime pay, leaving nonexempt employees with fewer prospects to advance their careers.

The Department of Labor has also proposed indexing the salary level to either the 40th percentile of full-time salaried workers' weekly earnings or the Consumer Price Index. According to the Department, this would allow the salary threshold to remain relevant in the future while avoiding the political and time-consuming nature of the regulatory process. This will require significant economic analysis and research so that AH&LA may provide the Department with the most accurate and informative comments on the proposal's affect on the hospitality industry. Such analysis is costly and time-consuming. In order to complete this analysis, AH&LA requested a 60-day extension to the comment period.

Additionally, the Department chose not to propose any specific changes to the primary duties test, which is the test used to determine if the employee's primary responsibilities fit the definitions of executive, professional, or administrative positions and therefore qualify the individual as an overtime-exempt employee. We agree the Department should not return to the more detailed long duties test, which was effectively abandoned by DOL decades ago, or otherwise tamper with the existing duties test. Imposing the archaic long duties test on our modern economy or something similar would simply lead to less clarity and more litigation.

The Department, however, has asked the public for input on the current duties test and posed several related questions. This approach is more appropriate for a Request for Information or Advanced Notice of Proposed Rulemaking than a Notice of Proposed Rulemaking. The absence of a specific regulatory proposal greatly impairs the ability of the regulated community to provide meaningful, substantive comments. If DOL wishes to make changes to the duties test—and we strongly recommend against doing so—the Department should engage in a separate rulemaking in which it provides specific regulatory proposals.

For all of these reasons, AH&LA strongly urges the Subcommittee, as well as the full Education and the Workforce Committee, to safeguard the current overtime exemptions and reject the Administration's proposal in order to protect the hospitality industry, its workers, and the economy as a whole. We look forward to working with you as we move forward in this process.

Sincerely,

Brian Crawford
Vice President, Government & Political Affairs
American Hotel & Lodging Association

THE EDUCATION AND WORKFORCE COMMITTEE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING TESTIMONY
"Examining the Costs and Consequences of the Administration's Overtime Proposal"
Thursday, July 23, 2015 at 10:00a.m.

Dear Distinguished Members of the Education and Workforce Committee:

The American Network of Community Options and Resources (ANCOR) appreciates the opportunity to provide testimony on the important issue of overtime protections for the workforce, including the dedicated men and women who are employed in the provision of services to individuals with intellectual and developmental disabilities. ANCOR is a national trade association representing more than 1,000 private providers of community living and employment services to more than half a million individuals with disabilities across the country. Together, our members employ more than 400,000 direct support professionals and other staff.

The proposed Department of Labor (DOL) overtime rule for discussion is an issue that affects virtually all workers and businesses in the country, and we appreciate the Committee holding a hearing to explore it further. We share the goal of policymakers of seeking to ensure that this country's workforce is strengthened through fair and adequate pay, a goal that ANCOR has long championed through its National Advocacy Campaign aimed at raising awareness and promoting the importance of the overall issue. However, as policymakers continue to discuss changes to these rules and requirements, it is critically important that it be done in a thoughtful and careful way that recognizes that any changes in this policy could affect and have significant consequences for the viability of our nation's providers of disability services.

The primary (and, in most cases, only) source of funding for our members is Medicaid. Our members are faced with the growing trend and reality of shifting Medicaid services from intermediate care facilities (ICFs) to home and community-based services (HCBS). Medicaid is unique among funding sources as a state-federal partnership. As such, Medicaid rates are set by the states, and they are then matched by Federal funding at a predetermined match rate. Medicaid-funded providers do not have the ability to negotiate or enforce rates[1], or to respond to funding pressures by passing on cost increases to the state entities that contract with them to provide services, or to the consumer. As more individuals with disabilities are living quality lives in the community[2], the need for disability service providers has risen. Yet nationally, Medicaid rates have not kept pace with increasing operational costs and need,

[1] See *Armstrong et al v. Exceptional Child Center, Inc.* 575 U.S. ___ (March 31, 2015) found at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCoQFjABahUKEwiA7Pffpe_GAhVFeD4KHe3zBA0&url=http%3A%2F%2Fwww.supremecourt.gov%2Fopinions%2F14pdf%2F14-15_d1oe.pdf&ei=GtevVYD3NcXw-QHt55No&usg=AFQjCNE79DCa-er6QC7YylSyJO5mKrSZ7g&sig2=cdf5FQKbGsmX9afEgpb38w (current as of July 22, 2015)

[2] From 2001-2011 the number of qualified individuals with disabilities who chose community services almost doubled. *Medicaid Home and Community-Based Services Programs: 2011 Data Update* found at http://kff.org/medicaid/report/medicaid-home-and-community-based-services-programs-2011-data-update/ (current as of July 22, 2015)

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leaving providers with no choice but to impact program efficiency, reduce staff and hours worked, or a combination of these. This leaves a lasting and negative impact on services.

ANCOR is currently gathering data from disability provider organizations and others around the country to determine the impact of the proposed overtime exemption rule. Preliminary feedback indicates that the increased cost of compliance with the DOL rule as proposed, coupled with existing demands and pressures, will be significant, and may result in base salaries being lowered or overtime work being limited or prohibited for employees who are currently overtime exempt. This is a challenging proposition at a time when the demand for home and community-based services for individuals with disabilities is increasing, while the pool of workers who are qualified and willing to perform this work is shrinking[3]. Simply hiring additional workers to avoid overtime is not a viable strategy, as there is already a workforce crisis stemming from the shortage of available workers in this field.

This rule has the potential, if not thoughtfully approached, to undermine other key initiatives that are important for supporting the rights of people with disabilities to live and work in their communities. The *Olmstead* mandate, compliance with the new Centers for Medicare and Medicaid Services home and community-based services (HCBS) rule, and various state Employment First initiatives, among others, are reliant on a strong workforce to support people with disabilities. These laws and policies mandate that services that our members provide are done so on an increasingly individualized basis, requiring smaller employee to consumer ratios to ensure that individuals are receiving person-centered services. It is essential that the DOL final rule does not diminish the ability of disability service providers to hire and retain staff to meet these obligations and as a result negatively impact services for people with disabilities.

We strongly encourage that Congress and the Obama Administration consider carefully the important role played by our nation's providers of disability services as the proposed rule and overall policy issue continue to be debated. We welcome a conversation with policymakers to share our experience, expertise, and data to work toward the common goals of ensuring the workforce is compensated fairly while maintaining providers' ability to support individuals with high quality, necessary supports.

For further information please contact:

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[3] *IMPACT: Feature Issue on Direct Support Workforce Development* (a project by the University of Minnesota's Institute on Community Inclusion) found at https://ici.umn.edu/products/impact/202/202.pdf (current as of July 22, 2015)

July 22, 2015

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
U.S. House of Representatives
418 Cannon HOB
Washington, D.C. 20515

The Honorable Frederica Wilson
U.S. House of Representatives
208 Cannon HOB
Washington, D.C. 20515

RE: Department of Labor's Proposed Overtime Rule

Dear Chairman Walberg and Ranking Member Wilson:

On July 6, 2015, the Department of Labor (DOL) published a proposed rule to update the regulations governing which executive, administrative, and professional employees (white collar workers) are entitled to the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay protections. The proposal more than doubles the salary level required for "white collar" exemptions and signals DOL may change the duties tests in the final rule without actually proposing any specific language the public can comment on.

HR Policy Association is the lead organization representing chief human resource officers of over 360 of the largest corporations doing business in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Reform of the 1938 Fair Labor Standards Act to reflect the 21st century workplace is a long-standing goal of the Association, and we have testified to that effect before this Subcommittee on many occasions. Most, if not all, of the HR Policy Association member companies will be directly impacted by the proposed rule.

The proposed rule would dramatically increase the number of employees covered by the nation's arcane overtime law without overhauling the rules to reflect changes in the modern, digital workplace. The proposal would significantly impact employers in certain industries and regions and could require employers to carefully monitor and track the time their managers spend performing concurrent nonexempt duties – thereby reducing workplace flexibility, efficiency, and customer service.

Attached is a letter the Association sent to DOL last year as a follow-up to a meeting the Association had with Secretary Perez in May 2014. The letter articulated and expanded upon many of the concerns that were expressed in that meeting, and suggested some reforms that would better enable employers to provide the kind of workplace flexibility sought by today's workforce without running afoul of the FLSA's arcane requirements. Unfortunately, these ideas were not included in the proposed rule. The letter noted:

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- The differences between the workplace of 1938, which is embedded in the law's assumptions, and that of today are dramatic in a number of relevant aspects, including scheduling, occupations, skills, the location and nature of work, the dominance of a global economy, and the explosion of litigation.
- Being covered by the FLSA's overtime requirements does not necessarily benefit an employee because it not only does not necessarily mean an increase in compensation—in fact, it could result in a reduction—but also because it inhibits the ability of the employer to provide flexibility in scheduling and the location of work.
- Because the law's distinctions between exempt and non-exempt employees are tied to mid-Twentieth Century skills and occupations, the biggest compliance problems employers face relate to application of this distinction, as was experienced by the Department of Labor itself in dealing with a complaint involving the exempt status of over 1900 of its employees that was ultimately settled with the awarding of back pay to a number of them.
- As noted in a recent Government Accountability Office study, the lack of clarity in the law has resulted in an explosive increase in the number of FLSA private action lawsuits filed by the plaintiffs' bar, increasing by 514 percent since 1991.
- Instead of exacerbating these problems by expanding the number of employees covered by the law's restrictions, the letter recommends some specific areas that should be addressed, including:
    - Making it easier for employers to provide flexible scheduling and telecommuting by clarifying what constitutes "hours worked" when digital communications devices are used away from the workplace;
    - Providing greater clarity in the duties tests used to determine whether administrative and professional employees are exempt, recognizing the dramatic changes in occupations and workplace responsibilities that have taken place since those duties were established in the 1950s; and
    - Enabling employers to correct potential misclassifications of employees' FLSA exempt/non-exempt status without triggering class action lawsuits.

It is very unfortunate that the Department is proposing to take a dysfunctional law and, rather than trying to make it more functional, is simply expanding its sweep to cover millions of new workers. A law written to apply to the traditional, factory-like setting that existed in the mid-20th century just doesn't match up with the 21st century workplace in which employees increasingly use their computers and mobile devices to stay connected to the workplace outside of their normal working hours. Moreover, polls show that nearly eight in ten (79%) workers view this as a somewhat or strongly positive development. Yet, if employers are required to track their time as hourly, rather than salaried, employees, it inevitably results in restrictions on use of IT outside the workplace to ensure that the law is not being violated.

Finally, the Department's reasoning for annually indexing the salary level test is particularly troubling. By proposing to automatically index the salary level every year the Department displays an utter disregard for the annual costs and unintended consequences it will impose on

the economy simply because the Department does not have the time or resources to conduct future rulemakings on a more frequent basis than it has in the past. Both Congress and previous administrations have declined to do this throughout the history of the FLSA for good reason.

Thank you for convening today's hearing and for the opportunity to submit this letter for the record. We look forward to working with you and DOL on these important issues in the future.

Sincerely yours,

Daniel V. Yager
President and General Counsel

Attachment:

August 20, 2014

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Perez:

I am writing to follow up on our May 28 meeting on the March 13, 2014 Presidential Memorandum on "Updating and Modernizing Overtime Regulations." We appreciate your receptiveness to our ideas on how the President's directive can be fulfilled. However, we are concerned by some of your public statements that suggest the Department's proposed rule will not completely accomplish all of the Memorandum's stated objectives and strongly encourage you to issue an Advance Notice of Proposed Rulemaking (ANPRM) to ensure that the views and recommendations of all stakeholders are thoroughly considered in the process. In addition, we are requesting an additional meeting or meetings with the Department to further elucidate the points raised in this letter.

In that vein, the purpose of this letter is to articulate our concerns about how the current Fair Labor Standards Act (FLSA) regulations—specifically the Part 541 "white collar" exemption rules—are out of sync with today's workplace, and some specific aspects of those regulations which are most in need of updating. Like the widespread support for eliminating the complexity, ambiguity, and potential for abuse of the U.S. tax code, most Americans can agree, at least as a guiding principle, that simplifying and streamlining the FLSA is in the best interest of employees, employers, and the U.S. economy.

The FLSA and Today's Workplace In considering the FLSA, it is important to understand the state of the American workplace when the 1938 law was enacted. The Depression-era workplace was characterized by:

- A fixed beginning and end to both the workday and workweek in most American workplaces;
- With the exception of certain occupations (*e.g.*, repairmen, truck drivers, outside sales persons), the vast majority of work was performed in the employer's workplace because the technology allowing the performance of jobs from remote locations was not yet available;
- A far more stratified and predictable designation of occupations, as compared to today's workplaces where concurrent exempt and non-exempt duties are performed by a wide variety of employees, and there is a more rapid evolution of job descriptions and duties;
- Far fewer jobs requiring advanced knowledge in a field of science or learning that was customarily acquired by a four year college degree;
- Businesses and occupations which were primarily focused on and carried out within the United States, as opposed to the on-going globalization of markets and the corresponding expansion of the workday to accommodate different time zones;

- A greater preponderance of manual labor because of the relative absence of technology and mechanization that has transformed the way work is performed today; and
- Relatively little use of private litigation as a means to enforce federal laws and policies.

The FLSA was passed before the first commercial TV broadcast (1939), the first commercial jet airline (1949), and the founding of the first computer company (1949). To contrast today's workplace with the one that existed when the FLSA was passed, consider automotive production. In the 1930s, at the height of the Ford Motor Company's production of its popular Model A, the huge River Rouge plant, which embodied the then leading-edge concept of consolidated, integrated manufacturing, employed over 100,000 workers and churned out a finished Model A every 49 seconds.[1] By contrast, in 2013 a GM facility in Kansas City, Kansas, employed 3,877 workers, and produced one of five different models of cars every 58 seconds.[2] With the introduction of modern computing technology, robotics, and the shift to highly decentralized, just in time global production and logistics schemes, today's auto plants would be unrecognizable to the 1930s workers, whom the law was designed to protect. With technology and robotics, many of today's workers, who previously relied upon physical methods of production, now use their minds and computers to an extent that was beyond the imagination of most science fiction writers in the Depression.

Today, in fact, the entire concept of work is changing as the United States moves to highly automated manufacturing using fewer employees and an expanded service economy that is heavily dependent on technology and much more mobile. For example, today, inside salespeople "virtually" make outside sales calls on clients using the same technology outside salespeople use (*e.g.*, laptops, smart-phones, and the Internet) to visit and call on customers. And, in many cases, the inside salespeople utilize complex engineering principles. Another example is the rapidly evolving duties of information technology professionals, to be discussed further below. For obvious reasons, virtually none of these jobs were contemplated during the formulation of the statute or its regulations.

To illustrate the challenges of keeping the FLSA relevant in a rapidly evolving workplace, in 1990 Congress directed the Department of Labor to publish regulations to treat similarly skilled computer employees as exempt under section 13(a)(1) of the FLSA,[3] and then in 1996 Congress froze the definition of "Computer Professionals" in place[4] when less than 40 percent of Americans owned a cell phone, let alone a smart-phone, less than 3 percent of U.S. homes had broadband access,[5] and Facebook didn't exist.[6] Today over 90 percent of Americans own smart-phones,[7] over 70 percent of U.S. homes have broadband,[8] and over 70 percent of U.S. adults regularly use social networking sites.[9] Needless to say, how and where work gets done has changed dramatically, and the computer professional exemption is woefully outdated.

Meanwhile, even the most traditional industries have undergone dramatic transformations in how and where work is done. For example, as discussed at our meeting, electric utility companies in the process of shifting from coal-fired to new generation turbine or combined gas cycle power plants have had to radically rethink workforce training, roles and responsibilities and staffing locals. Whereas workers in the old coal plants were typically divided into several different job categories, with many performing largely hands-on, physical tasks throughout the facility, the new plants are run almost entirely by a small group of employees working primarily in a single room filled with computers and instruments that control and monitor the plant. The employees at these facilities are multi-skilled, technically educated, highly paid professionals

who effectively operate the facilities, often taking on roles ranging from operating equipment to handling purchasing, documentation, scheduling, and working with vendors. As one company's representative at our meeting noted, "They're operating more like asset owners." By having more responsibility and impact on the overall running of a business, many employees who would have been viewed as non-exempt production employees in the 1950's are more akin to exempt administrative and professional employees now.

In addition to enormous changes in the basic concept of work and transformations within major industries in the United States since passage of the FLSA, the use of private rights of action to enforce federal laws and policies has also undergone extraordinary growth, especially over the past 20 years. When Congress chose to create a private right of action in the FLSA, it did not anticipate the explosion of private litigation that would ensue beginning in the 1970s, accelerating exponentially over the last forty years. From 1942 to 1967, the rate of private litigation hovered around three cases per 100,000 people.[10] It then climbed to 13 cases by 1976, 21 by 1986, and 29 in 1996—an increase of about 1,000 percent since passage of the FLSA in 1938.[11] FLSA wage and hour litigation, in particular, has experienced a significant boom in the last decade beyond anything the law's framers could have possibly envisioned.[12]

Yet, despite all these changes within American workplaces, industries and courtrooms during the last half century, the basic structure of the FLSA has never been fundamentally reexamined. The FLSA and its regulations simply have not kept pace with changes in the workplace. For example, the purpose of the FLSA's executive, administrative, and professional exemptions is to recognize that certain employees have such a level of responsibility, skill, education/training, scheduling uncertainty/flexibility, and pay level, that they warrant being exempt under the basic principles of the law, but the current regulations do not recognize this because they don't accurately capture the modern workplace. Our goal is not to move more employees into exempt roles, but to see that the regulations carry out the original intent of the law in this new global, wireless world. The previous administration made a laudable attempt to address a number of areas that needed to be updated at that time, but the process was constrained by political acrimony, strong opposition within Congress, and a limited scope that failed to fully address the problems. Thus, while the resulting changes in the 2004 rulemaking were improvements, they did not go far enough to fix the overall problem.

Admittedly, much of the problem is created by the outdated statute itself. The FLSA was enacted in 1938 when the unemployment rate had averaged 19.6 percent over the previous eight years and, though it has been amended in a noteworthy manner 17 times, those amendments have, for the most part, been limited to expanding coverage to specific categories of employees and increasing the minimum wage, while occasionally addressing very narrow aspects of the law, such as providing exemptions for "any employee employed by an establishment which is a motion picture theater."[13] Although the minimum wage seems to generate far greater attention in public policy discussions, most of the difficulties in the modern workplace created by the FLSA fall under the classification of employees as exempt or nonexempt and the corresponding overtime requirement.

Broadening the Coverage of the FLSA to More Employees Would Not Necessarily Benefit Those Employees Although the President's Memorandum ordering a modernization and updating of the FLSA regulations does not appear to be constrained by any limitations, we are concerned by reports and strong signals being sent by the administration that the process is primarily, if not exclusively, intended simply to narrow the FLSA's statutory exemptions in order to broaden the coverage of the FLSA's overtime requirements to a substantially greater number of employees.

In fact, narrowing the FLSA overtime exemptions will not necessarily benefit the affected employees for three reasons:

- Nonexempt status under the FLSA determines *how* an employee is paid, not *how much*, which means that an employee does not necessarily receive a larger paycheck by being covered by the law and in fact may receive a smaller one if her or his employer chooses to set a lower hourly wage to offset overtime costs, as was pointed out in our meeting.
- Nonexempt status under the FLSA significantly restricts the ability of employers to provide flexibility to employees through the use of the digital communications technology that today's workforce prefers and expects.
- Experience has shown that employees whose positions change from exempt to nonexempt status often strongly resent being treated as an hourly employee, for professional and social status reasons, concerns over the loss of professional growth potential, and because of the limitations on workplace flexibility previously mentioned.

We will consider each of these points separately.

Nonexempt Status Does Not Necessarily Mean a Larger Paycheck As previously noted, FLSA coverage does not necessarily determine *how much* employees get paid but *how* they get paid. The amount an employee is paid is determined by a variety of factors, including market rates, education, experience, performance and so forth. Employers will generally establish compensation for an employee based on these factors to meet talent attraction and retention needs. Additionally, in today's service-based economy, labor rates are set for the length of contracts, and moving those rates around is not necessarily economically feasible or possible. Compensation is sometimes pre-negotiated and price sensitivities sometimes don't allow for changes mid-contract.

In setting wage rates, an employer will consider the amount of hours an employee is likely to work, recognizing that that will impact employment costs. Indeed, nonexempt status may very well mean *less* pay if the employer has overestimated the amount of overtime likely to be worked in establishing the base. Needless to say, these uncertainties do not exist for exempt employees who enjoy the predictability of a salary. (It should be noted that, to be exempt as an executive, administrative or professional employee, an employee *must* be paid "on a salaried basis.")

The reality that nonexempt status does not necessarily result in increased pay was acknowledged by the Department in 2003 when it said:

> Affected employers would have four choices concerning potential payroll costs: (1) Adhering to a 40 hour work week; (2) paying statutory overtime premiums for affected workers' hours worked beyond 40 per week; (3) raising employees' salaries to levels required for exempt status by the proposed rule; or (4) converting salaried employees' basis of pay to an hourly rate (no less than the federal minimum wage) that results in virtually no (or only a minimal) changes to the total compensation paid to those workers. ... Nothing in the FLSA would prohibit an employer affected by the proposed rule, or under the current rule, from implementing the fourth choice above that results in virtually no (or only a minimal) increase in labor costs. For example, to pay an hourly rate and time and one-half that rate for 5 hours of overtime in a 45-hour workweek and incur approximately the same total costs as the former $400 weekly salary, the regular hourly rate would compute to $8.421 ((40 hours × $8.421) + (5 hours × (1.5 × $8.421)) = $399.99).[14]

Further, a recent Economic Policy Institute study, noted it is highly likely there will be "little change" in employees' total pay if the salary threshold is increased. According to the EPI report:

> Since employers have a rough sense of how much they want to pay for a given worker, including any time-and-a-half overtime costs, they will adjust their 'straight-time,' or base wage, down to a level that will make the total hourly wage, including [overtime] costs, equal to their intended rate of pay. Under this model, wage offers adjust to hold labor costs constant.[15]

The EPI report also notes that narrowing the FLSA's statutory exemptions could lead to employers hiring additional workers instead of increasing overtime pay to complete necessary work. Indeed, this goes to one of the original rationales for the Fair Labor Standards Act, which was to view the new law as a job-creating mechanism during the Depression. However, this rationale has been largely overtaken by the modern realities of the employment relationship, which includes a number of factors that enter into the hiring process besides base compensation--primarily benefits, federal and state taxes, global access to talent, and laws and regulations governing the hiring and termination processes. Thus, even proponents of FLSA expansion rarely use this as their rationale.

Restricts Workplace Flexibility The preference of today's workforce for greater flexibility as to when and where they perform their work is universally acknowledged. Indeed, the current administration has encouraged employers to provide such flexibility through initiatives such as the recent White House Summit on Working Families. You recognize the value of such flexibility in your own life and have noted that many employees in the U.S., who are typically nonexempt, have no wiggle room in their work schedules. Yet any narrowing of the FLSA executive, administrative, and professional exemptions will likely inconvenience employees, reduce workplace flexibility and make it more difficult for employees to manage work/life balance.

It goes without saying that this desired flexibility is often possible only through the digital technology that was unavailable when the FLSA was enacted and the existing regulations were last re-written. Moreover, it is clear that the overwhelming majority of today's employees embrace the digital workplace. Thus, a recent Gallup poll showed that "full-time U.S. employees are upbeat about using their computers and mobile devices to stay connected to the workplace outside of their normal working hours. Nearly eight in ten (79%) workers view this as a somewhat or strongly positive development. . . . Nearly all workers say they have access to the Internet on at least one device, whether a smart-phone, laptop, desktop, or tablet, so it may be that they enjoy the convenience of easily checking in from home instead of putting in late hours at the office. They may also appreciate the freedom this technology offers them to meet family needs, attend school events, or make appointments during the day, knowing they can monitor email while out of the office or log on later to catch up with work if needed."[16]

Yet, the FLSA deters, and often prevents, an employer from providing this flexibility to nonexempt employees by requiring employers to track all "hours worked" (or portions of varying lengths thereof), which poses a challenge for employers if the employees wish to perform some or all of their duties away from the workplace. This can involve telecommuting, where some or all of the workday is spent by the employee away from the site at home or elsewhere. It may also involve the employee doing some work at home outside of normal working hours, which modern communications technology makes possible in today's digital workplace. In such cases, tracking the exact time spent working becomes an extremely difficult task. Even where an employer is aware of certain activities, it is not always possible for the employer to know how much time was spent engaged in the activity. For example, an employer may have a record of a time-stamped email that an employee sent, but it may not know how much time the employee spent drafting the email. Finally, even when nonexempt employees confine their work activities within normal working hours, they may occasionally check their smartphones outside of normal working hours for work-related emails, text messages, meeting invitations, etc. When they do, it raises the question as to whether that time is counted towards "hours worked," and some attorneys have even argued that they may also demarcate the beginning or ending of the workday, thus requiring time spent commuting to also be counted as time worked.

Because of these challenges, and the potential threat of litigation, many employers have taken steps to prevent their nonexempt employees from doing any work outside the workplace by denying them the employer-provided smartphones that exempt employees are given and denying access to their email accounts and other components of the company's information system.

Of course, these issues do not arise where an employee is eligible for one of the FLSA's executive, administrative or professional exemptions. Unfortunately, many employees that view themselves and others as an executive, administrative or professional employee (such as loan underwriters, HR recruiters, insurance fraud investigators, and mortgage loan officers) often do not fall clearly within the often vague contours of the regulatory language. Although sometimes their status is clear, other times it is arguable enough to support a misclassification lawsuit, with the accompanying costs of litigation and/or settlement. The number of such lawsuits has exploded over the past 20 years, increasing 514 percent from 1991 to 2012.[17] However, in the case of either a settlement or a successful suit, the question of how many hours were worked outside the workplace becomes part of the back-pay award, with the employer having little or no record of those hours.

Why Many Employees Resent Being Converted From Exempt To Nonexempt Hourly Status In view of these aforementioned realities, it should be no surprise that when employers are compelled to reclassify employees from exempt to non-exempt status, there is often bitter employee resentment. Employees realize, eventually if not at the outset, that it may mean little, if any, extra pay (possibly even less) accompanied by less flexibility in their scheduling and an inability to take advantage of the virtual workplace. Rather, the only change is how their pay is calculated.

Adding to the frustration, non-exempt status can limit employee participation in important professional development and training activities, particularly if they are at risk of capping-out the amount of hours they are allowed to work for cost reasons. Employees reclassified as non-exempt may feel deeply disappointed to lose out on the personal benefits of these initiatives, which will remain more feasible for their exempt colleagues to participate in. Moreover, a currently exempt employee who leads a team of other exempt employees assigned to complete a major project is very likely to resent being reclassified as non-exempt because of some regulatory change.

In addition, in many workplaces, being exempt is viewed, rightly or wrongly, as being part of the professional ranks which many employees aspire to achieve. This is particularly true for positions that appear to be similar from an employee's point of view, but where it is difficult to determine the degree of discretion and independent judgment that separates exempt and nonexempt workers.

Force-Fitting the Outdated Regulations to Modern Occupations As employers struggle to apply the 1938 law and its regulations to the modern workplace, their problems are exacerbated by the outdated "duties tests" under the various "white collar" exemptions. Perhaps even more difficult to manage are the large and growing number of occupations whose duties do not squarely fit within any of the exemptions, generating a litigation explosion that has been a veritable playground for the plaintiffs' bar, and creates a drag on job creation. According to the Government Accountability Office (GAO), since 1991, the number of FLSA lawsuits filed has increased by 514 percent, from 1,327 in 1991 to 8,148 in 2012.[18]

Examples of difficulties employers face in determining who is exempt and who is nonexempt abound:

- Entry-level Degreed Engineers and Accountants The FLSA regulations state that to be an exempt professional, an employee must perform "work requiring advanced knowledge in a field of science or learning" involving the "consistent exercise of discretion and judgment." Often, as new graduates start their first jobs, how much discretion and judgment they exercise as they follow the highly complicated rules and principles of the profession and/or directions from those to whom they report, is quite subjective and extremely difficult to determine. At the same time, an employee that has obtained a sufficient level of training for purposes of the exemption could subsequently fail to adequately perform his or her responsibilities, and in effect, would not consistently exercise discretion and judgment. The quandary faced by the employer is determining at what point new engineers and accountants who, by every other standard—including lucrative starting salaries—would clearly be considered a professional, cross the threshold into the blurry FLSA definition of an exempt professional. The same is true with many other entry level positions that require a degree even to be considered for the opening.

- Computer Employees The FLSA regulations include an exemption for "computer employees" but the definition is rooted in the technology of 1992, a time before many people had Internet access or email, let alone use of the sophisticated software technologies of today.[19] Thus, many of today's critical IT duties, such as information security, enterprise-wide database administration, systems integration and ensuring the overall integrity and continuity of IT systems and applications are not part of the exemption even though individuals performing these duties are clearly highly-skilled and well-paid computer employees. Even basic concepts like "debugging" and the Internet are not part of the current outdated FLSA language.
- Inside Sales The outside sales exemption was written into the 1938 FLSA to account for traveling salespeople, whose time could not be accurately tracked and verified by employers, as opposed to employees who conduct sales from "inside" the company or in a "fixed office" location. The different treatment of inside and outside salespeople is artificial, outdated and unfair in today's economy. Inside and outside salespeople, while performing the same function with similar metrics, are treated inequitably under the law. The reliance on a "fixed" office location for determining exemption status is outdated, given today's work environment. In this day and age, inside salespeople "virtually" call on clients the same way outside salespeople do: by e-mail, tele/videoconference, smart-phones, and laptops, none of which requires a fixed office location. In many cases, they are dealing with highly engineered products and services that require a significant amount of expertise and understanding when dealing directly with the customer to configure the product or design and implement the service to the customer's needs. The compensation structure for inside and outside sales roles should equitably support pay for performance based on sales targets and achievement, and should not solely be based on the location from which work is performed or solely on the hours worked. Thus, the outside sales exemption needs to be broadened to reflect today's workplace realities and available technology.[20]
- Determining Sufficient Credentials For professional employees to be exempt, the advanced knowledge required for the exemption must be "customarily acquired through a prolonged course of specialized intellectual instruction." It is not clear what "customarily" means. As currently interpreted by some courts, an employer could have employees performing complicated engineering duties who would have to be paid and treated differently if they acquired their knowledge and expertise in different ways. In reality, the issue should be whether the knowledge has either been acquired or not; how it was acquired should be irrelevant. The illogic of the present interpretation can be seen in a recent Second Circuit Court of Appeals decision holding that an engineer with 20 years experience who was a member of the American Society of Mechanical Engineers and performed work that involved complicated technical expertise and responsibility was non-exempt because, although the employee had enrolled in some courses at various universities and had 20 years of work experience as an engineer, he did not have a college degree.

- DOL's Own Struggles Particularly nettlesome is determining what level of "discretion and independent judgment" employees must have to qualify for the administrative exemption. Sometimes, not even the Department of Labor's Wage and Hour Division (WHD) can make up its mind. For example, on September 8, 2006, the WHD determined that mortgage loan officers are bona fide administrative employees who are exempt under the FLSA. Yet, on March 24, 2010, WHD reversed itself and determined that they do not qualify for the exemption. Then in 2013, the U.S. Court of Appeals for the District of Columbia Circuit reinstated the 2006 Department of Labor guidance advising that mortgage loan officers are actually exempt from overtime requirements in the FLSA. If the WHD cannot consistently determine who is a bona fide administrative employee, how are employers supposed to figure it out without costly and unnecessary litigation? Meanwhile, the Department's own inability to distinguish between who is and who is not exempt has been exposed by a grievance brought against the Department, involving the exempt status of more than 1,900 employees, that was ultimately settled with the awarding of back pay to a number of them. In addition to a large number of administrative employees, those reclassified as nonexempt included highly paid computer professionals, paralegals, litigation support specialists, and pension law specialists, as well as highly paid WHD compliance specialists.[21]

The Litigation Explosion The problems in complying with the FLSA are exacerbated by the fact that the statute provides for enforcement not only by the Department of Labor but also by private action. As a result, the private bar has taken advantage of the law's lack of clarity by pursuing highly lucrative class actions against employers who struggle to ascertain who is exempt and nonexempt. In many cases, these involve employees making salaries—sometimes in six figures—that the Department of Labor doesn't focus on because they are not the vulnerable workers the FLSA was intended to protect. Moreover, the employer typically has a sound basis for assuming that its actions are legal, yet the lack of clarity in the law may add an element of doubt or court decisions may differ on whether or not these employees are exempt. Meanwhile, plaintiffs' lawyers are rarely deterred in such instances, knowing that, absent total clarity under the law, which is a rarity, many employers will settle the cases to avoid the expenses and uncertainties of litigation.

According to the Government Accountability Office (GAO), over the last two decades, the number of FLSA lawsuits filed nationwide in federal district courts has increased significantly, with most of this increase occurring in the last 12 years. Since 1991, the number of FLSA lawsuits filed has increased by 514 percent, from 1,327 in 1991 to 8,148 in 2012,[22] and this does not count the number of cases brought under state laws which often vary from the federal law. Moreover, not only has the number of FLSA lawsuits increased, but they also constitute a larger proportion of all federal civil lawsuits than they did in past years.[23] As noted, companies often settle these cases, with a median settlement cost of $7.4 million for federal cases and $10 million for state cases.[24]

Although DOL updated its regulations in 2004 in an attempt to clarify the exemptions, and provided guidance about the changes, stakeholders told the GAO there is still significant confusion among employers about which workers should be classified as exempt under these categories. The activity on the part of plaintiffs' attorneys who capitalize on this lack of clarity has been a "significant contributing factor" to the increase in FLSA cases since 2001.[25] In some states, specifically Florida, where nearly 30 percent of all FLSA lawsuits were filed from 1991 to

2012, plaintiffs' attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods.[26] In addition, ambiguity in applying the FLSA statute or regulations—particularly the exemption for executive, administrative, and professional workers—was cited as a factor underlying the increase in litigation by a number of people interviewed by the GAO. The problem is particularly severe in those states that have more restrictive exemptions under state laws, thus further adding to the difficulties facing large, multi-state employers seeking uniform national employee classifications. While there is no federal pre-emption of state law with regard to the FLSA, an update of the federal regulations by DOL could lead other states to update and clarify their rules in an effort to reduce unnecessary litigation.

Impact of Potential Changes in Minimum Salary and Duties Tests for Exempt Status
Because of the above concerns, employers are understandably alarmed about the possibility that the Department will respond to the President's memorandum by dramatically increasing the minimum salary for one or more of the white collar exemptions while also establishing a minimum percentage of time that employees must spend performing exempt duties, which would substantially compound the difficulty of classifying the exempt status of employees above the new salary threshold. Confirming these concerns, the Department's own website links to an Economic Policy Institute study that calls for increasing the salary level from $455 a week ($23,600 a year) to $970 a week ($50,440 a year).[27]

The result of such changes would be extremely damaging to many employers and their employees, particularly those in certain industries, such as retail and hospitality, not to mention small businesses where a substantial increase in costs could mean the difference between staying in business and closing their doors.

In the retail industry, for example, a likely direct impact of increasing the salary level for exempt classifications will be the reduction in managerial positions in retail establishments, thus depriving employees of promotional opportunities to salaried exempt positions. If an assistant manager of a retail store became nonexempt because her or his annual salary was $40,000 or less, it is foreseeable that the store owner will eliminate the assistant manager position and replace it with an hourly-paid position rather than absorb the costs of tracking and monitoring the time and duties of the assistant manager.

Separately, a rigid duties test based on a minimum percentage of time spent performing exempt duties would be exceedingly onerous and potentially unworkable. Many employees today perform a broad range of exempt and nonexempt tasks throughout the day and workweek due, in part, to the extraordinary technological advances since 1938. Some industries also have fluctuating and unpredictable periods of demand that would make a rigid duties test unworkable. For example, certain retail industries experience unanticipated spikes in demand due to weather and natural disasters that require salaried managers to assist hourly associates fill in gaps at the cash register, fill orders, or stock shelves. This can also be caused by unscheduled absences of employees due to illness, family needs or other causes. In such instances, a strict duties test would harm the business's functionality and ability to serve its customers by tying the hands of managers who are not able to exceed an allowed percentage of time performing such non-exempt tasks.

Areas of Needed Reforms Rather than taking an approach of simply expanding the coverage of the FLSA overtime requirements to more employees—and thus exacerbating the problems that we have outlined—we strongly encourage the Department to focus instead on revising and clarifying the regulations to provide greater clarity and consistency in a manner that reflects the modern workplace. While this is by no means an exclusive list, there are a number of areas in which this could be done.

1. Providing greater flexibility for nonexempt employees. As discussed above, for nonexempt employees to utilize the available flexibility of the digital workplace, the FLSA regulations must accommodate certain realities:

   - Negligible amounts of time – Although an employee who occasionally checks and perhaps quickly responds to messages on a mobile device or platform may technically be working, the activity is often sporadic and typically involves negligible periods of time. The current FLSA "statements of general policy or interpretation not directly related to regulations" seek to address this so-called "de minimis" time by citing court cases that are 59 or more years old and provide little meaningful guidance for today's digital workplace.[28] The Department's interpretation states that an employer may disregard "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes . . ."[29] The Department's interpretation then cites a 1952 court case where amounts of time involving a dollar in pay per week should not be disregarded, and a 1955 case where "10 minutes a day is not de minimis."

     Solution: Establish a clearly defined and realistic de minimis exception that recognizes the reality of technology as well as the fact that employees want to stay connected to their workplaces outside of their normal working hours.

   - Commuting time – If an employee spends more than a de minimis amount of time performing work away from the worksite prior to or after commuting, some plaintiffs' attorneys argue this makes the commuting time compensable. Although there are no cases where this theory has been affirmed by a court or the Department of Labor, the law's silence has resulted in the allegation being included in several lawsuits.

     Solution: Clarify that time spent commuting is not compensable even if it occurs before or after work has been performed.

   - Unauthorized work – Even where an employer has specifically ordered an employee not to perform work outside working hours, the law requires that the time be counted and the employee paid if the employer "should have known" the employee was working overtime.[30] Establishing this assumed knowledge could involve an innocuous phone call or email during off hours or even a failure of an employer to recognize that a certain task could not have been completed during normal working hours.

     Solution: Establish a safe harbor for employers who clearly communicate the requirement that work outside of normal working hours must be both authorized and recorded.

2. Providing greater clarity in the professional and administrative duties tests The Department should build upon the work begun by the previous Administration to obtain better clarity in the duties tests for the 541 "white collar" exemptions. To some extent, this can be provided through specific examples given in the regulations. However, there are also needed clarifications that would have broader applicability.

   - Clarification of the administrative exemption – According to the Department of Labor, "the administrative exemption is the most challenging of the Sec. 13(a)(1) exemptions to define and delimit, and the 'discretion and independent judgment' requirement has become increasingly difficult to apply with uniformity in the 21st century workplace."[31] Even back in 1949, the Department recognized the standard was subjective and the difficulty of applying it consistently has increased with the passing decades.[32] The Department has also noted the "production versus staff dichotomy" is difficult to apply uniformly in the 21st century workplace.[33] Moreover, the requirements continue to generate significant confusion and litigation despite the clarifications made in 2004.

     Solution: In the absence of a clear bright-line compensation standard for the administrative exemption, the Department should work with all stakeholders to develop additional real-world examples of what types of employees meet the exemption and develop a consensus on how to clarify the rules to reduce litigation. This could include a review of how difficult it is to apply the "discretion and independent judgment with respect to matters of significance" requirement, how well the "production versus staff" dichotomy embedded in the administrative exemption operates in today's service and sales economy, and what changes, if any, could be made to simplify the standard for employers. Such a recommended approach underscores our recommendation that the Department's next step in this process should be an Advance Notice of Proposed Rulemaking (ANPRM).

   - Clarification of the professional exemption – As noted above, the "discretion and independent judgment" requirement has become increasingly difficult to comply with in the 21st century workplace, and it is especially inconsistent with modern workforce practices as it applies to professional employees.[34] It is also not clear when an employee, whose job qualifications requires a four-year college degree in a specific field of science or learning, is working in a "profession" or "occupation" where specialized academic training is a standard prerequisite for entrance into the profession, especially when the FLSA regulations allow for employees to meet the exemption through a combination of work experience and intellectual instruction and not necessarily through an entity that has been approved by an accrediting or certifying organization. Moreover, as the Department noted in 2004, "the areas in which the professional exemption may be available are expanding" but the Department has not provided any guidance since 2004 on what those "areas" might be.

     Solution: In the absence of a clear bright-line compensation standard for the professional exemption, similar to our recommendation regarding the administrative exemption, the Department should work with all stakeholders to identify "the areas in which the professional exemption may be available are expanding" as well as developing additional up-to-date examples of what types of employees meet the exemption and the computer employee exemption. This could include developing eligibility criteria that is

based on knowledge needed to perform the job duties, rather than any specific degree requirement that is consistent with the Department's long-standing application of the exemption to employees who lack a four-year degree but have substantially the same knowledge level and perform substantially the same work as the degreed employees. As suggested above, an ANPRM could be very helpful in this effort.

3. Protecting employer attempts to comply with the law The litigation eruption of the past twenty years has involved a number of occupations that have historically been treated as exempt (*e.g.*, store managers, stock brokers, mortgage loan officers, and insurance claims adjusters) in addition to newer ones that are not adequately addressed in the regulations, or where there are splits in various circuit court decisions. Many if not most of these have also involved occupations where many employees expect and/or prefer exempt status. In the face of this growing litigation—and often as a response to a change in DOL or the courts' interpretation of the law—an employer may be advised by counsel to reclassify a group of employees from exempt to non-exempt. However, employers who have done this have found that it may backfire and produce the very litigation they were seeking to avoid when one or more employees seeks outside counsel on whether they should have been treated as nonexempt all along. Even where the answer is not clear, the plaintiffs' lawyer may seek to take advantage of the situation by filing a lawsuit seeking back pay for unpaid overtime. The existence of this threat deters many employers from reclassifying employees in response to a self-audit that has been conducted.

   Under current law, most courts recognize only two valid ways by which individuals in the private sector can release or settle a FLSA claim: 1) a DOL-supervised settlement under 29 U.S.C. § 216(c), or 2) a court-approved stipulation of settlement. As part of a DOL-supervised settlement, the Wage and Hour Division may send an employer a Form WH-58 for each employee to whom the employer is offering back wages for the employee to sign as a release by the employee of future claims against the employer. Generally, in the absence of a DOL-supervised settlement, any release of FLSA claims an employer obtains from an employee is of no effect.[35] Unfortunately, the Wage and Hour Division does not always send employers and employees a WH-58 release form. According to one report, "some investigators have said that they were no longer authorized to use the form or that the form was being revised."[36] Moreover, some Wage and Hour offices are still using an outdated version of Form WH-58, and there are conflicting court decisions on whether or not an employee has waived their right to bring a private suit if they sign the check for back wages but do not sign a Form WH-58.[37]

   A few recent court cases, however, allow private FLSA settlements without DOL or court supervision. In 2005, the Sixth Circuit Court of Appeals held private settlement agreements are not foreclosed by the FLSA claims and may be enforceable.[38] More recently, the Fifth Circuit Court of Appeals held that a private settlement unapproved by either the DOL or federal district court can be enforceable under certain circumstances.[39] Still, employers that settle FLSA claims without DOL or court approval do so at their own risk.

   Solution: The Department should establish a streamlined new procedure whereby an employer may undertake a reclassification of its employees and, as part of the process, obtain the equivalent of a settlement agreement with the Department that forecloses a private lawsuit.

This is by no means a complete list of potential reforms that could fulfill the President's directive that the FLSA regulations be "updated and modernized." We would strongly encourage you to build upon the progress achieved by the previous administration and undertake a thorough re-examination of every aspect of those regulations, drawing upon the experience of the broad range of stakeholders affected by them. We believe this can only be successfully accomplished through an Advance Notice of Proposed Rulemaking that invites the public to provide the kind of commentary and recommendations contained in this letter. We would be happy to meet with you again to elaborate further on our ideas and concerns. Thank you for your consideration of our views on this important matter.

Sincerely,

Daniel V. Yager
President & General Counsel

Enclosure

cc: Dr. David Weil, Wage & Hour Administrator
Brian Deese, Acting Director, Office of Management & Budget
Members, Senate Health, Education, Labor and Pensions Committee
Members, House Education and the Workforce Committee

[1] Vaclav Smil, *Made in the USA: The Rise and Retreat of American Manufacturing* (Massachusetts: Massachusetts Institute of Technology, 2013).

[2] "Fairfax Assembly Plant," General Motors, accessed June 11, 2014, http://media.gm.com/media/us/en/gm/company_info/facilities/assembly/fairfax.html.

[3] Pub. Law No. 101-583.

[4] Pub. Law. No. 104-188.

[5] "Wireless History Timeline," CTIA-The Wireless Association, accessed June 11, 2014, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-history-timeline.

[6] Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

[7] Pew Research Center, *Cell Phone Ownership Hits 91% of Adults*, http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/.

[8] Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

[9] Pew Research Internet Project, *Smartphone Ownership 2013*, http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

[10] Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the United States 12 (Princeton University Press 2010).

[11] *Id.*

[12] William Martucci and Kristen Page, "Winning in Wage and Hour Litigation: Compliance, Experts and the Certification Process," The Metropolitan Corporate Counsel, Oct. 2011, at 37.

[13] 29 USC 213(b)(27).

[14] U.S. Department of Labor, Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, March 23, 2003, Federal Register, pg. 15576.

[15] Ross Eisenbrey and Jared Bernstein, "New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules," Economic Policy Institute, March 13, 2014.

[16] Gallup, Most U.S. Workers See Upside to Staying Connected to Work, April 30, 2014, available at: http://www.gallup.com/poll/168794/workers-upside-staying-connected-work.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Business%20-%20Economy%20-%20Technology%20-%20USA%20-%20Workplace.

[17] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[18] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[19] Senator Kay Hagen introduced bipartisan legislation (S. 1747) to update the computer employee exemption in the 112th Congress.

[20] Over the last 10 years, legislation attempting to change the FLSA language non-exempt status for inside sales people was introduced and passed by the full House in the 105th, 106th and 107th Congresses.

[21] *See*, Law Offices of Snider and Associates, *Department of Labor FLSA Overtime Grievance*, http://www.sniderlaw.com/pages/FLSADOL.html.

[22] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[23] *Id.*

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[24] Samuel Estreicher and Kristina Yost, "Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment," New York University School of Law, Working Paper No. 08-03, January 2008.

[25] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[26] *Id.*

[27] Ross Eisenbrey and Jared Bernstein, "New Inflation-adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Institute, March 13, 2014. Also see: Brendan V. Duke, "America's Incredible Shrinking Overtime Rights Need an Update," Center for American Progress, June 23, 2014.

[28] 29 CFR 785.47.

[29] *Id.*

[30] Under, 29 CFR 785.12, "The [hours worked] rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." Further, under 29 CFR 785.13, "In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."

[31] 68 FR 15567, March 31, 2003.

[32] 69 FR 22142, April 23, 2004.

[33] 68 FR 15566, March 31, 2003.

[34] See *Pippins v. KPMG LLP*, 2d Cir., No. 13-889, July 22, 2014. Accountants working as "audit associates" for an accounting firm fit within the learned professionals exemption.

[35] However, recent court cases appear to allow allow private FLSA settlements without DOL or court supervision in certain circumstances.

[36] Judith E. Kramer, "What Employers Should Know About Resolving U.S. Department of Labor Audits," Thompson Information Services, available at http://www.thompson.com/public/headlines.jsp?id=44.

[37] See *Bullington v. Fayette County School District*, 2000 WL 1568726 (Ga. Ct. App. 2000); *Heavenridge v. Ace-Tex Corp.*, 1993 WL 603201 (E.D. Mich. 1993). But see *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986) where the court held that the fact that the employee cashed a back-wage check as a result of a Wage-Hour audit did not, in itself, constitute a waiver of the right to bring suit. In that case, however, Wage-Hour did not give the employer or employee a Form WH-58 or other release form.

[38] See *Martinez v. Bohls Equip. Co.*, 361 F. Supp. 2d 608, 628 (W.D. Tex. 2005).

[39] See *Martin v. Spring Break '83 Productions, LLC.*, 688 F.3d 247 (5th Cir. 2012).

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Congressman Tim Walberg
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August 3, 2015

Dear Congressman Walberg,

The DOL of Labor's ("DOL") federal overtime regulations under the Fair Labor Standards Act ("FLSA") have become outdated and increasingly complicated. The DOL's much anticipated notice of proposed rulemaking issued July 6, 2015 represents a missed opportunity to implement a streamlined and balanced approach to overtime—potentially modernizing protections and providing employers with needed clarity.

The current FLSA regulations prescribe a multi-step process for employers to determine whether an employee is exempt from the FLSA requirement to pay overtime, using a salary amount test, salary basis test, and a duties test. In the proposed rule, the DOL discussed modifying the salary amount test by increasing the minimum required annual salary to $50,440.00 and requested comments on potential changes to the duties test. Since 2004, exempt status is determined with the standard duties test, which requires an exempt employee's "primary duty" to fulfill the substantive exemption. The definition of "primary duty" is not based on a specific percentage of time spent on exempt/nonexempt work. Rather, it is defined with its customary dictionary definition meaning "principal, main, major, or most important duty that the employee performs."[1]

Rather than proposing substantive changes to the current duties test, the DOL posed various wide-ranging inquiries to commenters providing industry only speculation as to what the final rule might produce. Implementing changes to the duties test in the final rule would inflict a substantial injustice on employers, in addition to being a blatant contradiction of the DOL's commitment to transparency. Under the Administrative Procedure Act ("APA"), the DOL is required to provide the public with meaningful notice and an opportunity to comment on administrative agency rulemakings. Merely posing six open ended inquiries to employers without as much as a paragraph of proposed regulatory language does not satisfy congressional intent in enacting APA §553. While we appreciate the DOL's interest in how businesses practically apply the duties test, the DOL must also assure respondents that it will subject any proposed changes to a separate notice and comment period to ensure a transparent and effective rulemaking process.

Generally, the DOL's questions center on how, and whether, to mandate the amount of non-exempt work an exempt employee may perform. The DOL inquires about three models, (1) reinstating the long/short duties test, (2) implementing the current California law, and (3) mandating a bright line minimum amount of allowable-exempt work. The current, single standard duties test achieves the regulation's intent to properly identify and provide overtime exemption to executive, administrative and professional employees while providing these higher level employees with flexibility to perform any and all needs a business may have. Allowing managerial level employees to take a more hands on approach increases employee morale and provides increased oversight at a ground zero level.

[1] U.S. Department of Labor, Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA).

Requiring the employee's "primary duty" to fulfill the substantive duties test without regard to a specific percentage of exempt work that must be done, or a specific cap on non-exempt work continues to accurately reflect the realities of the workplace and provide a practical approach that can be realistically applied. Further, judicial precedent has determined that this standard allows for the totality of the circumstances to be assessed while still ensuring that the employee's main, or primary job function is consistent with the regulation's intent.

The previous long/short duties test is problematic for various reasons. First, in proposing a salary threshold of $50,440.00 or $970.00 per week, the short duties test will go largely unused. Previously, in order to qualify for exemption under the short test prior to the 2004 rulemaking, an employee must earn at least 130% of the long test salary. Calculated based on the DOL's proposed $50,440.00 salary threshold, an employee would need to earn at least $65,572.00 to even be eligible for the short test analysis if revived today. Further, the short and long tests were of little utility even prior to the 2004 amendment. Because of the low minimum salary test ($155/week) at that time, market forces effectively abolished the long test's application—most employers paid employees at least enough to qualify for the simplified short test even at that time. Thus even as a practical matter, a single duties test is, and has been effective from long before 2004 and should not be reinstituted.

Implementing California's quantitative overtime model which bases an employee's exemption on the percentage of time spent on individual duties presents many of the same concerns. Requiring employees to monitor the specific percentage of time on exempt vs. nonexempt work is both impractical and inefficient and has created a considerable amount of litigation in California. Employers would be required to execute this onerous review for each individual employee, and maintain compliance in light of judicial developments all while attempting to develop and sustain successful business operations.

Further, California has the most restrictive state overtime law in the nation. Modeling the duties test based upon this standard in addition to mandating a salary threshold which markedly surpasses the highest, current, state threshold demonstrates the federal overreach inherent in this proposed rulemaking. Because of the vast economic, industry, and regional disparity among states, federal regulations are best utilized as a baseline protection upon which states can expand where these regional and industry disparities necessitate.

Increased Salary Threshold

The DOL's proposal to double the minimum salary level required for exemption from $23,660 to $50,440 and automatically adjust salary threshold each year based on unreliable inflationary measures presents multiple additional concerns. This proposal not only abandons the DOL's historic rulemaking policies, but fails to recognize the grave consequences to both employees and employers if the salary level is adopted and automatic inflationary measures are implemented.

Historically, the DOL has established the minimum salary level for exemption by looking to points near the lower end of the current range of salaries to determine the appropriate level. In 1958, the DOL analyzed data on actual salary levels of employees that were exempt and set the minimum salary required for exemption at a level that excluded the lowest 10th percentile of employees in the lowest wage industries, the lowest region, the smallest businesses and the smallest cities. In 2004, the DOL analyzed BLS data to set the minimum salary level to exclude the lowest 20th percentile of employees in the lowest wage region and industry. The DOL justified doubling the percentile by explaining that a higher salary was needed due to the changes to the duties test and did so by using the lowest salary levels. In the 2015

proposed rule, the DOL has not provided adequate justification for doubling the salary level to the 40th percentile and did not explain its failure to follow the tradition of using salary levels that account for regional and industry differences.

The DOL recognizes that rural areas and lower-wage industries will be the most impacted by the proposal, but claims the vast majority of workers reside in Metropolitan Statistical Areas ("MSAs"). However, the DOL ignores the fact that salary levels vary significantly by region and therefore between MSAs. In many industries, salary levels depend on the cost of living associated with that city or region. For example, an entry-level financial analyst will earn a higher salary in New York City in comparison to Chicago because the cost of living in New York City is higher. Therefore, employers in New York City will be less affected by a mandated federal minimum salary. Further, the DOL seems to be insinuating that MSAs are analogous to the largest cities in the U.S., which is not accurate. MSAs include large cities, but also encompass smaller cities and their surrounding areas. The DOL's assertion that the proposed salary level is appropriate because most potentially affected workers reside in MSAs and do not work in low-wage industries is specious. Further, the DOL also fails to acknowledge regional differences for salaries in high-wage industries, which will certainly lead to certain employers and employees being disproportionately impacted.

The DOL fails to recognize the negative implications the proposed rule will have on employees and the job market. While the DOL has a valid argument for increasing the salary level for overtime eligibility, doubling the current salary level is not sound. Not only does the DOL overlook the fact that employers have alternatives to paying employees overtime, but it does not acknowledge the harmful effects on employees and workplace culture. The DOL assumes that significantly raising the minimum salary will automatically result in a greater number of employees receiving overtime. However, employers will implement alternatives, such as cutting employees hours, in order to avoid paying overtime rates, which will ultimately limit employment opportunities. Many non-exempt employees will lose job flexibility, benefits, and opportunities for advancement and bonuses. While exempt employees do not receive overtime for working more than 40 hours a week, they also do not lose pay for working less. Exempt employees are often permitted flexibility in structuring their day for personal needs, such as doctor's appointments and telecommuting. Non-exempt employees are not given the same flexibility because employers have to monitor their hours in order to prevent overtime rates and stay compliant with the FLSA. Employers may also reduce non-exempt employees to part-time, resulting in less income, loss of benefits, and ineligibility for bonuses.

The DOL's proposal is especially disadvantageous for young professionals in entry-level positions. Entry-level positions often provide invaluable training, learning, and career-enhancing opportunities. Similarly, young professionals will struggle to distinguish themselves from their peers if they are not permitted to work over 40 hours in a week. Therefore, it will be more difficult for entry-level positions to receive promotions or rise into the professional ranks. Fewer advancement opportunities and incentives will cause employees to be less motivated, which will inhibit productivity and weaken employee morale.

Automatic Adjustment of Salary

The DOL not only proposes to annually adjust the salary without describing definitive methodology, it attempts to base this adjustment on inflationary measures that the DOL has previously held to be unreliable. Historically, both Congress and the DOL have consistently rejected automatic annual increases to the minimum salary level required for exemption. In 2004, the DOL rejected the use of inflationary measures stating that, "The final rule reflects the DOL's long-standing tradition of avoiding the use of

inflation measures for automatic adjustments to these salary requirements…The DOL continues to believe that such a mechanical adjustment for inflation could have an inflationary impact or cause job losses. We are particularly concerned about the impact that an inflation adjustment could have on lower-wage sectors."[2]

While salary levels should be adjusted on a regular basis, the DOL provides no support for its proposition that salaries should be adjusted annually or that inflationary measures are reliable methodology for doing so. In its 2004 rulemaking, the DOL itself explicitly stated that the use of inflationary measures are unreliable, will negatively impact industry, and are against congressional intent. Additionally, the DOL does not address the projected impact from annual adjustments several years from now. As the U.S. Chamber of Commerce discussed, "The threshold will continue to move upward rapidly as the pool of employees being taken into account continues to skew towards higher salary levels with the result of creating a ratchet effect that could soon eliminate the white collar exemptions entirely."[3] While automatic adjustments may be less time consuming than rulemaking, employers will be left with limited control over these business decisions and increased administrative burden in annually adjusting salaries. Salary levels should be reviewed and adjusted, but the negative impacts and unreliability associated with annual automatic adjustments render this proposal unreasonable and unjust.

As a company employing over one thousand employees, the DOL's proposed changes are particularly concerning. We appreciate this opportunity to discuss these proposed rules with you, and appreciate your continuing commitment to common sense solutions that protect employee interests in a manner that also respects the pressures facing employers.

Very sincerely yours,

Sean Cotton
Meridian Health Plan
Chief Administrative Officer

[2] 69 Fed. Reg. 22122, 22171 (2004) (codified at 29 CFR pt. 541).
[3] Hearing Before the House Education and the Workforce Committee's Subcommittee on Workforce Protections, House of Representatives, 114th Cong. (2015) (Statement of Tammy D. McCutchen, U.S. Chamber of Commerce).

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

July 22, 2015

The Honorable Timothy Walberg
Chairman
Subcommittee on Workforce Protections
Education and the Workforce Committee
U.S. House of Representatives
2436 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am writing to express NAHB's appreciation to you and the Subcommittee on Workforce Protections for having this important discussion on the Department of Labor's (DOL) proposal to significantly alter the current overtime rules under the Fair Labor Standards Act. NAHB is concerned that the DOL's proposed changes will have a significant impact on regulated employers and small businesses, including home builders and specialty trade contractors.

Under current law, workers who earn less than $23,660 a year are considered non-exempt employees by DOL, and employers must pay them time-and-a-half for any hours they work over a traditional 40-hour work week. With DOL acting to more than double this overtime threshold to over $50,000 in 2016, NAHB believes that such a dramatic surge is unlikely to result in an increase in workers' take-home pay. Rather, it would force business owners to structure their workforce to compensate by scaling back on pay and benefits, as well as cutting hours to avoid the overtime requirements.

NAHB economists have released the attached state-by-state analysis showing that in total, more than 110,000 construction supervisors would no longer be eligible for the exemption and may be overtime-eligible under this new rule. NAHB is concerned this significant change to the salary threshold will reduce job-advancement opportunities and the hours of full-time construction supervisors, leading to construction delays, increased costs and less affordable housing options for consumers.

NAHB stands ready to work with the Subcommittee on Workforce Protections as it deliberates on this important issue. Thank you for considering our views.

Sincerely,

James W. Tobin III

cc: Members of the Subcommittee on Workforce Protections

NAHB

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

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

NAHB

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

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

NAHB

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

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

NAHB

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

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

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

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

NAHB

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

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

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

July 22, 2015

The Honorable John Kline
Chairman
Committee on Education and
the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and
the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Kline and Ranking Member Scott:

The National Retail Federation (NRF) and our members have grave concerns regarding the Administration's proposed changes to the "white collar" overtime exemptions (RIN: 1235-AA11). The sweeping changes pondered by the Department of Labor (DOL) are utterly complex and if adopted, would significantly alter the current overtime framework. Given this complexity and the questions on the duties test and non-discretionary bonuses left unanswered by the Department in the NPRM, NRF has requested a 60 day extension of the comment period in order to compose thorough comments. We believe DOL's proposal is unprecedented and will negatively impact career advancement opportunities for employees and further insert the government into the way retailers run their businesses.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. The retail industry is the nation's largest private sector employer; supporting one in four U.S. jobs or 42 million working Americans. Retail contributes $2.6 trillion to annual GDP, marking retail as a daily barometer for the nation's economy.

In anticipation of the proposed rule, NRF commissioned an Oxford Economics study and a GfK survey of retail and restaurant managers to better understand the impacts that potential changes to the salary threshold and/or duties test would have on the industry. The NRF Oxford Economics study, "Rethinking Overtime," analyzed three possible new exemption thresholds: $610, $808, and $984 per week. The study has since been updated to reflect the more than doubling of the minimum salary level in the NPRM and the proposed mechanisms for an automatic annual increase to the threshold. The magnitude of the salary increases, the lack of certainty about the amount of annual increases, and the Department's failure to account for significant regional differences in wages all render the proposed changes daunting for many retailers.

The updated Oxford report forecasts what the overtime threshold would be after two and five years if set at $50,440 (or $970/week) in 2016 as DOL has proposed and indexed either to CPI-U or pegged to the 40th percentile wage series in subsequent years. Oxford's analysis predicts that if the salary level is set at $50,440 in 2016 and indexed to CPI-U inflation, it would rise to $52,676 in 2018

NATIONAL RETAIL FEDERATION
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www.nrf.com

and $56,212 in 2021. Alternatively, if the threshold is tied to the 40th percentile wage series, past trends suggest the threshold would increase to $52,884 in 2018 and $56,836 in 2021.

Forecasting the 40th percentile of full time salaried workers is complicated by the rule itself, however. The change in the overtime rules is likely to alter how CPS survey respondents answer the salary versus non-salary question, presumably by prompting more workers to report that they do have an hourly rate of pay. This will drive up the wage distribution for salaried workers and establishes the potential for a vicious cycle in which the overtime rule influences the very metric by which it is set. This could result in an exponential increase in the salary threshold from year to year.

Oxford estimates that DOL's proposed increase in the salary threshold to $970/week would affect approximately 2,189,600 exempt retail and restaurant workers, or roughly 64 percent of the total number of exempt workers in the industry. The study predicts 104,400 workers who are closest to the new threshold would likely see an increase in their base salaries by a total of $159 million; however, this group would also suffer an equivalent decrease in their bonuses and benefits.

In addition, 463,000 workers would be converted from salaried exempt status to hourly non-exempt status and become eligible for $5.36 billion in overtime earnings. Once again, however, this group would also see their hourly rates decreased by an equal amount, leaving their total annual earnings unchanged. Finally, we expect 231,500 workers would be converted from exempt salary to non-exempt hourly and have their hours reduced to 38 hours per week. This change would cost these workers $2.32 billion in earnings but would prompt employers to hire an estimated 117,100 part-time workers to fill their labor needs.

As evidenced by the above findings, it is unlikely that many affected workers would experience a boost in overall compensation simply because they gained the potential to earn overtime pay. The net result of these changes would be an accelerated hollowing out of middle-level management, making it much more difficult for hourly workers to rise into the professional ranks. We expect companies would encounter difficulties developing talent and promoting internally due to the narrower pipeline of management personnel resulting from these changes, diminishing the opportunity for merit advancement typical in many retail and restaurant workplaces.

Oxford Economics estimates that the passive cost to businesses of the new rule would be enormous – $8.4 billion per year assuming retailers do not make changes to offset their increased costs. The proposed changes in the rule would impose new costs on businesses, many of whom would have to update their payroll systems to convert salaried employees to hourly, track time, and end incentive payments or bonus structures for many workers who are currently eligible for such payments. The magnitude of these costs is not trivial; Oxford estimates that at the proposed salary threshold of $970 in 2016, the likely aggregate administrative cost for retail and restaurant businesses alone to comply with the new regulation would be $745 million. Unfortunately, DOL's calculations grossly underestimate the impact that the rule would have on employers and the time it would to take to make reclassification decisions, many of which may be made on an individual basis. For example, the Department estimates that it will only take small entities one hour to familiarize themselves with

the rule and that the average annualized direct costs to *all* employers would total $239.6 to $255.3 million.

Significantly, NRF is also concerned with the Department's methodology in the NPRM. Notably, the Department failed to account for significant regional differences in wages across the country and across different sectors of the economy when setting the salary threshold. In addition, BLS's current description of its methodology on the 40th percentile wage series does not allow their numbers to be reproduced and the validity of their calculations to be checked. The opacity surrounding their data should concern stakeholders and members of Congress and needs to be examined more critically. Furthermore, our Oxford Economics study found that the series as currently defined can be quite volatile, changing as much as five percent from one month to the next. The level of uncertainty this creates for business owners is simply unacceptable.

Thus while an increase in overtime eligibility will not correspond with an increase in overall compensation for employees, the Department's proposed changes will result in reduced career advancement opportunities for hourly workers, diminished flexibility, and a dramatic increase in the overall costs of doing business. NRF will comment extensively on the rule to address our members' concerns with the unprecedented changes made to the salary threshold and the questions the Department has left open-ended on potential changes to the duties test.

Sincerely,

David French
Senior Vice President
Government Relations

cc: Members of the Committee on Education and the Workforce
U.S. House of Representatives

PARTNERSHIP TO PROTECT

WORKPLACE OPPORTUNITY

July 23, 2015

Chairman Tim Walberg
Subcommittee on Workforce Protections
U.S. House of Representatives
2181 Rayburn HOB
Washington, D.C. 20515

Ranking Member Frederica Wilson
Subcommittee on Workforce Protections
U.S. House of Representatives
2181 Rayburn HOB
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of the Partnership to Protect Workplace Opportunity, we thank you for holding today's hearing on Department of Labor's (the Department) proposed regulation amending the exemptions for executive, administrative, professional, outside sales, and computer employees (the "EAP exemptions" or "white collar exemptions"). The Partnership consists of a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry (*See* http://protectingopportunity.org for additional information, including a list of partners). The Partnership's members believe that employees and employers alike are best served by a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. We believe the Department's proposal would negatively impact the ability of the Partnership's members to maintain that flexibility and clarity.

The Department proposes increasing the salary levels required for the white collar exemptions and the highly-compensated exemption and annual automatic updating of those levels. Currently, those salary levels are $455 per week/$23,660 per year for the white collar exemptions and $100,000 per year for the highly compensated employees. Under the Department's proposal, the standard salary level would rise to $970 per week or $50,440 per year and the highly compensated employee standard would be set at $122,148. The Department is thus proposing to more than *double* the minimum salary level required for the EAP exemptions. This is particularly noteworthy given a national, February 2015, survey from the polling company, inc./WomanTrend, which found roughly one-in-five adults (21 percent) would not increase the overtime salary threshold at all. In fact, a 65 percent majority preferred increasing the salary limit by no more than 50 percent, or to $35,490 per year.

The Department claims the dramatic increase in the minimum salary requirement is needed to set a standard salary level for full-time salaried employees that "adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating a return to the more detailed long duties test."

We agree the Department should not return to the more detailed long duties test, which was effectively abandoned by DOL decades ago. Imposing the archaic long duties test on our modern economy would simply lead to less clarity and more litigation. The Department's dramatic increase to the minimum salary threshold is similarly unnecessary and damaging and would have negative consequences for employees, employers and the economy. The Department needs to take a more measured approach.

According to the Department's estimate, more than four million employees would need to be reclassified (to being non-exempt) as a result of the proposed minimum salary increase. This would result in less workplace autonomy and fewer opportunities for advancement, while forcing employees to closely track their hours to ensure compliance with overtime pay and other requirements. Employees would have less control over when and where they work.

The change to non-exempt status means that many employees would lose the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees would lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. Employers are also more reluctant to provide nonexempt employees with mobile devices or may place restrictions on their use, as employers need to account for any time employees spend on such devices. The Department simply ignores these consequences for employees in NPRM.

Similarly, the Department's proposal glosses over the fact that this proposed increase in the salary level would make it difficult to maintain part-time exempt positions. Under the current salary requirement, a part-time, pro-rated salary is sufficient to establish the exemption (provided that the pro-rated amount exceeds $455 per week). The proposed new amount makes such an arrangement far more difficult, effectively eliminating some flexible workplace arrangements. If an employee's pro-rated salary is not in excess of the new salary amount, that employee would now need to meticulously record his or her working hours, even if he or she never approaches 40 hours, because the FLSA's "hours worked" recordkeeping obligations apply to all non-exempt employees.

In addition, nonexempt status can lead to fewer opportunities for career advancement. Again, changing to non-exempt status requires employers – and employees – to watch the clock. For example, employees who have reached or are near 40 hours of work in a week may need to skip additional training or other career-enhancing opportunities, because the employer is not able to pay overtime rates for that time.

Finally, when employees are converted to non-exempt status, they often find that they have lost their ability to earn incentive pay (e.g., bonuses). Under the existing rules, employers that provide incentive payments to hourly employees must include those payments in the employee's "regular pay rate" for purposes of calculating overtime pay rates, even if the bonus is provided months after the overtime takes place. Faced with the difficult recalculation of overtime rates—sometimes for every pay period in a year—employers often simply forgo these incentive payments to non-exempt employees rather than attempt to perform the required calculations.

Particularly troubling is the impact these increases would have on regions of the country where the cost of living is significantly lower than large metropolitan areas, the West Coast and

the Northeast. The proposed nationwide floor for exempt status would exceed not only California's current standard of $720 per week, but also the California standard for 2016, which will be $800 per week. When even California employers need to raise the salary level to maintain the exemption, it is clear that what is supposed to be a salary floor for exempt employees across the country simply fails in any meaningful way to account for regional economic differences.

In addition, the Department's proposal fails to account for the devastating impact such an increase is likely to have on certain sectors of the economy, such as retail, restaurant, not-for-profits, educational institutions, and state and local governments. An Oxford Economics report commissioned by the National Retail Federation estimates that 2,189,600 retail and restaurant workers, or 64 percent of exempt workers in the industry, would be affected by the increase in the salary level. Approximately 32 percent of these affected employees would be converted from salaried exempt status to hourly non-exempt status, while 11 percent would have their hours reduced. The report also found that the changes would cost retail and restaurant businesses $8.4 billion per year.

The Department's decision to index the salary level for future increases would also be unprecedented and damaging. Both Congress and previous administrations have declined to do this throughout the history of the FLSA. The Department has proposed two possible methodologies that may be used for increasing the salary thresholds in coming years. As a result, the regulated community must now provide its comments on two different options, as well as any other options that may be identified by commenters (including, of course, the option not to require automatic, annual increases to the salary level). Determining the expected impact of the multiple methods will require significantly more in the way of economic analysis, as well as outreach to the Partnership's members as we attempt to determine the impact of the increase not only in the first year, but in the second year and the years beyond. Issues related to salary compression and the potential impact of essentially forced salary increases on future merit increases will also need to be considered and analyzed.

Finally, while the Department did not make any specific regulatory proposals with respect to the duties tests, the agency is "seeking additional information on the duties test for consideration in the final rule," and posed several questions. This type of vague inquiry is suitable for a Request for Information or Advanced Notice of Proposed Rulemaking, but it is not appropriate for a Notice of Proposed Rulemaking. The absence of a specific regulatory proposal complicates the ability of the regulated community to provide meaningful, substantive comments and is contrary to both the Administrative Procedure Act and the administration's goal of making the federal government policy setting more transparent.

Given these circumstances, the 60-day comment period provided by the Department is simply inadequate. Last week, the Partnership requested that the Department extend the comment period by 60 days, to November 3, 2015.

Thank you for convening today's hearing and for the opportunity to submit this letter for the record.

Sincerely,

The Partnership to Protect Workplace Opportunity and the following organizations:

4A's - American Association of Advertising Agencies

American Bakers Association

American Bankers Association

American Council of Engineering Companies

American Apparel & Footwear Association (AAFA)

American Hotel & Lodging Association

American Staffing Association

American Supply Association

Associated Builders and Contractors

Associated General Contractors

Auto Care Association

College and University Professional Association for Human Resources

Food Marketing Institute

HR Policy Association

Information Technology Alliance for Public Sector

International Association of Amusement Parks and Attractions

International Foodservice Distributors Association

International Franchise Association

International Public Management Association for Human Resources

Manufactured Housing Institute

National Association of Electrical Distributors

National Association of Home Builders

National Association of Manufacturers

National Association of Professional Insurance Agents

National Association of Wholesaler-Distributors

National Newspaper Association

National Automobile Dealers Association

National Council of Chain Restaurants

National Federation of Independent Business

National Grocers Association

National Lumber and Building Material Dealers Association

National Pest Management Association

National Public Employer Labor Relations Association

National Restaurant Association

National Retail Federation

National RV Dealers Association

Pennsylvania Food Merchants Association

Retail Industry Leaders Association

Small Business & Entrepreneurship Council

Society for Human Resource Management

Society of American Florists

U.S Chamber of Commerce

WorldatWork

July 23, 2015

The Honorable Tim Walberg
Chairman, Subcommittee on Workforce Protections
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable Frederica Wilson
Ranking Member, Subcommittee on Workforce Protections
2181 Rayburn House Office Building
Washington, DC 20515

Re: Examining the Costs and Consequences of the Administration's Overtime Proposal

Dear Chairman Walberg and Ranking Member Wilson,

On behalf of WorldatWork, I write today to outline and express our membership's concerns with the administration's overtime proposal.

WorldatWork is a nonprofit human resources association of professionals and organizations focused on compensation, benefits, work-life effectiveness and total rewards. WorldatWork members believe there is a powerful exchange relationship between employer and employee, as demonstrated through the WorldatWork Total Rewards Model. Total rewards involves the integration of six key elements that effectively attract, motivate, retain and engage the talent required to achieve desired organizational results.

Compensation's positive influence on an employer in terms of long-term results and productivity gains have far-reaching benefits to organizations and individual employees; the communities in which they operate, live and work; and the overall U.S. and global economies. There are many approaches to achieving this positive effect from the employment relationship, all of which consider a broad array of ideas, values and goals. To achieve these societal benefits, organizations need several degrees of decision-making flexibility to adapt compensation to a mutually beneficial result organized within a public policy parameter.

The U.S. Department of Labor's proposed regulation to amend the exemptions for executive, administrative and professional employees ("EAP" exemptions) would dramatically impact the ability of WorldatWork's members to maintain that flexibility and clarity. The proposed increase to the salary level, more than doubling the current level, is far higher than what WorldatWork anticipated. Additionally, the proposed threshold does not account for regional economic differences – differences that even the 2015 General Schedule (GS) Locality Pay Table accounts for.

The overtime proposal also recommends annually increasing the salary threshold adjusted to the 40th percentile of full-time earners or the Consumer Price Index – Urban (CPI-U). However, this annual adjustment does not consider the salary budget nightmare that will ensue for most businesses. First, the rule does not consider that business' fiscal year might be different than the calendar year. Second, it does not consider that an update indexed on the 40th percentile of full-time earners will have a significant impact on employers as they begin to classify more and more employees as hourly and they

fall out of the salaried worker population. Finally, the proposed rule does not address the issues related to salary compression and the potential impact of forced salary increases over merit increases.

Reclassifying employees to non-exempt status will likely lead to other negative consequences. One area of concern is with job flexibility. Under exempt status, employees must generally be paid the same salary regardless of the hours worked, and thus are afforded a level of work flexibility to take a couple hours off for an appointment or tend to a family matter without being docked in pay. Non-exempt employees will be forced to take this time as unpaid, which will limit their ability to address these personal obligations. A second area of concern is whether wages for employees will ultimately rise with this change. Labor costs are among the single largest costs of most businesses and are closely monitored to avoid budget overruns. It is unlikely that employers will increase their overall labor costs by simply paying former exempt employees additional overtime. Employers will likely offset that cost through some corresponding reduction in other areas of employee compensation. Thus, the administration's goal to increase wages paid to workers may not be realized.

Finally, our members are concerned that the proposed rule does not make any specific regulatory changes to the duties test, but leaves open the possibility of regulation action on the duties test in a final rule. Rather than simplifying the regulatory process, the Department's action complicates the ability of the regulated community to provide meaningful, substantive comments. Because the Department elected to not focus the discussion with specific regulatory proposals, the regulated community must use its comments to not only identify its own proposals, but also to guess as to what other proposals may be submitted and then explain the presumed impacts of those hypothetical proposals.

WorldatWork applauds your leadership for holding this important hearing and looks forward to working with you and members of the House Education and Workforce Committee as the administration moves forward with the regulation. More than 80 percent of Fortune 500 companies employ a WorldatWork member. These total rewards compensation experts are the professionals who will be charged with implementing the changes to the overtime exemption and managing organizations' compensation budgets going forward.

Sincerely,

Cara W. Welch

Cara Woodson Welch, Esq.
Vice President, External Affairs & Practice Leadership

[Whereupon, at 12:01 p.m., the subcommittee was adjourned.]

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