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THE 21ST CENTURY WORKFORCE: HOW CURRENT RULES AND REGULATIONS AFFECT INNOVATION AND FLEXIBILITY IN MICHIGAN'S WORKPLACES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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THE 21ST CENTURY WORKFORCE: HOW CURRENT RULES AND REGULATIONS AFFECT INNOVATION AND FLEXIBILITY IN MICHIGAN'S WORKPLACES

Tuesday, March 29, 2016
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Lansing, MI

The subcommittee met, pursuant to call, at 9:59 a.m., in Rooms M119–M120, Lansing Community College West Campus, 5708 Cornerstone Dr., Lansing, Michigan, Hon. Tim Walberg [Chairman of the subcommittee] presiding.

Present: Representatives Walberg and Bishop.

Staff Present: Jessica Goodman, Legislative Assistant; Tyler Hernandez, Deputy Communications Director; John Martin, Professional Staff Member; and Eunice Ikene, Minority Labor Policy Associate.

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

We welcome you today. This is a real live subcommittee hearing, but it sure feels much better in a way, being back in my district for the field hearing.

I would like to thank our witnesses for joining us. I would also like to thank the staff here at the Lansing Community College for their hospitality. This is a great facility. It kind of evidences what the Education and the Workforce Committee is all about in addressing real-world needs for real-world working environment, as well as people trained and prepared for real-world jobs. And living around Washington, at times, real world is not the expression we all know all that much about, so it is good to be here.

It is good to be here and have the opportunity to learn more about how policies and proposals coming out of Washington are affecting workers and employers both in Michigan and across the country. Discussions like this, one, are important because they inform the work we do as lawmakers. They help us, as your representatives in our nation's capital, better understand your concerns, your struggles, and your successes. And they help us ensure your priorities remain our priorities.

I don't have to tell you that in this economy, which is still struggling to recover, a lot of Americans continue to face significant

challenges. Millions of men and women are struggling to find jobs. Millions of others are working part-time jobs when what they really need and want is full-time work. Family incomes across the country remain flat. People are hurting, and as policymakers, we have a responsibility to do everything we can to help. One important way we can do that is by taking a close look at the rules and regulations governing our workplaces.

For almost 80 years, the *Fair Labor Standards Act* has been the foundation of our wage and hour standards, 80 years. The law plays an important role in the lives of millions of working Americans. The problem is that a lot has changed in our workplace over the 80 years. We have even gone beyond bag phones, and the Federal wage and hour rules have not kept up.

Today, the regulations guiding the law's implementation are rigid, outdated, and simply are not working for the twenty-first century workforce. Millennials are now the majority of the workforce, and they, like most in the workforce, do not want a flawed regulatory structure that constrains flexibility and innovation by creating confusion and uncertainty in today's workplaces. Unfortunately, the current law raises more questions than it provides answers.

That is why Republicans have long supported improving and updating the rules surrounding Federal wage and hour standards, modernizing them to account for advances in technology and to better reflect the innovative, flexible economy we have today. We remain willing and ready to work toward that goal.

However, we also remain insistent that we do so responsibly. It is not enough to simply change the rules. We have to improve them. And we have to do so in a way that does not place additional burdensome requirements on small business owners, does not stifle job creation and wages, and does not limit opportunity and flexibility for workers.

Unfortunately, the administration is taking a different approach to updating workplace rules and regulations. In fact, the Department of Labor is in the process of finalizing an overtime rule that is anything but responsible. Instead of making changes to address the complexity of current regulations, the proposal will impose significant burdens on employers, limit workplace flexibility, and make it harder for workers to advance in their careers. The administration's regulatory proposal will ultimately hurt the very people who need help.

There are better ways to update and modernize current rules and regulations, and we owe it to the American people to explore them. That is the purpose of today's hearing. We want to hear about your experiences and understand your concerns. What is working? What is not working? What changes need to be made to ensure Federal policies support rather than discourage the economic growth our nation desperately needs? How can we help you and others in our communities pursue the personal opportunity you are working to achieve?

[The information follows:]

Prepared Statement of Hon. Tim Walberg, Subcommittee on Workforce Protections

It's good to have the opportunity to learn more about how policies and proposals coming out of Washington are affecting workers and employers both in Michigan and across the country. Discussions like this one are important because they inform the work we do as lawmakers. They help us as your representatives in our nation's capital better understand your concerns, your struggles, and your successes; and they help us ensure your priorities remain our priorities.

I don't have to tell you, that in this economy which is still struggling to recover a lot of Americans continue to face significant challenges. Millions of men and women are struggling to find jobs. Millions of others are working part-time jobs when what they really need and want is full-time work. Family incomes across the country remain flat. People are hurting, and as policymakers, we have a responsibility to do everything we can to help. One important way we can do that is by taking a close look at the rules and regulations governing our workplaces.

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Americans. The problem is that a lot has changed in our workplaces over the 80 years, and federal wage and hour rules have not kept up.

Today, the regulations guiding the law's implementation are rigid, outdated, and simply not working for the 21st century workforce. Millennials are now the majority of the workforce, and they like most in the workforce do not want a flawed regulatory structure that constrains flexibility and innovation by creating confusion and uncertainty in today's workplaces. Unfortunately, the current law raises more questions than it provides answers.

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Chairman WALBERG. I look forward to hearing from each of you on the panel, so I am going to yield to my distinguished college from Michigan, Congressman Mike Bishop, for his opening remarks as well.

Mr. BISHOP. Thank you, Chairman Walberg, and thank you to our panel for being here today.

I want to make a special acknowledgement to Chairman Walberg for his dedication to this cause and for his steadfast leadership on this Committee to address this issue.

I want to thank you for being here, everybody, for participating in this hearing. These discussions are very helpful to all of us, very valuable. They help us deliver meaningful solutions to the many

challenges facing Americans right now, including those facing our workers and job creators.

In fact, when it comes to updating rules and regulations related to workforce protections and wage and hour standards, having the opportunity to hear your perspectives and experiences are particularly important. Because when we are talking about these issues, it is not about public policy; it is very personal. It is personal for the workers who need the flexibility to care for their loved one. It is personal for the parent who wants to make it to their child's school or game. And I can relate completely with that. It is personal for the working mom or dad who is helping an aging relative. Workplace flexibility is incredibly personal and important to a lot of people.

It is also personal for the low-wage worker trying to seize opportunities to move up the economic ladder. At a Committee hearing last year, we heard from a witness, Eric Williams, who worked his way up from crew member at a fast-food restaurant to become the chief operating officer of a major U.S. corporation. On top of that, he also owns and operates several restaurants of his own. This is the American dream. It is also what is at stake if we miss the mark when it comes to updating regulations related to wage and hour standards.

As Chairman Walberg did say, the rules and regulations guiding the implementation of the *Fair Labor Standards Act* are too complex. They are burdensome, and they are outdated. They no longer provide the kind of protections and opportunities that they could and should for workers and employers. I think that is something Republicans and Democrats can clearly agree upon. Where we disagree, seemingly, is the best way to update them.

During the same hearing in which Eric Williams shared his inspiring success story, he also raised some troubling concerns with the consequences one of the administration's recent regulatory proposals had, and that was the Department of Labor's overtime rule, which the good Chairman shared a little bit of his concern about earlier. It will create for workers and small businesses significant concerns, despite the fact it was intended to help.

Mr. Williams explained that the rule will be detrimental to workplace flexibility, how it will negatively impact pay and bonuses, and how it will severely limit hardworking, talented Americans from recognizing and realizing their dreams.

Workers and small businesses are not the only ones concerned about the administration's proposal. Those in higher education worry the rule could have unintended consequences for them as well, leading to higher costs and forcing schools to restrict hours for certain employees.

Here in Michigan, we are very fortunate to have an abundance of incredible universities that serve students from our State and from States across the country. Two of our witnesses are joining us from some of them: the University of Michigan and Michigan State University. Under no circumstances should we be making it harder and more costly for students at these universities, or any university, to receive a quality education.

Americans deserve better than the changes that led to these kinds of consequences. That is why we will continue our efforts to

promote and encourage reforms that clarify current rules and regulations, modernize them, and make them better - reforms that won't stifle innovation, flexibility, and opportunity. These things are essential in allowing our workforce to grow and change to better meet the needs of workers, job creators, and consumers; and they will continue to help us push the limits of what we are able to accomplish.

I look forward to hearing from all of you, all your comments, and look forward to working with all of you along the way as we accomplish our goals. Thank you. I yield back.

[The information follows:]

Prepared Statement of Hon. Michael D. Bishop, a Representative in Congress from the State of Michigan

These discussions really are valuable to us. They help us deliver meaningful solutions to the many challenges facing Americans right now, including those facing our workers and job creators.

In fact, when it comes to updating rules and regulations related to workforce protections and wage and hour standards, having the opportunity to hear your perspectives and experiences are particularly important. Because when we're talking about these issues, it's not just public policy it's personal.

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As Chairman Walberg said, the rules and regulations guiding the implementation of the Fair Labor Standards Act are too complex, burdensome, and outdated. They no longer provide the kind of protections and opportunities they could and should for workers and employers. I think that's something Republicans and Democrats can agree on. Where we seem to disagree is the best way to update them.

During the same hearing in which Eric Williams shared his inspiring success story, he also raised some troubling concerns with the consequences one of the administration's recent regulatory proposals the Department of Labor's overtime rule will create for workers and small businesses. He explained how the rule will be detrimental to workplace flexibility, how it will negatively impact pay and bonuses, and how it will "severely limit hardworking, talented Americans from realizing their dreams."

Workers and small businesses are not the only ones concerned about the administration's proposal. Those in higher education worry the rule could have unintended consequences for them as well, leading to higher costs and forcing schools to restrict hours for certain employees. Here in Michigan, we're very fortunate to have an abundance of incredible universities that serve students from our state and from states across the country. Two of our witnesses are joining us from some of them: the University of Michigan and Michigan State University. Under no circumstances should we be making it harder and more costly for students at these universities or any university to receive a quality education.

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I look forward to hearing from all of you about how we can best accomplish those goals.

Chairman WALBERG. I thank the gentleman.

Pursuant to Committee rule 7(c), all Committee 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. Ms. Nancy McKeague is senior vice president of employer and community strategies and chief human resources officer for the Michigan Health and Hospital Association and is testifying on behalf of the Society for Human Resource Management. She is responsible for internal human resources and is a staff lead for the Michigan Health and Hospital Association's Business Advisory Council and not a stranger to this subcommittee and hearing process. Welcome.

Ms. MCKEAGUE. Thank you.

Chairman WALBERG. Mr. Jared Meyer is a fellow with Economics21 at the Manhattan Institute. He conducts research in microeconomic theory and the effects of government regulation, and is kept busy doing that. Welcome.

Dr. Dale Belman is a professor with the School of Labor and Industrial Relations and adjunct professor with the Department of Economics at Michigan State University. Much of his work has focused on collective bargaining, labor relations, and compensation in the public sector and government regulation of labor markets. Welcome.

Ms. Laurita Thomas is the associate vice president for human resources at the University of Michigan. And we have no wall in between these two schools right here. It is not football game day. Ah, the handshake.

Chairman WALBERG. In this capacity she is responsible for human resource policy for all University of Michigan campuses and a full range of comprehensive, integrated human resource services, products, and operations- a full plate. Welcome.

Mr. Mark Wilson is vice president and chief economist for H.R. Policy Association. He previously served as deputy assistant secretary for the Employment Standards Administration at the Department of Labor. His work is focused on providing research and analysis of employment impacts and cost of workplace-related litigation and regulations, and is no stranger to this Committee as well and also to this area since this is your home area.

Mr. WILSON. Yes.

Chairman WALBERG. He grew up in East Lansing. Welcome back.

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

[Witnesses sworn.]

Chairman WALBERG. Thank you. You may be seated. Let the record reflect the witnesses answered in the affirmative.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. And I am looking for oh, there it is. There is our lighting system. It is fairly self-explanatory. If you know the stoplights on the roadway, it is pretty much the same. With the green light on, you have five minutes of testimony. When

you see the yellow light come on, that means there is a minute left in those five minutes. And then when red, finish up your sentence or short paragraph to the best of your ability.

In a field hearing like this with the amount of time that we do have and the limited number of members of the Committee here, we are not going to hold with great strictness to that, but we would appreciate it because we will have opportunity to ask questions relative to your testimony.

And so let me recognize our witnesses now, beginning with Ms. McKeague for your five minutes of testimony.

TESTIMONY OF NANCY MCKEAGUE, SENIOR VICE PRESIDENT AND CHIEF OF STAFF, MICHIGAN HEALTH AND HOSPITAL ASSOCIATION, OKEMOS, MI, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. MCKEAGUE. Thank you. I am Nancy McKeague. I'm senior vice president and chief of staff for the Michigan Health and Hospital Association, and I am appearing before you today on behalf of the Society for Human Resource Management.

Thank you for the opportunity to testify before the subcommittee again at this time in our home state on how federal regulations affect innovation and flexibility in the workplace.

As you mentioned, Mr. Chairman, few regulations impact the workplace more than those that implement the *Fair Labor Standards Act*. While employers of all sizes work diligently to classify employees correctly and remain in compliance with the FLSA, classification decisions are particularly challenging because they're based on both objective and subjective criteria. Therefore, on occasion, an employer acting in good faith could mistakenly misclassify employees as exempt who, in reality, should be nonexempt or vice versa.

Let me tell you a little bit about the MHA. We're a nonprofit association, and we advocate for hospitals and the patients and communities they serve. We're an employer of choice, having received workplace awards which are referenced in my written statement. Yet even some of the best employers face practical challenges with the FLSA.

It's not uncommon for employers to face high legal costs for complying with the statute, costs that are particularly difficult for an organization like the MHA with a tight budget. Unfortunately, increased litigation related to alleged FLSA violations leads to less funding for the nonprofit's core mission, whether that's providing patient treatment, caring for children, or conducting research.

Nonprofits like MHA must make challenging employee classification determinations, as our employees are often performing a mix of duties which includes both exempt and nonexempt functions. For example, sometimes we'll find that one of our employees will fit all of the executive employee exemptions under the FLSA with the exception of supervision of two or more employees. Take the instance of our MHA Foundation. The executive director for the foundation supervises only one employee, so that made our determination of her status a little bit more challenging. But in the end, we determined that she should be classified as exempt because of her autonomy, her experience, and our confidence in her judgment.

Given those sorts of ambiguity, the stakes in improperly classifying employees are high. Planning for an increase in litigation can be particularly difficult for the nonprofit sector and small employers. When the 2004 changes to the *Fair Labor Standards Act* overtime regulations were enacted, the MHA had to allocate additional funding to retain counsel in order to assure our practices were compliant. In the end, a nonprofit hospital's decision to direct limited funding to defending against lawsuits means less money for patient care and treatment.

As an employer in the health care sector, our member hospitals are working 24 hours a day, seven days a week, providing critical treatment and care to patients. Because of the nature of our work, we must have the ability to respond as quickly as possible and utilize flexible hours, especially for clinicians.

The FLSA makes this difficult for certain employees. While nonexempt employees can receive time-and-a-half pay, they can't be afforded the same workplace flexibility benefits as exempt employees. The FLSA actually impedes workplace flexibility by prohibiting private sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 per week even though all public sector employees are offered this type of flexibility, which is commonly referred to as comp time.

SHRM has long supported the *Working Families Flexibility Act* to provide employees with the option of comp time to businesses and their hourly employees. Mr. Chairman, today's examination of the FLSA is particularly timely given the administration's overtime proposal is under final review after they received more than 290,000 comment letters in response to the proposal.

SHRM has repeatedly stated that an increase to the salary threshold for overtime pay is warranted but the DOL's proposed 113 percent increase is too much, too fast. Using a salary threshold at the 40th percentile of average weekly earnings, which is estimated to be more than $50,000 for 2016, presents significant challenges for small employers, nonprofits, and employees in lower cost-of-living areas. If the salary threshold is doubled, many employees will lose their exempt status and the workplace flexibility it affords, not to mention the professional status and autonomy that go with it.

Mr. Chairman, thank you for protecting for introducing the *Protecting Workplace Advancement and Opportunity Act*, which would nullify the DOL's overtime proposal. SHRM strongly supports this legislation to require the department to conduct an economic analysis of how changes to the overtime rules will impact nonprofits, small businesses, and others before they issue a new rule. This is a reasonable response to the current overtime proposal, and SHRM encourages all members of Congress to support it.

In closing, SHRM and its members are committed to working with the members of this Committee to address the FLSA in a manner that balances the needs of both employees and employers and does not produce requirements that could limit workplace flexibility. Thank you, Mr. Chairman.

[The statement of Ms. McKeague follows:]

STATEMENT OF NANCY MCKEAGUE, SHRM-SCP, SPHR

SENIOR VICE PRESIDENT & CHIEF OF STAFF, MICHIGAN HEALTH & HOSPITAL ASSOCIATION

ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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

FIELD HEARING ON
"THE 21ST CENTURY WORKFORCE: HOW CURRENT RULES AND REGULATIONS AFFECT INNOVATION AND FLEXIBILITY IN MICHIGAN'S WORKPLACES"

MARCH 29, 2016

Introduction

Chairman Walberg, my name is Nancy McKeague, and I am Senior Vice President & Chief of Staff for the Michigan Health & Hospital Association, based near Lansing, Michigan. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. On behalf of our approximately 275,000 members in over 160 countries, I thank you for this opportunity to appear before the Committee to discuss how current federal rules and regulations affect employers and employees.

SHRM is the world's largest association devoted to human resource (HR) management. Representing more than 275,000 members in over 160 countries, the Society serves the needs of 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.

The Michigan Health & Hospital Association (MHA), founded in 1919 as a nonprofit association, advocates for hospitals and the patients they serve. This includes all community hospitals in the state, which are available to assist each of Michigan's nearly 10 million residents, 24 hours a day, seven days a week. Michigan hospitals consist of various types of health care facilities, including public hospitals—owned by city, county, state or federal government, and nonpublic hospitals—individually incorporated or owned and operated by a larger health system. In total, the MHA has 107 employees, including 78 exempt employees and 29 nonexempt employees. The MHA has employees in a variety of occupations including lawyers, physicians, allied health professionals, and computer and information technology (IT) professionals.

The MHA is a top employer in Michigan, earning the Alfred P. Sloan Award for Excellence in Workplace Effectiveness and Flexibility in both 2009 and 2010. The *When Work Works* Awards (formerly known as the Alfred P. Sloan Awards), are given annually by SHRM and the Families and Work Institute, to honor organizations that are using workplace flexibility as a strategy to make work "work" better—for the employer and the employees. In addition, the MHA received Modern Healthcare magazine's "Best Places to Work in Healthcare" award in 2010 and 2012, based on a judging system that is weighted 25 percent on an organization's nomination and 75 percent on its employees' survey results—making the award significantly representative of staff sentiment.

Given the topic of today's hearing, my testimony will focus on the Fair Labor Standards Act (FLSA) and some of the challenges it poses to workplace flexibility and innovation. I will explain the key issues posed by the FLSA to our nation's employers and employees; demonstrate some of the practical challenges faced by employers when complying with the FLSA; explain how the FLSA hinders an employer's ability to provide workplace flexibility; and lastly, discuss the Obama Administration's proposal to update the FLSA overtime regulations.

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.

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) administers and enforces the FLSA with respect to private employers and state and local government employers.

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]

Employees of firms that are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, record-keeping or child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce.

Additionally, many states 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, then employers are required to follow federal law. The myriad of federal and state laws add additional complexity when employers are working diligently to remain compliant.

Employee Classification Determinations under the FLSA

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

These classification determinations must also be made looking at each individual job position. Classification decisions for all positions are particularly challenging as they are based on both objective (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 who, in reality, should be nonexempt, or vice versa.

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

FLSA-Practical Challenges for Employers

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself has

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

remained relatively unchanged in the more than 70 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done.

Therefore, today's examination of rules and regulations that impact the workplace and workforce is an ideal forum to focus on the FLSA regulatory structure and the practical challenges it poses on the workplace, which are outlined below.

Employee Classification Determinations: The organizational structure of and duties performed by employees in the nonprofit sector can lead to difficult employee classification determinations. The MHA, like many nonprofits, has a fairly flat organizational structure that is not as rigid as those commonly found in for-profit enterprises. For example, exempt employees in nonprofit organizations that are similar to the MHA often engage in work activities along with nonexempt employees in order to meet members' expectations. Thus, employee classifications do not always fit nicely into the FLSA's two separate bucket approach of "exempt" or "nonexempt" employees.

For a small organization, the "primary duties" test presents unique challenges because it is difficult to distribute work evenly across a limited capacity organization. As a result, managers may frequently assist with the work of their nonexempt colleagues and perform exempt and nonexempt work concurrently. I will elaborate later in my testimony on the flexibility restraints associated with the FLSA.

For example, we sometimes find an employee will fit all of the executive employee exemptions under the FLSA with the exception of the supervision of two or more employees. Take the instance of the MHA Foundation, which was established to support hospitals and their community partners to improve the health of individuals and communities throughout Michigan. Because the executive director for this Foundation supervises only one employee, determining her classification was challenging. In the end, we decided to make her exempt because of her autonomy, experience and our confidence in her judgment.

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

Nonprofit employers like the MHA work hard to ensure employee classification decisions are in compliance with the FLSA. With a limited budget and tight margins, we must do everything in our power to limit expensive lawsuits. When the 2004 changes to the FLSA overtime regulations were enacted, the MHA had to allocate additional funding to retain counsel in order to assure our practices were compliant. We have two HR staff members, and I estimate that about 35 percent of their time is dedicated to compliance matters. This restricts the time and resources we have available for organizational development and building support services for our member hospitals in Michigan.

With employers and employees now finally understanding the full impact of the 2004 overtime changes, I am concerned that the proposed changes could lead to a new wave of litigation and additional confusion. Planning for an increase in litigation can be particularly difficult for the nonprofit sector and small employers. In the end, a nonprofit hospital's decision to direct limited funds to defending against lawsuits means less money for patient care and treatment.

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

As an employer in the health care sector, our member hospitals are working 24 hours a day, seven days a week, providing critical treatment and care to patients. With the outdated nature of the FLSA, many of our members feel limited with how nonexempt staff can use their time when working from home. Currently, our database manager and our help desk manager are nonexempt employees, but they both would greatly benefit, and so would our organization at large, from the flexibility that comes with a work-provided smartphone. These employees want to be responsive to our members' needs. However, because of the difficulties associated with tracking these after work hours, we've had to restrict when and how these employees assist users with technology-related questions. Added flexibility to provide this technology would be quite beneficial because these employees are supporting and assisting other smartphone users within our organization.

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

In the health care sector we have many jobs that didn't even exist ten years ago—some technology-related and some due to medical and scientific advances. Because of the nature of our work, we must have the ability to respond as quickly as possible and utilize flexible hours, especially for clinicians. For instance, when several states, including Michigan, experienced medical emergencies due to contaminated compounded injections, we had nurse managers working alongside the teams they manage to provide patient care for an extended period during the crisis.

The FLSA makes it difficult, if not impossible in many instances, for employers to provide workplace flexibility to millions of nonexempt employees. While nonexempt employees can receive time-and-a-half pay, they cannot be afforded the same workplace flexibility benefits as exempt employees. At the MHA, we restrict telecommuting options because of FLSA compliance concerns. While we do offer flexible schedules, we require that all work be performed between 7:00 a.m. and 6:00 p.m. on weekdays. Another consequence of this outdated statute is seen in the MHA's decision to limit internships and fellowship opportunities because of flexibility restrictions.

Furthermore, the statute also prohibits private-sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public-sector employees are offered this type of flexibility, commonly referred to as "compensatory or comp time." This comp time option would be made available to all employers and employees if H.R. 465, the Working Families Flexibility Act, was enacted. SHRM strongly supports H.R. 465 because it meets our core workplace flexibility principle—that in order for flexibility to be effective, it must work for both employers and employees. Specifically, the bill would modernize the application of the FLSA to the private sector by permitting employers to offer employees the voluntary choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work. Currently, federal, state and local government employees are offered a similar benefit.

While the ability to offer nonexempt, private-sector employees comp time is one way public policy can encourage greater access to workplace flexibility, SHRM believes more can be done to

incentivize employers to implement effective and flexible workplaces. It is our strong belief that public policy must not hinder an employer's ability to provide flexible work options. Rather, public policy should incentivize and enhance the voluntary employer adoption of workplace flexibility programs.

Because SHRM and its members believe the United States must have a 21st century workplace flexibility policy that reflects the nature of today's workforce, the Society developed five principles that is now guiding a legislative proposal that will encourage employers to voluntarily provide paid leave to their employees. I have included a copy of the principles at the end of my written statement (Appendix A).

DOL's Proposed Overtime Regulations

Another pending Obama Administration proposal that is likely to impact workplace flexibility and innovation is the DOL's proposed changes to the FLSA overtime regulations. As you know, on March 13, 2014, President Barack Obama directed the DOL, through a Presidential Memorandum, to "modernize and streamline" the FLSA overtime regulations. On June 30, 2015, the DOL published proposed changes to regulations defining the "white-collar" overtime exemptions. Key provisions of the DOL's proposed update include:

- **Updating The Salary Threshold –** The DOL proposed increasing the salary threshold for overtime pay from $23,660 to $50,440 per year as of 2016. This would be a 113 percent increase in the salary threshold and would move the salary level to the 40th percentile of earnings for all full-time salaried workers.

- **Annual Automatic Updates –** The DOL proposed increasing the minimum salary threshold on an annual basis by pegging it to changes in the 40th percentile or by indexing it to inflation using the Consumer Price Index for All Urban Consumers, which measures the cost of goods and services for urban consumers.

- **Potential Changes To The Duties Test –** While the DOL did not propose specific changes to the duties test, the department indicated that it is considering changes by asking for input on whether the concurrent duties test is still useful and if the test should require that employers track time to ensure that exempt employees spend a certain percentage of their time performing exempt duties.

The DOL recently finished reviewing the 290,000 comment letters it received in response to the proposed overtime regulation and the proposal is now at the Office of Management and Budget for final review. A final rule is expected to be published between late spring/summer. SHRM voiced its concerns on behalf of the HR profession through a comment letter signed by 50 SHRM state councils, 307 SHRM chapters and the Council for Global Immigration, a SHRM strategic affiliate.

In addition, the SHRM-led Partnership to Protect Workplace Opportunity (PPWO), a coalition of over 67 employer groups, submitted a comment letter with the support of 133 public and private employer groups. Consisting of a diverse group of associations, businesses, public sector employers, and nonprofits representing employers with millions of employees, the PPWO is leading the employer community's response to the overtime regulations.

SHRM's Analysis of the Overtime Regulations

SHRM appreciates the Obama Administration's interest in updating the salary threshold. However, using a salary threshold at the 40th percentile of weekly earnings (estimated at $50,440 per year in 2016) presents challenges for employers whose salaries tend to be lower, such as small employers, nonprofits, employers in certain industries, and employers in lower cost-of-living areas. Of equal concern, SHRM opposes automatic increases to the salary threshold, which have been considered and rejected in the past. Automatic increases ignore economic variations of industry and location.

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

Throughout the rulemaking process, SHRM has cautioned 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.

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.

As for the impact on MHA, we will need to reclassify seven percent of our workforce, costing $35,000 in additional payroll cost in the first year alone. As you know, this proposed rule would require automatic increases each year so the payroll cost will continue to grow as well as our 401(k) contributions and life insurance premiums. In addition, reclassifying employees and adjusting salaries in response to the new salary threshold will likely cause wage compression issues with entry-level and mid-level employees' salaries nearing the level of their managers. In order to offset these issues, MHA will need to provide additional salary increases for the managers and directors, adding to the initial payroll costs cited.

Furthermore, MHA expects significant compliance costs in order to comply with this new rule. In an effort to prepare for the final rule, MHA has conducted extensive market analyses, reviewed position descriptions and validated our pay grade ranges at a cost of $12,000. So far, we have invested approximately 35 hours of human resources staff time in preparation for the rule and the rule isn't even final.

Given these collective concerns with the current DOL overtime rule, SHRM appreciates the leadership of Representatives Walberg and Kline in introducing legislation, H.R. 4773, the Protecting Workplace Advancement and Opportunity Act, to nullify the current overtime proposal. This reasonable legislation does not prevent the DOL from moving forward with changes to the overtime regulations. It simply requires the DOL to perform an economic analysis of how changes to overtime regulations will impact nonprofits, small businesses, and employers in other industry sectors before issuing a

new rule. The bill would also prohibit automatic increases to the salary threshold while ensuring any proposed changes to the duties test receive proper scrutiny through the formal notice and comment process. SHRM strongly supports this legislation and recommends its swift passage.

Conclusion

The FLSA is a valuable and fundamental cornerstone among America's workplace statutes. SHRM educates its membership and their organizations about all wage and hour issues under the FLSA. But the FLSA was crafted in a bygone era, and it should be re-evaluated to ensure it still encourages employers to hire, grow, innovate and better meet the needs of their employees.

Working to comply with the FLSA can create high legal costs for employers, which is particularly difficult for the nonprofit sector with tighter budgets. Simply stated, more confusion from Washington and increased litigation related to alleged FLSA violations leads to less funding for a nonprofit's core mission, whether that is providing patient treatment, caring for children or conducting research.

SHRM and its members, who are located in every congressional district in the nation, are committed to working with this Subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce requirements that could limit workplace flexibility.

As for the DOL's overtime proposal, 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.

Thank you, I welcome your questions.

# # #

Appendix A.

SHRM's Recommendations for a 21st Century Workplace Flexibility Policy

Shared Needs: SHRM envisions a "safe-harbor" standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer's policies or collective bargaining agreements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing—and often conflicting—existing patchwork of regulations.
- Create administrative and compliance incentives for employers that offer paid leave by offering them a safe-harbor standard that would facilitate compliance and save on administrative costs.
- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe-harbor leave standards to satisfy federal, state and local leave requirements.

Employee Leave: Employers should be encouraged to voluntarily provide paid leave to help employees meet work and personal life obligations through the safe-harbor leave standard. A federal policy should:

- Encourage employers to offer employees some level of paid leave that meets minimum eligibility requirements as allowed under the employer's safe-harbor plan.
- Allow the employee to use the leave for illness, vacation, personal and family needs.
- Require employers to create a plan document, made available to all eligible employees, that fulfills the requirements of the safe harbor.
- Require employers to attest to the U.S. Department of Labor that their plan meets the safe-harbor requirements.

Flexibility: A federal workplace leave policy should encourage maximum flexibility for both employees and employers. A federal policy should:

- Permit the leave requirement to be satisfied by following the policies and parameters of an employer plan or collective bargaining agreement, where applicable, consistent with the safe-harbor provisions.
- Provide employers with predictability and stability in workforce operations.
- Provide employees with the predictability and stability necessary to meet personal needs.

Scalability: A federal workplace leave policy must avoid a mandated one-size-fits-all approach and instead recognize that paid leave offerings should accommodate the increasing diversity in workforce needs and environments. A federal policy should:

- Allow leave benefits to be scaled to the number of employees at an organization; the organization's type of operations; talent and staffing availability, market and competitive forces, and collective bargaining arrangements.
- Provide prorated leave benefits to full- and part-time employees as applicable under the employer plan, which is tailored to the specific workforce needs and consistent with the safe harbor.

Flexible Work Options: Employees and employers can benefit from a public policy that meets the diverse needs of the workplace in supporting and encouraging flexible work options such as telecommuting, flexible work arrangements, job sharing, and compressed or reduced schedules. Federal statutes that impede these offerings should be updated to provide employers and employees with maximum flexibility to navigate work and personal needs. A federal policy should:

- Amend federal law to allow employees to manage work and family needs through flexible work options such as telecommuting, comp time, flextime, a part-time schedule, job sharing, and compressed or reduced schedules.
- Permit employees to choose either earning compensatory time off for work hours beyond the established workweek, or overtime wages.
- Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.

Chairman WALBERG. Thank you.

I now recognize Mr. Meyer. And it is good to have a millennial—

Mr. MEYER. Yes.

Chairman WALBERG.—on our witness panel here to hear perspective. You have five minutes.

TESTIMONY OF JARED MEYER, FELLOW, ECONOMICS21, MANHATTAN INSTITUTE FOR POLICY RESEARCH, WASHINGTON, D.C.

Mr. MEYER. Well, Chairman Walberg and Representative Bishop, thank you for the opportunity to give testimony on how new administrative interpretations of the *Fair Labor Standards Act* of 1938 fail to reflect the realities of today's workforce.

I'm a fellow at the Manhattan Institute and I'm the co-author with Diana Furchtgott-Roth of Disinherited: How Washington Is Betraying America's Young. I'm also the author of the forthcoming Uber Positive: Why Americans Love the Sharing Economy.

The American economy is changing, and millennials' attitudes about work and their careers are changing with it. The rapid rise of the so-called sharing economy embodies many young Americans' new economic ideal, one driven by technology, convenience, and flexibility.

Companies such as Uber and Airbnb offer the technical platform and support to allow transactions between buyers and sellers to easily take place. For this reason, these types of companies are often referred to as "intermediaries." Those who partner with intermediaries are classified as independent contractors, not employees.

The flexibility that independent contractor status offers workers is vital to the success of the sharing economy. While some workers use these platforms full-time, the vast majority use them for part-time work and supplemental income. About eight in 10 Lyft drivers work under 15 hours a week, and over half of Uber drivers use the platform for less than 10 hours a week. Furthermore, half of Lyft drivers work another job while partnering with the company, and two-thirds of Uber drivers work another job as well.

Independent contractor status allows the decision of when or for how long to work to be controlled by workers, not companies. And this opportunity to smooth out earnings to do everything from meeting rent to paying down student loans or funding a new business venture is a benefit of the sharing economy that must be protected. This is especially critical for the 70 percent of Americans ages 18 to 24 who experience an average monthly change of over 30 percent in their monthly incomes.

But the sharing economy's rise obscures a troubling economic trend. Once dynamic, the American economy is growing slowly and entrepreneurship is actually falling. Even though two-thirds of millennials want to work for themselves at some point, less than 4 percent of private businesses are even partially owned by someone under the age of 30.

One reason for this is government policy, particularly in regards to labor regulation, ignores the realities of a twenty-first century economy and continues to hold back millennials' economic opportunity. For example, the Labor Department recently issued an Administrator's Interpretation, effective immediately, to clarify the

definition of independent contractors. It states, "most workers are employees," not independent contractors. Because it was termed "guidance," it didn't have to go before the public for comment, even though it has the potential to upend the sharing economy.

Currently, workers are either classified as employees or independent contractors. Employees are given many protections and benefits under the *Fair Labor Standards Act* that are not available to contractors. In exchange, employers are able to set the terms of workers' employment. On the other hand, the independent contractor status provides workers with more control and flexibility.

The Labor Department's new interpretation formally accepts the six-part "economic realities" test for determining whether workers are employees or independent contractors. At the same time, it downplays one of these six criteria a lack of control over workers' hours as a determinant in employment status. This could be devastating for sharing economy companies as they do not control their workers' hours.

Unlike employees, independent contractors are not entitled to minimum wage, overtime pay, unemployment insurance, or workers' compensation, but extending these employment protections to independent contractors makes no sense. When debating the future of worker classification, lawmakers should resist calls to extend employee wage and hour protection to independent contractors.

Since intermediaries, again referring to sharing economy companies, do not control workers' hours, and determining how much someone is actually working only for that intermediary is very difficult, if not impossible. Minimum wage and overtime pay requirements are inapplicable to these companies' business models.

Additionally, one of the benefits of the sharing economy is that supply can easily fluctuate to meet an ever-changing demand. Because of the option of flexibility, independent contractor work for intermediaries is often transient or done in addition to other work. Think back to the statistics I used earlier. This is why there is little reason to compel employers to fund unemployment insurance benefits.

Intermediary workers are also usually completing jobs offsite and using their own materials. For these reasons, workers' compensation systems should remain optional, not made mandatory for intermediaries.

But most importantly, the worker classification question needs to be sorted out by federal legislators, not by courts or unaccountable executive agencies. The alternative is the crippling of the sharing economy by executive agencies that are set on incorrectly classifying the vast majority of new economy workers as employees.

Millennials want to be entrepreneurs and they desire employment that is flexible, mobile, and individualized. The Department of Labor's attempts to stifle the rise of the promising new business models seen in the sharing economy through regulation is no way to help millennials achieve their vision of the American dream. In order to promote an entrepreneurial workforce, Congress needs to use its power to rein in the Department of Labor.

Thank you again for the opportunity, and I look forward to continuing the discussion.

[The statement of Mr. Meyer follows:]

Washington Is Out of Touch with the 21st Century Workforce

Jared Meyer
Fellow, Economics21
Manhattan Institute for Policy Research

Testimony Submitted to the House Education and the Workforce Committee

Subcommittee on Workforce Protections

March 29, 2016

Introduction

Chairman Walberg, Ranking Member Wilson, and other Members of House Education and the Workforce Committee, thank you for the opportunity to give testimony on how new administrative interpretations of the Fair Labor Standards Act of 1938 fail to reflect the realities of today's workforce.

I am a fellow at Economics21 at the Manhattan Institute for Policy Research and am the coauthor, with Diana Furchtgott-Roth, of *Disinherited: How Washington Is Betraying America's Young*.[1] I am also the author of *Uber Positive: Why Americans Love the Sharing Economy*.[2] Since this summer, I have traveled across the country and heard millennials talk about the economic challenges they are facing and their plans for the future.

The American economy is changing, and millennials' attitudes about work and their careers are changing with it. The rapid rise of the so-called "sharing economy" embodies many young Americans' new economic ideal—one driven by technology, convenience, and flexibility. However, government policy, particularly in regards to labor regulation, ignores the realities of a 21st century economy and continues to hold back millennials' economic opportunities.

Millennials want to be entrepreneurs, and they desire employment that is flexible, mobile, and individualized. The Department of Labor's attempts to stifle the rise of promising new business models though regulation is no way to help millennials achieve their vision of the American Dream.

What Is the Sharing Economy?

Entire industries are being transformed, consumers have more power than ever before, and people are finding new ways to earn a living—even in today's slow economic recovery. All of these improvements stem from the rise of the so-called sharing economy. However, groundbreaking business models are in danger of being suppressed because of overzealous labor regulation that codifies outdated views of the workforce.

While much has been written about novel sharing-economy business models and the opportunities that they create, the idea behind the sharing economy is nothing new.

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[1] Diana Furchtgott-Roth and Jared Meyer, *Disinherited: How Washington Is Betraying America's Young*, Encounter Books, May 2015.
[2] Jared Meyer, *Uber-Positive: Why Americans Love the Sharing Economy*, Encounter Book, April 2016.

What sets these innovative companies apart from those of the past is their ability to use the Internet and smart phones to easily connect those who want something with those who have something to offer. The Internet offers easy access to an online platform that facilitates transactions between buyers and providers of goods or services. These transactions are the basis of the sharing economy.

Peer-to-peer online interaction, made available only recently by technological advances, is behind everything from eBay and Airbnb, to Zipcar and EatWith, to TaskRabbit and Uber. There have always been people who want to buy a hard-to-find product, find a place to stay, eat a home-cooked meal, get assistance on a task, or find a way to get around. The problem was finding someone who was willing to offer the desired goods or services at a reasonable price. Imagine going from door to door, asking home owners if they had an extra room to rent and for how much. Now, travelers simply have to log on to Airbnb, and, with a few clicks of a mouse, they can find a room that fits their needs and budgets.

Companies such as Uber and Airbnb offer the technical platform and support to allow transactions between buyers and sellers or service providers to easily take place. For this reason, these types of companies are often referred to as "intermediaries."[3] Those who partner with intermediaries are classified as independent contractors, not employees.

Before intermediaries existed, the difficulty of matching buyers with sellers led to the rise of many types of industries, such as those of the taxi and travel agency, that built their business models around the lack of consumer empowerment. Now, with the sharing economy's rapid expansion, these industries are facing increased competition.

These benefits of reduced transaction costs for workers do not end with those who partner with intermediaries. They also extend to entrepreneurial skilled professionals, such as photographers, personal trainers, academic tutors, lawyers, and accountants, who are now able to find customers and promote their businesses at much lower cost.[4]

The flexibility that independent contractor status offers workers is vital to the sharing economy's success. While some workers use these platforms full time, the vast majority use them for part-time work or supplemental income. About 8 in 10 Lyft drivers choose to drive 15 hours a week or less, and half of Uber drivers use the platform for less than

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[3] Seth Harris and Alan Krueger, *A proposal for modernizing labor laws for 21st century work: The "independent worker"*, The Hamilton Project, December 2015.
[4] Jon Lieber and Lucas Puente, *Beyond the Gig Economy: How New Technologies Are Reshaping the Future of Work*, Thumbtack, March 2016.

10 hours a week.[5] Independent contractor status allows the decision of when or for how long to work to be controlled by workers, not companies.

Control over one's hours is a valuable option for many Americans that needs to be maintained. An independent survey of 3,100 Lyft drivers found that 82 percent of the drivers agreed or strongly agreed with the statement, "I like being an independent contractor." Since flexibility is one of the main benefits of the sharing economy model, it is not surprising that 99 percent of Lyft drivers agreed that with the statement that "I like to choose when I work."[6]

Though surveys can encourage respondents to answer in a particular fashion and should not be taken as authoritative, the overwhelming number of favorable responses points to the conclusion that Lyft drivers value their independent contractor status.

Uber drivers share the same sentiment. When 600 Uber drivers were asked the question, "If both were available to you, at this point in your life, would you rather have a steady 9-to-5 job with some benefits and a set salary or a job where you choose your own schedule and be your own boss?" 73 percent said that they prefer flexibility over the traditional employment model.[7]

An analysis of its customers' bank accounts by JPMorgan Chase & Co. shows that one out of every 100 Americans earned income through a sharing economy platform in September 2015.[8] This is up from one in every 1,000 in October 2012. Over the three-year study, over 4 percent of Americans earned income through the sharing economy.

While the sharing economy still accounts for a small percentage of overall U.S. employment, the individualized work arrangements that it embraces make up a much larger, and growing, percent of the labor force.[9] For the 70 percent of Americans ages 18 to 24 who experience an average change of over 30 percent in their monthly incomes, the opportunity to smooth out earnings to meet rent, pay down student loans, or fund a new business venture is a benefit of the sharing economy that must be protected.[10]

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[5] Jonathan Hall and Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, January 22, 2015.
[6] Keker & Van Nest LLP, *Declaration of Simona A. Agnolucci in Support of Lyft, Inc.'s Brief Regarding Preliminary Approval of Class Action Settlement*, March 17, 2016.
[7] Jonathan V. Hall and Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, Uber, January 22, 2015.
[8] *Paychecks, Paydays, and the Online Platform Economy*, JPMorgan Chase & Co., February 2016.
[9] Will Rinehart and Ben Gitis, *Independent Contractors and the Emerging Gig Economy*, American Action Forum, July 29, 2015.
[10] *Paychecks, Paydays, and the Online Platform Economy*, JPMorgan Chase & Co., February 2016.

For example, working with Uber supplies the only source of income for 20 percent of Uber drivers.[11] But Uber earnings provide supplemental, non-significant income for 48 percent of drivers.

Furthermore, half of Lyft's drivers work another job while partnering with the company, and three out of ten work another full-time job.[12] Similarly, two-thirds of Uber drivers hold another full- or part-time job.[13]

Policymakers often fail to realize that a 21st century economy cannot flourish while it is under the thumb of labor laws and regulations that are inapplicable to today's workforce. Economies grow through a dynamic process that necessitates change and disruption. Forcing new business models to comply with labor laws and regulations that limit entrepreneurship is no way to promote a dynamic market.

Millennials' Yet-Unrealized Entrepreneurial Dreams

The sharing economy's rise obscures a troubling economic trend. Once dynamic, the American economy is now growing slowly. The Brookings Institution reports that business startup rates are much lower now than they were in the second half of the 20th century.[14] Business dynamism, determined by firm entry, firm exit, and job reallocation rates, has also declined. This fall in entrepreneurship is leading to the aging of American businesses. In 1992, 23 percent of firms had existed for 16 years or more. By 2011, this percentage had increased to 34 percent.[15]

New business formation is vital for economic growth. Young Americans desperately need more employment opportunities, as 20- to 24-year-olds still face an unemployment rate of over 8 percent.[16] For teenagers, the unemployment rate is 16 percent.

A decline in entrepreneurship is troubling for the economy for a variety reasons—especially when starting a business is seen as a major part of the American dream for many millennials.

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[11] *Uber Driver Roadmap* 2.0, Benenson Strategy Group, November 14, 2015.
[12] Keker & Van Nest LLP, *Declaration of Simona A. Agnolucci in Support of Lyft, Inc.'s Brief Regarding Preliminary Approval of Class Action Settlement*, March 17, 2016.
[13] *Uber Driver Roadmap* 2.0, Benenson Strategy Group, November 14, 2015.
[14] Ian Hathaway and Robert E. Litan, *Declining Business Dynamism in the United States: A Look at States and Metros*, Brookings Institution, May 2014.
[15] Ian Hathaway and Robert E. Litan, *The Other Aging of America: The Increasing Dominance of Older Firms*, Brookings Institution, July 31, 2014.
[16] *The Employment Situation*, Bureau of Labor Statistics, March 4, 2016.

Millennials have been called the most entrepreneurial generation. While this may be true based on their desires to start businesses and their near-universal respect for entrepreneurs such as Steve Jobs, few young Americans have followed through on their entrepreneurial dreams. Millennials' failure to start businesses follows the troubling trend of declining entrepreneurship and dynamism in the U.S. economy.

A Bentley University survey of millennials found that 66 percent of respondents want to start their own business.[17] Echoing these findings, Deloitte found that about 70 percent of millennials envision working independently at some point in their careers.[18]

Yet, as of 2013, only 3.6 percent of private businesses were at least partially owned by someone under the age of 30. This is the lowest proportion since the Federal Reserve began collecting data nearly a quarter-century ago.[19]

The U.S. Department of Labor's effort to make it more difficult for independent contractors to work is an example of regulation that fails to comprehend the realities of today's economy by limiting entrepreneurial work.

The distinction between contractors and full-time employees can have important implications for millennials. The American Dream may have once been finding employment at a large company, working there for a few decades, and then retiring with a defined-benefit pension, but now millennials' American Dream looks much different than their parents' and grandparents'. New opportunities to change or advance one's career are prioritized, and individualized, flexible work arrangements are the model of the future.

DOL's Fight Against Independent Contractors

The Labor Department recently issued an administrator's interpretation, effective immediately, to clarify the definition of an independent contractor. It states that "most workers are employees," not independent contractors.[20] Because it was termed "guidance," it did not have to go before the public for comment, even though it has the potential to upend the sharing economy.

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[17] *The Millennial Mind Goes to Work*, Bentley University, November 11, 2014.
[18] *The Deloitte Millennial Survey*, Deloitte, January 2014.
[19] Ruth Simon and Caelainn Barr, *Endangered Species: Young U.S. Entrepreneurs*, The Wall Street Journal, January 2, 2015.
[20] David Weil, *Administrator's Interpretation No. 2015-1*, Department of Labor, July 15, 2015.

The popularity of the sharing economy has propelled the distinction between independent contractors and employees into the forefront of policy. This is an important debate that the public needs to take part in through the legislative process. Congress cannot continue to let unelected bureaucrats determine the future of America's labor market outside of public view.

Currently, workers are either categorized as employees or independent contractors. Employees are given many protections and benefits under the Fair Labor Standards Act that are not available to contractors. In exchange, employers set the conditions of workers' terms of employment. On the other hand, the independent contractor model provides workers with more control and flexibility.

The Labor Department's new interpretation formally accepts the six-part "economic realities" test for determining whether workers are employees or independent contractors.[21] At the same time, it downplays one of the six criteria, a lack of control over workers' hours, as a determinant of employment status.

Shifting from independent contractors to employees is costly. The Labor Department's Employment Cost Index shows that providing benefits adds around 30 percent to the cost of employing a worker.[22] This estimate is not an overstatement. When MyClean (the Uber of housecleaning) moved from independent contractors to full-time employees, its labor costs increased 40 percent, according to its CEO.[23] A similar company, Homejoy, shut down this year due to labor classification disputes.[24]

Something similar could happen to Uber, as one California driver who brought a case against the company was legally classified as an Uber employee.[25] If this ruling against Uber's current business model in *Berwick v. Uber Technologies, Inc.* is extended to the rest of the company and the emerging sharing economy as a whole, many other startups and workers will suffer.

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[21] *Fact Sheet 13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, Department of Labor, May 2014.
[22] *Employment Cost Index*, Bureau of Labor Statistics, October 2015.
[23] Kate Rogers, *What the Uber, Lyft lawsuits mean for the US Economy*, CNBC, March 16, 2015.
[24] *Homejoy says goodbye, and thank you*, Homejoy, July 17, 2015.
[25] *Barbara Berwick v. Uber Technologies, Inc.*, California Labor Commission, June 16, 2015.

Uber also faces a class action lawsuit *O'Connor v. Uber Technologies Inc.* over its employment classification practices.[26] Lyft just settled its pending employment classification class action lawsuit *Cotter v. Lyft Inc.* for $12.25 million.[27]

The settlement allows Lyft to continue classifying its drivers as independent contractors—a designation that is crucial to the sharing economy's success. But even though the settlement does not carry any legal precedent, it will lead to additional lawsuits and uncertainty for other sharing-economy companies. This will raise the costs of these services, costs that will be passed on to consumers.

The Labor Department has muddled the once-clear distinction between employees and independent contractors. This move creates uncertainty and costly legal battles for businesses and workers. Moving these workers into an employer-employee relationship from their current—but threatened—independent contractor status would substantially hinder the growth of sharing economy, not to mention the work opportunities and consumer benefits that it provides.

Unlike employees, independent contractors are not entitled to minimum wage, overtime pay, unemployment insurance, or workers' compensation. But extending these employment protections to independent contractors makes no sense.

Since intermediaries do not control workers' hours, and determining how much someone is actually working solely for the intermediary is difficult (if not impossible), minimum wage and overtime pay requirements are inapplicable to the companies' workers. Additionally, one of the benefits of the sharing economy is that supply can easily fluctuate to meet ever-changing demand.

Because of the option of flexibility, independent contractor work for intermediaries is often transient, or done in addition to other work. This is why there is little reason to compel employers to fund unemployment insurance benefits. Intermediaries' workers also usually complete jobs off-site and use their own materials. For these reasons, workers' compensation systems should remain optional—not mandatory—for intermediaries.

When debating the future of worker classification, lawmakers should also resist calls to amend federal antitrust laws to allow independent contractors to collectively bargain.

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[26] Edward Chen, *O'Connor v. Uber Technologies, Inc. et al., C13-3826 EMC*, U.S. District Court, Norther District of California, December 22, 2015.

[27] *Class Action Settlement Agreement and Release Case No. 3:13-cv-04065-VC*, January 27, 2016.

Collective bargaining is currently reserved for employees, who are able to unionize if a majority of an identified group of employees wants to be represented by a union.

Successful collective bargaining efforts would likely take away many benefits of the flexible, entrepreneurial work arrangements that independent contractors enjoy. Independent contractors are allowed to unionize, but under federal labor law they cannot collectively bargain (though the Seattle City Council recently voted to extend collective bargaining to ridesharing and taxi drivers).[28]

This makes sense because independent contractors work for themselves. The reason antitrust law would have to be amended is that collective bargaining by independent businesses violates federal prohibitions against price fixing.

Additionally, why should independent contractors who do not want union representation be forced to follow and fund collectively-bargained labor agreements that they do not support? Of course independent contractors should be allowed to join a union, as they are now, but it makes little sense to force them to adhere to collectively-bargained agreements when they often work with more than one company and/or have another full-time job.

These workers have diverse priorities and work arrangements, even when they work with the same intermediary. Those who use Uber for supplemental income and part-time work have vastly different concerns than those who use the service for a full-time job. If collective bargaining is allowed, which group's interests will the union represent? Majority rule could take away one of the cornerstones of the sharing economy – the diverse benefits that flexible work opportunities provide.

Many independent contractors who partner with intermediaries would prefer to have access to some portable benefits. Portable pensions already exist in the form of Individual Retirement Accounts and Simplified Employee Pension Plans. Portable health insurance, although expensive, exists through the Affordable Care Act. Social Security provides disability insurance.

Even with the existing options, the option to offer other portable benefits without being determined to be an employer is something that many sharing economy firms are interested in.[29] This ability would help firms attract and keep the best talent. Intermediaries could benefit from pooling their independent contractors to secure better

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[28] Nick Wingfield and Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions,* New York Times, December 14, 2015.

[29] *Common Ground for Independent Workers,* Medium, November 10, 2015.

rates for benefits such as auto, health, and disability insurance and savings and retirement programs. Unfortunately, intermediaries that offer such benefits are in danger of being classified as employers. A legal carve-out should be created to allow intermediaries to offer these benefits and still retain their non-employer status.

Regulatory overreach is not confined to the Department of Labor Wage and Hour Division's recent administrator's interpretation that downplays companies' lack of control over workers' hours and tasks as a factor in deciding employment cases. The National Labor Relations Board has, through a series of decisions, also made it more difficult to work as an independent contractor.[30]

The Labor Department's Wage and Hour Division and the National Labor Relations Board are trying to change the previously-clear distinction between employees and independent contractors. This, combined with the changing nature of work, leaves judges with the impossible task of dealing with these two agencies' guidelines as lawsuits work their way through the courts. The uncertainty the status quo creates harms many companies and their workers, both inside and outside the sharing economy.

The worker classification question needs to be sorted out by federal legislators, not courts or unaccountable executive agencies. The alternative is the crippling of the sharing economy by executive agencies set on incorrectly classifying the vast majority of new economy workers as employees.

Conclusion

Millennials desire to work for themselves, but government labor regulation hinders the realization of their entrepreneurial dreams. This obstructionism is clear in the Department of Labor's treatment of independent contractors. In order to promote an entrepreneurial workforce, Congress needs to use its powers to rein in the Labor Department.

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[30] Chairman Pearce, Member Hirozawa, and Member McFerran, *Sisters' Camelot and Christopher Allison and IWW Sisters' Camelot Canvassers Union*, National Labor Relations Board, September 25, 2015; Chairman Pearce, Member Hirozawa, Member Johnson, and Member Schiffer, *FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc. and International Brotherhood of Teamsters, Local Union No. 671*, National Labor Relations Board, September 30, 2015.

Chairman WALBERG. Thank you.

Dr. Belman—

Dr. BELMAN. Thank you.

Chairman WALBERG.—I recognize you for your five minutes.

TESTIMONY OF DR. DALE BELMAN, PROFESSOR, SCHOOL OF HUMAN RESOURCES AND LABOR RELATIONS, MICHIGAN STATE UNIVERSITY, EAST LANSING, MI

Dr. BELMAN. Fifty, 40, maybe as close as 30 years ago, there was broad agreement that the U.S. economy was based on shared prosperity. Firms prospered. Employees and employers worked together, learned how to do work better, increased productivity. They shared those gains not equally but they shared in the gains from doing things better, from improved prosperity. This resulted in better pay, better benefits, improved economic security, investments in employees and in employee training.

For example, George Romney, president of American Motors in the late '50s and early '60s both limited the pay to top managers and instituted profit-sharing, the first of the auto companies to do that. Even major retailers such as Sears prided themselves on good salaries and benefits and a career path for diligent employees. Sears, of course, was nonunion.

A belief in shared prosperity was also expressed in the implementation of protective labor legislation. The *Fair Labor Standards Act* was extended to cover wholesale and retail trade, to cover hospitals and the public sector. We improved the security of private pension plans through ERISA. Under the Nixon administration, we created OSHA to create a safe and more healthful workplace.

This path to shared prosperity has significantly been abandoned for much more of a winner-take-all economy, one that too often pits employers against employees. We can see this in stagnant real wages over the last 35 years, only slow improvement in family incomes, and that only because families are working more hours largely by moving women into the labor force. Likewise, levels of income and wealth and equality have risen to levels that rival the 1920s and the Gilded Age.

Abandoning the path to shared prosperity appears not only in outsourcing, offshoring, tax inversions, and other headline-grabbing changes, but also in the details of protective labor law. Under the rubric of economic necessity, several States have reduced U.I. coverage to 12 to 20 weeks from 26 weeks. This comes on top of a long failure to modernize the U.I. system to address issues of working women and reduced careers. Currently, only one in three of the unemployed worker receives U.I. benefits. Two States have allowed for worker compensation opt-outs which deprive injured employers of many of the protections they had under State systems. A number of other States are currently considering this.

The Supreme Court in emphasizing the use of private arbitration of employee rights, under terms established by the employer, has substantially reduced employees' ability to pursue their legal rights with their employers.

Recent steps by the Department of Labor to update the salary standard for an employee to be considered exempt is long overdue. Since 1938, DOL and the courts have recognized the single best

test of exempt status is a salary high enough to demonstrate that the employee is highly valued.

In 1975, an individual who was exempt from the overtime had an annual earning of 110 percent of U.S. median family earnings. In contrast, at the current level of $455 per week or $23,660, individuals earning 45 percent of U.S. median income are exempt. If we had a family, one earner, four members, this amount, $23,660, would place them below the U.S. poverty threshold, they would be eligible for Medicare, for food stamps, and other income maintenance programs.

The current threshold also provides strong incentives for employers to classify low-wage workers as salaried managers and essentially obtain uncompensated work by having them work unpaid overtime.

The DOL proposal would just raise the overtime threshold to just below 100 percent of U.S. median family income. So it would basically not quite restore where it was in 1975. In 1975 companies dealt with it successfully, small businesses and large businesses. So I'm not sure that there are going to be disastrous effects. In fact, I'd argue that there would not be disastrous effects.

Some brief observations on the gig economy. This is new, this is exciting, this is different. It's not particularly new. Most of my research is on construction, and construction looks a lot like the gig economy. Employees not tied to a single employer, they regularly move between employers and projects. Because of that gig structure and the lack of a strong relationship between employer and employee, wages fluctuate greatly with immediate demand.

There's a lot of economic uncertainty. Benefits such as medical coverage and pensions and 401(k)s are rare to nonexistent. Employer-provided training is also rare to nonexistent outside the union sector. Owners and employers regularly complain about a lack of sufficiently skilled craft workers. Southern Power and Curt have been arguing about this for years and trying to find a way to have more trained workers.

There is rampant misclassification of employees as independent contractors. As a result, employees are deprived of workers' compensation, unemployment insurance coverage, as well as the employers' share of FICA. State and Federal Governments lose tax revenues. Employers who play by the rules, classify their employees correctly, are substantially disadvantaged in bidding on construction projects.

What this suggests is that creating some sort of new structure, independent worker or something, which has reduced benefits is a problem because it's hard enough to get enforcement of current relatively clear concepts of independent contractor versus employer/employee. You add another status, it becomes virtually impossible. The U.I. system isn't going to be able to cope with it, and they do most of the misclassification of work.

To summarize, the proposed provisions of the overtime threshold aren't keeping with the history of the *Fair Labor Standards Act*. It restores that threshold to a reasonable income level. It provides businesses flexibility and employment of highly valuable employees, while protecting lower-paid employees from being required to work extended hours without compensation.

Thank you.
[The statement of Dr. Belman follows:]

Strengthening Labor Protections Provided by the Fair Labor Standards Act

Professor Dale Belman
School of Human Resources and Labor Relations
Michigan State University

Testimony Submitted to the House Education and the Workforce Committee
Subcommittee on Workforce Protections

3/29/2016

The Fair Labor Standards Act of 1938 created the institutional structure which defined minimum standards for U.S. labor markets. It was the first federal law to limit child labor, and through its overtime provisions, it defined the standard work week as 40 hours. It also established the minimum wage, which employers were required to pay employees. In addition to these direct effects, the Fair Labor Standards Act made necessary administrative and legal determinations of the distinction between an independent contractor and an employee, between those with substantial professional or managerial roles and other employees, and defined when employees were considered to be working.

The U.S. economy and U.S. labor markets are dynamic and in constant flux. The need for different occupations and skills has changed substantially since the passage of the Fair Labor Standards Act, and the application of the Act has changed considerably over time. For example, when the Fair Labor Standards Act was passed, the minimum wage provisions covered in the main, goods-producing industries and utilities. Amendments to the Act have extended its coverage to include the employees of wholesale and retail firms and hospitals, among other industries added to coverage by the Act. Likewise, inflation has necessitated raising the Federal minimum wage to maintain its role in assuring adequate hourly compensation for low-wage employment.

In keeping with its statutory mandate to update the exemption, the U.S. Department of Labor has proposed increasing the minimum annual salary that an employee must be paid to qualify for a managerial or professional exemption from overtime pay. This exemption reflects a recognition that certain professional and managerial occupations are well paid, that their incumbents have considerable control over their work time and so do not require the protections of the overtime or minimum wage provisions of the Fair Labor Standards Act. An example of this would be a faculty member of a university. Faculty typically hold advanced educational credentials, have broad control over their hours of work and receive compensation above the median income of families in the United States. Employees in this position do not require the overtime protections of the Fair Labor Standards Act. The tests for exemption from the overtime provisions include both a duties test and an income test. Employees are exempted from overtime and minimum wage provisions if their work

- is directly related to the management of his or her employer's business, or

- is directly related to the general business operations of his or her employer or the employer's clients, or
- requires specialized academic training for entry into a professional field, or
- is in the computer field, or
- is making sales away from his or her employer's place of business, or
- is in a recognized field of artistic or creative endeavor.

In addition, as DOL and the courts have long recognized, the single best test of exempt status is a salary high enough to demonstrate that the employee is highly valued. A salary test has been a definitional criterion since 1938.

The Department of Labor's move to update the income criteria for qualifying for an exemption from overtime is a long overdue step. In 1975, an individual had to earn $250 per week to be eligible to be exempted from overtime. Calculated on a 52 week work year, this corresponded to an annual income of $13,000, 110% of U.S. median family income in 1975. The weekly pay required for exemption was increased to its current level of $455 per week in 2004. Again, calculated on a 52 week work year, this corresponded to $23,600; only 53% of the median family income of $44,434 in 2004. Currently, $23,600 is only 45% of median family income and is less than the U.S. poverty level for a family of four in 2016. If families were entirely dependent on an individual earning $455 per week, they would qualify for federal benefits including food stamps, the earned-income tax credit and Medicaid. Far from only being available to employees with a secure and sustainable "executive or professional" standard of living, the overtime exemption can be applied to individuals who are receiving federal income maintenance payments.

If DoL proposed to return the standard of 110 % of median family income, they used in 1975; the overtime exemption would require a weekly salary of $1,099. Instead they have established the new threashold at just below 2016 U.S. median family income

Raising the value of the income test for qualifying for the overtime exemption can only help employees. It does not require that employees be shifted from salaried to hourly pay; it does not require any change in employee duties. By making extended work hours better compensated, it can provide an increase in the earnings of some employees, spur the hiring of more employees to cover the extended hours currently worked by those who would no longer be exempted, or encourage employers to better manage employee hours.

A second issue is whether the gig economy requires the creation of new classes of employees who might be exempt from the minimum wage, from overtime, from unemployment insurance and other protective labor legislation. Again, carrying the theme of modernization forward, similar issues have been addressed in the past within the framework of the Fair Labor Standards Act and other protective legislation. Much of the excitement about the challenges posed by Uber or similar services comes from speculative examples which, when examined more closely, turn out to be greatly at variance with the reality of the work. The concern that Uber drivers might be doing other work or personal errands when they are "on call" turns out to be at variance with the requirements which Uber has for its drivers. Requirements that drivers respond within 15 seconds of receiving a ride request and that they respond positively to at least 80% of requests to

remain an Uber driver strongly suggest that Uber drivers are more closely controlled and have less freedom of action than many other employees who work away from direct supervision.

The gig economy, and its strengths and weakness, is not as new as some advocates suggest. Construction has many of the characteristics of the Gig economy. Employment is temporary and craft workers regularly move between employers. The distinction between employee and legitimate self employed workers is not always clear. Although construction can and does provide family supporting jobs, it is also characterized by serious problems for many employees. Outside of the union sector, health benefits and pension benefits, including 401(k) plans are rare. Training for employees is also rare and this has occasioned regular complaints by construction employers and owners about labor shortages and the deficiencies of the skilled workforce. There is also rampant misclassification of employees as independent contractors. This deprives employees of unemployment insurance, workers compensation coverage, of the employer share of FICA. It also results in substantial underpayment of federal and state taxes and works to the disadvantage of employers who play by the rules. The informal employment structures of the construction industry support the extensive use of undocumented workers, wage theft and other forms of exploitation. Given this experience with enforcing minimum labor standards in the gig economy in construction, it would be better as many states have already chosen to do, put more resources into enforcement than create new statuses which are challenging to enforce and encourage firms to skirt the law.

Fifty, forty possibly even 30 years ago there was broad agreement on **shared prosperity.** As firms prospered, improved productivity learned to do things better; they shared those gains with their employees. For example, George Romney, President of American Motors both established profit sharing for employees and limited the pay of top managers – gave back money every year. The philosophy of shared prosperity resulted in better pay, benefits, improved economic security, and investments in employees and employee training. This was not just for industrial firms, major retailers such as Sears provided both good salaries and benefits and a career path to diligent employees. The belief in shared prosperity was also expressed in the implementation of protective labor legislation including extension of the Fair Labor Standard Act to cover wholesale and retail trade, to cover hospitals and the public sector; the passage of ERISA to improve the security of private pension systems and the establishment of OSHA under the Nixon administration to create a safer and more healthful workplace.

The path of shared prosperity has largely been abandoned for one which all too often pits employers against employees. We see this in stagnant real wages and a very slow improvement in family incomes over 35 years. To the degree there has been improvement it is because women are working additional hours. Evidence of the abandonment of the path to shared prosperity is also found in the levels of income and wealth inequality which rival the 1920s and the Gilded Age. Perhaps too, in the rising support for populism, a previously quaint aspect of U.S history as citizens on the right and left believe the system is fixed against them. The abandonment of the path to shared prosperity appears not only in outsourcing, offshoring, tax inversions and other

headline-grabbing changes but also in the details of protective labor law. Under the rubric of economic necessity, several states have reduced U.I. Coverage to 20 weeks. This comes on top of a long failure to modernize the U.I system to address the issues of working women and shortened careers. Currently, only 1 in 3 unemployed workers receives U.I benefits. Two states have allowed, and more states are considering, worker compensation opt-outs which deprive injured employees of many of the protections they had under the state systems. Similarly, the Supreme Court's allowing private arbitration of employment rights in place of court trials, under terms established by the employer, greatly disadvantages employees in the pursuit of their rights.

The U.S economy is dynamic, and U.S. labor markets are in constant flux. The administration of protective labor legislation such as the Fair Labor Standards Act has always had to address this flux by modernizing, by updating administrative rules and adapting to the changing nature of employment. It has done this successfully for a number of changes which, at the time, seemed to change everything, but turned out to be less momentous. There is no obvious reason to believe if our purpose is to promote shared prosperity for employers, for employees and their families, that current changes cannot be addressed within the current framework.

Chairman WALBERG. Thank you.

Ms. Thomas, we now recognize you for your five minutes of testimony.

TESTIMONY OF LAURITA THOMAS, ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES, UNIVERSITY OF MICHIGAN, ANN ARBOR, MI

Ms. THOMAS. Good morning. Thank you, Mr. Chairman, and members of the House Education and the Workforce Subcommittee on Workforce Protections for the opportunity to talk about the proposed changes to the *Fair Labor Standards Act*.

In addition to my role at the University of Michigan, I am also a member of the National Board and the Public Policy Committee of the College and University Professionals Association for Human Resources. It represents human resource leaders at 1,900 U.S. colleges and universities.

I know I'm joined by many of my human resource colleagues when I say that I appreciate your willingness to hear and consider the unique impact of these proposed changes on higher education.

The University of Michigan supports an increase to the wage threshold, which has not been adjusted since 2004. However, we believe that closing that gap without adequate time for implementation could be counterproductive. Specifically, the new rules call for an increase from the current wage threshold of $23,660 a year to $50,440 a year with a very short implementation timeline and outside of the annual budget planning process through which we plan for new expenses.

There are limited ways to raise revenue outside of tuition, so adequate time for planning and implementation is very important. If this change were to occur abruptly, it would be cost-prohibitive for schools like Michigan to raise the salaries of those affected to the proposed new minimum in order to maintain the *Fair Labor Standards Act* exemption status for that the workers have today.

The University of Michigan is the largest higher-ed employer in the State, and these changes would affect more than 3,100 people in roles critical to our missions.

The proposed implementation cost at the University of Michigan is as high as $34 million. Early statewide estimates from the Michigan Association of State Universities total more than $60 million for 11 of the 15 member institutions reporting. If salaries were raised just for those employees close to the threshold, most of the remaining affected employees would need reclassification to nonexempt status.

Since many jobs in higher education, health care, and research are not well suited for hourly compensation, the change would result in reduced autonomy, fewer flexible work arrangements, and diminished opportunities for needed business travel for these employees.

Benefits could also be affected when tied to the exemption status. In some institutions, differentials in professional development funding, tuition assistance are also in play. Reclassifying them to nonexempt *Fair Labor Standards Act* status could represent a loss of total compensation for some employees with greater complexity for their employers.

Additional consequences include reducing opportunities for part-time employment, including roles that involve business event planning and onsite administration in which staff work longer hours for a limited number of days or weeks in exchange for reduced work hours in subsequent weeks. This serves a business need for our university but would no longer be possible.

University research activities could also be inhibited. Agencies providing research grants like the National Institutes of Health often set stipends for postdoctoral researchers well below this new threshold. Since research often requires extended attention to experiments at various times and outside of regular hours, postdocs are not compatible their roles are not compatible with the new rule.

I want to reiterate that we do support an increase to the wage threshold. What we suggest are changes in the way in which an increase is implemented. First, consider lowering the threshold so that the immediate goal is reduced. Or differentiate that for economic sectors by establishing a separate threshold for organizations in the nonprofit and public sectors. In either case, the University of Michigan advocates for a phased implementation over years to allow for proper planning.

Second, if a more measured approach to increasing the threshold is not adopted, we believe the Department of Labor should consider broadening the existing teaching exemption to include additional positions that are unique to higher education. That means recognizing exemption status in the regulations for not only those who teach and tutor but those for those who advise students, conduct scientific or professional research, provide student counseling, and offer services for residential life.

Third, we support a periodic review tied to the cost of living and to occur not more frequently than every five years with at least a one-year notice period to employers of pending increases for planning purposes outlined previously.

Finally, unrelated to the wage threshold itself, we believe that any changes to the duties test for exemption should be made available to the community of employers for review and comment before enactment.

Thank you.

[The statement of Ms. Thomas follows:]

Testimony Presented to the
House Education and Workforce Subcommittee on Workforce Protections

University of Michigan
Laurita Thomas, Associate Vice President for Human Resources

Lansing, MI
March 29, 2016

Good morning. Thank you Mr. Chairman and members of the House Education and Workforce Subcommittee on Workforce Protections for the opportunity to talk about the proposed changes to the Fair Labor Standards Act (FLSA) by the U.S. Department of Labor. I am Laurita Thomas, associate vice president for Human Resources at the University of Michigan. I am also a member of the national board and the public policy committee of the College and University Professionals Association for HR, representing HR leaders at 1,900 U.S colleges and universities, including 91 percent of all doctoral institutions. I know I am joined by many of my human resources colleagues across the state of Michigan and the country when I say that I appreciate your willingness to hear and consider the unique impact of these proposed changes on institutions of higher learning.

On Sept. 4, 2015, CUPA-HR submitted public comments to the federal government detailing the impact of the proposed changes on our sector and the ripple effects they could have on the cost of tuition, job security and part-time employees, among others. Today, I'd like to share some detail as to how the proposed changes will likely affect the University of Michigan and many other colleges and universities in our state.

First, I want to be clear that the University of Michigan supports an increase to the wage threshold. Adjustment of the threshold has not taken place since 2004, and we believe it to be in our country's interest to support fair wages, just compensation for overtime, and wage rules that reflect today's job market as well as the wide spectrum of roles and work conditions that exist, particularly in higher education.

While we believe that adjusting the salary threshold is overdue, we also believe that trying to close that gap without adequate time for implementation is equally problematic and could be counterproductive to fair overtime pay and job security.

Specifically, the new rules call for an increase from the current wage threshold of $23,660/year to $50,440/year, more than double, with a very short implementation timeline and outside of the normal budget planning process used at U-M and many other schools through which we project and plan for new expenses. There are limited ways to raise revenue outside of tuition so adequate time for planning and implementation is very important.

If this change were to occur abruptly, it would be cost-prohibitive for schools like Michigan to raise the salaries of those affected to the proposed new minimum to maintain the FLSA exemption status those workers have today. For the University of Michigan, the largest higher education employer in the state, the changes would affect more than 3,100 people in roles critical to our missions, including research fellows and lab staff, student housing officers, admissions recruiters, academic advisors, financial aid administrators, social workers, clinical dietitians,

clinical research coordinators and fundraisers. The projected cost at U-M to implement the change is as high as $34 million; early statewide estimates from The Michigan Association of State Universities peg the cost at more than $60 million for 11 of the 15 total member institutions reporting.

If salaries were raised for just those employees close to the threshold, most of the remaining affected employees would need reclassification to non-exempt status. Since many jobs in higher education, health care and research are not well suited for hourly compensation, the change would result in reduced autonomy, fewer flexible work arrangements that are important to employees and are critical to how work is done, and diminished opportunities for needed business travel for these employees. For example: tracking and compensating overtime hours for remote workers would become much more difficult but would be necessary to comply with the law; flexible work arrangements would therefore be more limited; and costs would increase for employees who travel regularly for business events since longer hours and paid travel time would be involved.

Benefits could also be affected when tied to exemption status. In some institutions, differentials in professional development funding or tuition assistance are also in play. These advantages would be lost to the employee when reclassified to non-exempt FLSA status, and since there is no guarantee of a wage increase, this could represent a loss of total compensation for some employees and greater complexity for employers.

Additional unintended consequences include reducing opportunities for part-time employment. Many part-time roles in higher education can involve business event planning and onsite administration. In these positions, staff work longer hours for a limited number of days or weeks in exchange for reduced work hours in subsequent weeks. This meets a business need, and our costs remain constant and predictable. This would not be the case under the new rule.

The rule also could inhibit research activities. Postdoctoral researchers and fellows comprise another group unique to higher education that is impacted by this rule and crucial to the research mission. Agencies providing research grants like the National Institutes of Health often set stipends for postdocs well below the new threshold. These postdocs clearly perform learned and professional work, yet they would not be allowed a professional exemption under the new rules at the rates set by NIH. Since research often requires extended attention to experiments at various times and outside of regular hours, postdoc roles are not compatible with the new rule. Institutions would need to raise postdoc salaries to the proposed threshold, which could diminish the volume of supported research.

What can be done to protect both higher education and our workforce?

Let me reiterate that we strongly support an increase to the wage threshold. What we suggest are changes to the way in which the increase is implemented, and we offer several options that would achieve both an increase in the threshold and sensible protections for some of the unique roles in higher education that directly support student success, classroom education and research.

First, consider lowering the threshold such that the immediate goal is less than the proposed increase of more than 100 percent. Or, differentiate for economic sectors by establishing a separate threshold for organizations in the nonprofit and public sectors. A survey of CUPA-HR

members revealed that nearly 87 percent supported increasing the threshold to a point between $29,172 and $40,352. In either case, however, the University of Michigan advocates for a phased implementation over years. This allows planning through the annual budgeting processes of our colleges and universities, and a smoother implementation with clarity for affected employees some of whom would inevitably be reclassified and need to understand the impact on timekeeping, benefits, work hours and flexible arrangements, off-hours research or lab assignments and more.

Second, if a more measured approach to increasing the threshold is not adopted, we believe the Department of Labor should consider broadening the existing teaching exemption to include the additional positions that are unique to higher education. That means recognizing exemption status in the regulations for not only those who teach and tutor but also those who advise students, conduct scientific or professional research, provide student counseling and offer services for residential life.

Third, we do not support an automatic annual increase in the wage threshold. Instead, we support a periodic review tied to cost of living and to occur not more frequently than every five years with at least a one-year notice period to employers of pending increases for planning purposes outlined previously.

Finally, unrelated to the wage threshold itself, we believe that any changes to the duties test for exemption follow the Administrative Procedure Act so that language is available to the community of employers for review and comment before enactment.

The climate for most colleges and universities in the U.S. is one of ongoing financial pressures that would curtail hiring new employees or increasing compensation as a result of these FLSA changes. We believe moving forward with an increase to the wage threshold is a positive and appropriate step, but that it must be done with recognition of differences in jobs and economic sectors to avoid unintended consequences that could harm both universities and the employees these rules are intended to protect.

Chairman WALBERG. Thank you, Ms. Thomas.

Mr. Wilson, I recognize you for your testimony.

TESTIMONY OF D. MARK WILSON, VICE PRESIDENT, HEALTH AND EMPLOYMENT POLICY, H.R. POLICY ASSOCIATION, WASHINGTON, D.C.

Mr. WILSON. Chairman Walberg, Congressman Bishop, thank you for the opportunity to discuss the twenty-first century workforce and how current rules and regulations affect innovation and flexibility in today's workplaces.

Perhaps the best illustration of how the FLSA has failed to keep up with the rapidly evolving workplace is its computer professional provision. Much like the discussion we're seeing now with the gig economy and the sharing economy, in 1990, Congress directed the Department of Labor to publish regulations to treat computer employees as exempt under the FLSA. But then in 1996 Congress froze the regulatory definition of computer professionals in place when less than 40 percent of Americans owned a cell phone, less than 3 percent of U.S. homes had broadband access, and Facebook didn't even exist.

Today, over 90 percent of Americans own smartphones, over 70 percent of households have broadband. Needless to say, the FLSA rules for computer professionals are woefully outdated.

Even the most traditional industries have undergone dramatic transformations in how and where work is done. For example, workers in old coal power plants were typically divided into several different job categories with many performing largely physical tasks throughout the plant. Today, newer power plants are run almost entirely by a small group of employees working primarily in one single room filled with computers. The employees are multiskilled, technically educated, highly paid professionals who take on a variety of duties ranging from operating equipment to handling purchasing, documentation, scheduling, and working with vendors.

Yet, despite all these changes within the American workplace, during the last half-century, the basic structure of the FLSA has never been fundamentally re-examined. It is increasingly having a negative impact on workplace flexibility and innovation.

The preference of today's workforce for greater flexibility as to when and where they perform their work is universally acknowledged. And it goes without saying that the desire is often possible only through the digital technology that was unavailable when the FLSA was enacted. In fact, the overwhelming majority of today's employees embrace the digital workplace.

A recent Gallup poll showed that full-time employees are upbeat about using their computers and mobile devices to stay connected to the workplace outside their normal work hours. Nearly eight in 10 workers view this as somewhat or strongly positive development. According to Gallup, nearly all workers say they have access to the internet based on at least one device, and they appreciate the freedom this technology offers them to meet their family needs, knowing they can monitor their email while out of the office, or log in later to catch up with work if needed.

Yet, the FLSA deters and often prevents an employer from providing this flexibility to nonexempt employees by requiring employ-

ers to track all hours worked, which poses a challenge if the employees wish to perform some or all of their duties away from the workplace.

Even when nonexempt employees confine their work activities to within normal working hours, they may occasionally check their smartphones outside of those hours at work for work-related emails and meeting invitations. When they do, it raises questions as to whether the time is counted towards hours worked. And some attorneys have argued that it could such activity could also mark the beginning and ending of the workday, requiring time spent commuting to be also 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 employer-provided smartphones and denying access to their email accounts and other parts of the company's information systems.

Regrettably, this inability to take advantage of the virtual workplace inconveniences employees, reduces workplace flexibility, and makes it more difficult for employees to manage their work-life balance.

But large employers simply cannot risk exposing themselves to potentially multimillion-dollar class-action lawsuits. And the number of lawsuits has exploded over the past 15 years, increasing almost 450 percent from 2000 to 2015.

FLSA also restricts training opportunities. At the time when upgrading the skills of the American workers is a priority, the FLSA's regulations discourage employers from offering training to their employees. Since many training opportunities are considered compensable time under the FLSA and where training could put a nonexempt employee into an overtime situation, their access to that training may be limited. Nonexempt employees may also be routinely excluded from offsite meetings and trips that could be both beneficial to them and their employer.

Because of the administrative difficulty of determining what time is compensable and the actual cost of that time, this inability to participate in off-hours or offsite events can stunt the growth of the career growth of nonexempt employees who lose the benefit of those activities.

In conclusion, the disconnect between the FLSA and the modern workplace will continue to grow if the law is left unchanged. It will increase tensions among employers, employees, and regulators with the only true beneficiary being the plaintiff's bar. Congressional attempts at incremental reforms stalled in the 1990s, and many policymakers are reluctant to make another attempt for political reasons. Yet the pressure to update the FLSA will steadily increase, and it will become a problem that is increasingly more difficult to ignore.

Thank you for the time, and I'd be happy to answer any questions you might have.

[The statement of Mr. Wilson follows:]

Statement

by

D. Mark Wilson
Vice President, Health and Employment Policy
HR Policy Association

Before the

House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on

The 21st Century Workforce: How Current Rules and Regulations Affect Innovation and Flexibility in Michigan's Workplaces

March 29, 2016

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CHAIRMAN WALBERG, RANKING MEMBER SCOTT AND HONORABLE MEMBERS OF THE SUBCOMMITTEE:

On behalf of the members of the HR Policy Association, thank you for the opportunity to appear before the committee today to provide the Associations' views on the 21st Century workforce and how current rules and regulations affect innovation and flexibility in Michigan's workplaces. I am Mark Wilson, Vice President, Health and Employment Policy, and Chief Economist for the Association.

The HR Policy Association represents the most senior human resource executives in more than 360 of the largest companies 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 (FLSA) to reflect the 21st century workplace has been a long-standing goal of the Association, and most, if not all, of the HR Policy Association member companies struggle to provide the kind of workplace flexibility sought by today's workforce without running afoul of the FLSA's arcane and dysfunctional requirements that were written almost 80 years ago.

The FLSA Is Out of Sync With Today's Workplace In considering the FLSA, it is important to understand the state of the American workplace when the law was enacted. In the 1930's, the 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 almost unrecognizable to workers in the 1930s, whom the law was originally 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 80 years ago.

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. Perhaps the best illustration of how the FLSA has failed to keep up with the rapidly evolving workplace and impedes innovation is its computer professional provision. 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 FLSA rules for computer professionals are woefully outdated.

Another example is the FLSA's rules for inside sales employees. 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.

Even the most traditional industries have undergone dramatic transformations in how and where work is done. For example, 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. 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 of our member company has told us, "They're operating more like asset owners."

Yet, despite all these changes within American workplaces and industries 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 interest is not to move more employees into exempt roles, but to see that the rules and regulations carry out the original intent of the law in our new global, wireless

world — and that they are clear and easy to comply with. In 2004, the previous administration made a laudable attempt to address a number of areas that needed to be updated and clairfied, but while the resulting changes were minor improvements, they did not go far enough to fix most of the problems. Even the Department of Labor admitted at that time that it could not update the rules for computer professionals without Congress first amending the law.

The FLSA Restricts Workplace Flexibility and Digital Innovation The preference of today's workforce for greater flexibility as to when and where they perform their work is universally acknowledged, and it goes without saying that this desired flexibility is often possible only through the digital technology that was unavailable when the FLSA was enacted.

The overwhelming majority of today's employees embrace the digital workplace. 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."[10]

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.

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, and meeting invitations. 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 professional and administrative employees are given and denying access to their email accounts and other components of the company's information system. In occupations such as off-site repair, where the use of Blackberries, iPhones or other personal digital assistants (PDAs) is essential, some employers require the employee to keep these devices at one of the employer's locations after hours, picking it up and dropping it off there, regardless of the location of site visits. Regrettably this inconveniences employees, reduces workplace flexibility and makes it more difficult for

employees to manage their work/life balance, but large employers simply cannot risk exposing themselves to potentially multi-million dollar class-action lawsuits.

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 FLSA regulations. 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. Moreover, the number of such lawsuits has exploded over the past 20 years, increasing 514 percent from 1991 to 2012.[11]

In view of these 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.

The FLSA Restricts Access to Training Opportunities At a time when upgrading the skills of American workers is a priority, the FLSA's regulations discourage employers from offering optional training to their employees. Because of the increased attention that must be paid to the hours worked by the nonexempt employees under the FLSA, they are at a competitive disadvantage in the workplace compared to exempt professionals and administrative employees. Since many training opportunities are considered compensable time under the FLSA, and where those opportunities would put the nonexempt employee into an overtime situation, their access to those training opportunities may be limited; the same is not true for their exempt colleagues.

Nonexempt employees may also be routinely excluded from off-site meetings or trips that could be beneficial to both them and the company because of the administrative difficulty of determining what time is compensable and the actual cost, once determined. This inability to participate in off-hours or off-site events can stunt the career growth of nonexempt employees who lose the benefit of these activities. In addition, in team situations where nonexempt employees are actively involved in deciding how the work is to be performed, the employer often has to discourage them—to the point of imposing discipline—from engaging in "after hours" work discussions with their exempt co-workers.

The FLSA exempt/nonexempt caste system that is based on job classifications is increasingly out of sync with corporate cultures that depend on teamwork. Moreover, 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 Outdated FLSA 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 exemption rules. For example:

- 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.[12] 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.[13]
- 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.[14]

Potential Impact of Department of Labor Rulemaking Because of the above concerns, employers are understandably alarmed about the possibility that the Department of Labor's pending FLSA rule will establish a minimum percentage of time that employees must spend performing exempt duties, which would substantially compound the difficulty of correctly classifying the exempt status of managers, professionals and administrative employees. 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.

Conclusion The disconnect between the FLSA and the modern workplace will continue to grow if the law is left unchanged. It will increase tensions among employers, employees, and regulators, with the only true beneficiary being the plaintiff's bar. Congressional attempts at incremental reforms stalled in the 1990s, leaving a bitter taste in many policymakers' mouths and making them reluctant to make another attempt. Yet the pressure will steadily increase, and it will become a problem that is increasingly more difficult to ignore.

Endnotes

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[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/.

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[9] Pew Research Internet Project, *Smartphone Ownership 2013*, http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

[10] 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.

[11] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[12] Senator Kay Hagen introduced bipartisan legislation (S. 1747) to update the computer employee exemption in the 112th Congress.

[13] 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.

[14] *See*, Law Offices of Snider and Associates, *Department of Labor FLSA Overtime Grievance*, http://www.sniderlaw.com/pages/FLSADOL.html.

Chairman WALBERG. Thank you, Mr. Wilson, and thanks to the panel. You have laid the foundations here for our discussions, and now I recognize Mr. Bishop for his five minutes of questioning.

Mr. BISHOP. Thank you, Mr. Chairman. So many questions, so little time. Mr. Wilson, since you just finished, I would like to ask you a follow-up question on your statement. Can you give us some indication as to how your members are preparing for this rule change now? How is it impacting that environment now?

Mr. WILSON. They are looking at their workforces. They are trying to determine what impacts a salary level threshold of around $50,000 would have on their employees in terms of which employees would have to be reclassified as nonexempt. They're looking at the hours that those employees typically are performing or the duties that they're performing to see if they that they're reviewing their duties more carefully, concurrent duties.

There's a number of things that they're doing to make sure that they're complying as best that they can with the vague and somewhat ambiguous duties test that surrounds the executive and professional and managerial administrative duties exemptions. And they're trying to get a gauge as to what impact it's going to have on their company and the training that they can provide, the types of benefits that they can provide. As was mentioned, some of the benefits and bonuses are structured, their compensation systems are structured in such a way that some of the bonuses are much easier to provide to salaried employees as opposed to paid hourly.

Mr. BISHOP. So employers are bracing for impact right now?

Mr. WILSON. Correct.

Mr. BISHOP. And the impact is potential but they still have to prepare for it. What kind of impact does that have on their behavior as an employer? Do they freeze their hiring process? Do they freeze any kind of movement within their company such as maybe even promotions or any movement within their salaried employees?

Mr. WILSON. That's a great question. I haven't seen that amongst our members yet. They're hiring where hiring is needed and necessary.

To the degree that it is having an impact on hiring, I would say that it's pulling resources devoted to reviewing and analyzing how they may implement this rule when it becomes final, given the short time frame that they're expected to have between when the final rule comes out and when they have to actually comply with it. The amount of time and effort that's being put into that is actually reducing their ability to hire and extend hours for current employees.

Mr. BISHOP. There is so much to ask there. I would like to spend more time with you, but I have a very small amount of time and I would like to move on to Ms. Thomas if I could, please.

You indicated in your testimony that it would cost the University of Michigan $34 million to comply with this rule. That is what you suggested the cost is going to be. In fact, $60 million for all the other universities together, the cost to implement this rule. I can't imagine I know it is difficult for the University of Michigan and Michigan State University to absorb that kind of cost, but I can't imagine how a smaller university, and Olivet or an Albion or some of these other universities will absorb that cost.

My question to you is we already see skyrocketing costs of tuition in this country. Is this going to impact the tuition? Will this be passed on to the student?

Ms. THOMAS. It's inconceivable to me that it would not impact tuition.

Mr. BISHOP. So we can see this rule this is to me the ultimate in the law of unintended consequences. This proposed rule has put into place something that is inconceivable to me, that we would change public policy that would actually have that kind of impact on students who already see skyrocketing costs of tuition, and on top of that, skyrocketing costs with their financing and their debt ratio, and these are the very people that are least likely to be employed right now, which leads me to Mr. Meyer.

Your testimony to me is most impactful because you represent the future of our country. And this whole discussion about the gig economy and the sharing economy and talking about Airbnb and Uber and Lyft was never even contemplated back in the '60s and '70s when Governor Romney was around or Richard Nixon. So we have got to somehow fashion the law to comply with today's world. And technology has taken us in a different direction.

There are too many things for you to talk about here, I know, because your head is about to explode about how this could impact the people in your world, your millennials. Could you share with us a little bit about this economy, what folks you are age are doing? I know that they are engaged with all kinds of online activity, part-time activity. Does this deter them from their future, from gainful employment, from making a future for themselves?

Mr. MEYER. Well, just to speak on the overtime rule, which I didn't touch on in my testimony but I've looked at, I know for me personally when I started working at the Manhattan Institute, I was making under what the threshold would be, but I was able to put in many hours, I was able to travel to conferences and do all of this to work up from a research assistant to fellow. If this rule was in place, I would not be a fellow at the Manhattan Institute right now.

Mr. BISHOP. Is it possible that the law ever contemplated the idea that we would have smartphones one day or internet connections where we can work from anywhere? I sit in an airport all the time, I am working my smartphone, responding. I am typing emails. It clearly is work. But did the law ever contemplate that? And do you think that the intent of Congress was to somehow grab all of these different things that we do as part of our job?

Mr. MEYER. You can definitively say that the law did not foresee all the changes we've had in the workplace. So what I would like to see is, moving forward, realize that these new opportunities, in addition to the sharing economy, it's working on your own, it's working on extra hours, it's working on your smartphone at the airport, that the law doesn't constrain this. Workers are choosing to do this to advance their careers or to work part-time. We need to get rid of the antiquated notion that it's a master-servant relationship, which was the language used in the 1930s to describe employer-employees. It's not how it is anymore.

Chairman WALBERG. The gentleman's time is expired but we will have other opportunities. You and I control this process right now

but we are going to try to keep some semblance, I guess, here of our normalcy.

Dr. Belman, going back to the issue of exempt status and the system by which or the formula that was put in place back in 1975, 2004, using that formula, would that bring us to the $50,000?

Dr. BELMAN. That would actually put us up above the $50,000. In 1975, the threshold was at 110 percent of the U.S. family median income. The reset has left it slightly below 100 percent. So the answer is it would be higher.

Chairman WALBERG. Would the 2004 standard?

Dr. BELMAN. No, the 2004 standard was at around 53 percent of U.S. median family income.

Chairman WALBERG. Mr. Wilson, coming from your background in dealing with that, give me some background on the reason and rationality for the 2004 standard in placing it at the $23,000 level, which I think arguably we could say is too low for now?

Mr. WILSON. Yes, I think—

Chairman WALBERG. But where would it be now if you used that standard and formula?

Mr. WILSON. Well, the history of the Department of Labor in setting the salary level threshold from 1938 to 1975 was typically set at 10 percent of the salaried employees, the 10th percentile of the salaried employees in the United States, roughly in that—

Chairman WALBERG. Of the total—

Mr. WILSON.—at that level. Of all salaried employees, it came in at about the 10 percent level. In 1975, the decision was made to preliminarily and it was supposed to be only on an interim basis adjusted for inflation, which is hasn't been done since, and it was raised. In 2004, we took a look at the number of salaried employees in the United States and took, by industry and region, and determined that the best place to set it at was the 20th percentile. We were going a little bit higher than it had traditionally been done. We didn't adjust it for inflation, but we set it at the 20th percentile, taking into account the impact it would have on small businesses, on retail industries, particularly in rural areas, which is critically important in terms of the impact it would have because it was a relatively large increase at that point in time.

Chairman WALBERG. Different than New York or San Francisco?

Mr. WILSON. Exactly. Right. And so that's the methodology we used in 2004. Using that methodology today would, off top of my head, set it at around $35-$40,000 a year in terms of the salary level threshold instead of the $50,000 that's currently being proposed.

Chairman WALBERG. Significantly less impact but still would you say in a lot—

Mr. WILSON. Substantial but significantly less impact, yes—

Chairman WALBERG. Okay.

Mr. WILSON.—in terms of the unintended consequences it would have.

And also want to add, Congressman Bishop, that our members are large members, and so they have the ability to adapt to this regulation much easier than a lot of the smaller businesses do. They're for-profit companies as opposed to universities that have much tighter budgets, and they're more easier can more easily in-

crease the prices of their goods, which, to the extent there's an impact and a cost of the bottom lines for our employers and our HR policies, association members, it'll just be passed on to consumers.

Chairman WALBERG. Okay. Ms. McKeague, you discussed in your testimony the overtime regulation proposed by the Obama administration and its potential impact on employee morale, which is an important issue, especially from the testimony you heard from Mr. Meyer about the millennials as well. The proposed regulation would convert many current management employees into hourly employees even though many employees prefer to be in the exempt classification. What do you see as the biggest concern for employees who are exempt now but would likely be reclassified as nonexempt?

Ms. MCKEAGUE. Their largest concern as articulated to me is the loss of flexibility in setting their work hours and accommodating a work-life balance. We use very minimal overtime at MHA, and I've been proud to be able to work with new generations of employees in order to put together schedules that allow them to meet their priorities. And I have eight employees on our association side who I will have to demote and reclassify if this law goes through the way it is. I—

Chairman WALBERG. Demote is the appropriate term?

Ms. MCKEAGUE. Obviously, Dr. Belman disagrees with me, but if you ask my eight employees whether moving from exempt status to nonexempt status was a demotion, they would tell you yes, and they would be in different bonus pools and they would be in different benefit programs than they were as exempt employees.

I don't have employees coming to me and asking to work more overtime. I have employees coming to me to ask for help in putting together a flexible schedule that accommodates their life balance needs.

Chairman WALBERG. Okay. My time is expired. I now recognize for a second round Representative Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

And just to follow up, Ms. McKeague, so this rule on overtime and expanded overtime eligibility will not necessarily result in a windfall of overtime income for newly classified nonexempt employees, is that correct?

Ms. MCKEAGUE. That is correct.

Mr. BISHOP. You see demotions and changes in the characterization of their work, maybe what they do. What other impact does it have other than I think the idea is that again, I am trying to get to the reason for the rule. Mr. Meyer said it makes no sense. I grab that quote and I think that best illustrates how I feel about what I am hearing. But what is the reasoning behind it? We are not going to see an increase in pay. I know that is what the intent, I think, is to try to increase pay and to grab whatever time employees spend working. But the overall net effect is not that at all?

Ms. MCKEAGUE. I would agree with you that is not the overall net effect. You asked an interesting question I thought earlier also, and I'm in the position of having so much to say with so little time. But you asked what we were doing to get ready for this rule because we anticipate, of course, a very quick turnaround on that.

SHRM established a six-step process that they recommended all of us follow to become prepared for this, and that ranges from iden-

tifying which jobs right now would fall under these thresholds, whether we have a zone within those thresholds, whether people who are close to the threshold will receive increases or whether it will actually move some people down, what we do with their training opportunities. And this is without discussing the changes that will occur due to wage compression when we move these employees up as well. So there'll be changes to job duties and to schedules and perhaps to staffing levels.

You also asked a question about the percentiles, and we did take a look at that because past administrations, both Republican and Democratic, have taken a look at this. And they were the proposals were between 10 and 20 percent. At the 30th percentile, this the wage would move to $40,196. At the 35th percentile, it would be $44,304. And this proposed threshold, of course, is $50,440. I have eight employees at this threshold who would be impacted by that.

And I love working with my millennial employees. I realize that might sound odd to other HR professionals, but, I mean, the whole concept of a gig economy is something that's on my mind. I have people like Mr. Meyer on my staff I want to keep, working in jobs that didn't exist when I came to work for the hospital association 12 years ago. And this is the kind of give-and-take I need in order to keep them.

Mr. BISHOP. I agree. Mr. Meyer, that was directed at you, and I would agree that much of this is about you and your millennial generation. The unemployment rate is high for your area of the workforce, and we ought to be doing everything we can to encourage growth in employment in that sector of the economy. And while in this case we live in a world where I am looking at a statistic here where only 3.6 percent of private businesses are at least partially owned by some under the age of 30, the lowest proportion in the last 25 years.

Mr. MEYER. Ever since the data began being collected, it's at its lowest level.

Mr. BISHOP. So is this a direct reflection of how we are interpreting the law and how we have failed to accommodate this generation into our workforce?

Mr. MEYER. I think to stay with the focus of this hearing, I'll look at the overtime rule, but imagine a startup. No one, even experienced people in startups are making $50,000 a year. And anyone who's worked there I know I worked at a startup in college you are working much more than 40 hours a week. So you're doing it for equity or you're doing it because it's something you really love and your investing in this company. So you're not doing it for the salary and you want to put in those extra hours to make your product work so it can come to market.

Putting in this threshold, which really would be prohibitive for startups, again, telecommuting, all these things that now you would need to keep track of workers' hours when most young people I'd say the vast majority want to work from home at least some days a week, work while they're on the road, do all that. It's again, some large businesses, it's going to create a lot of confusion and some shakeups in their pay, but this is going to really negatively affect startups.

Mr. BISHOP. Thank you.

Chairman WALBERG. I recognize myself for five minutes. It is getting to be a pattern.

[Laughter.]

Ms. Thomas, you mentioned employees who advised students who provide counseling and offer services in residential life. How would the services provided to students be affected by the proposed to change in the overtime rule?

Ms. THOMAS. There are a number of ways where that effect would be realized. Under our current application of the duties test, we have employees that make above and below the proposed threshold providing services to students. When you want to serve students well, you want to be available when students are available, and so you have flexibility in your workforce regarding being available for counseling and supporting students when they're likely to come to you for services.

Chairman WALBERG. It could be around the clock, couldn't it?

Ms. THOMAS. It could be around the clock, but we don't expect anyone to work around the clock. We want them to be flexible, to be available to their students and to be available when the student is most likely to seek that assistance. Some is going to be during the day, some is going to be at the end of the day, some is going to be well into the evening as it relates to residential life.

Chairman WALBERG. When you take into consideration, especially in the counseling area, whether it is guidance counseling for careers or whether it be mental health guidance counseling—

Ms. THOMAS. Absolutely.

Chairman WALBERG.—that goes on a major university campus like your own, relationships mean a lot. And so while you can program certain hours to be effective in working, generally speaking, with student body, there are times when you can't. Have you costed out or considered the impact financially to institution to care for those types of needs where the student wants to have that relationship and that is important for carrying on the counseling aspect by the employee to the student?

Ms. THOMAS. I believe that would be very difficult to cost out because across the University of Michigan as well as the other universities in our country, we are driven to serve students to the very best of our ability. They're part of the reason why we exist, if not the major reason why we exist. And so individuals have the flexibility to be responsive in creating that relationship and sustaining that relationship, and not only student life but in the academic affairs counseling that our students need to receive.

Chairman WALBERG. Well, going away from the purpose and the function just to the hard-core facts of dollars, you indicated in your testimony there could be reductions, significant reductions in pay level, salary level, and wages. Could you elaborate further on that?

Ms. THOMAS. I think in order to ensure that we have the resources because of our federal grants process and the various stipulations for that, we would not be able to employ as many individuals as we currently do and meet the requirements of the regulations as proposed. So the instance of we have a number of postdoctoral researchers, we have a number of individuals that work part-time in order to serve the needs of our experiments in our research arena with less funds available to pay them because

of the requirement to maintain their exempt status. In order to do their work, we will employ less people in those areas.

Chairman WALBERG. Our postdoctoral, they are considered professionals?

Ms. THOMAS. They are considered professionals today.

Chairman WALBERG. Okay.

Ms. THOMAS. Yes. And not all of them make above the proposed threshold.

Chairman WALBERG. Okay.

Ms. THOMAS. In fact, most don't.

Chairman WALBERG. Dr. Belman, it seems to me that reclassifying from exempt salaried status to nonexempt hourly status as proposed in the overtime rule would cause a number of problems. As Ms. Thomas notes, this would result in reduced autonomy, fewer flexible work arrangements that employees prefer, and fewer opportunities for business travel. The subcommittee has also received testimony that reclassified employees from salaried to hourly would cause significant morale problems for employees who would see this as a demotion. Do you agree that more than doubling the salary threshold would have some negative impacts on employees?

Dr. BELMAN. I'm sure there will be employees who believe they've been negatively impacted. However—

Chairman WALBERG. If you could pull yourself closer to the microphone.

Dr. BELMAN. Oh, I'm sorry. I'm sure there are some employees who will feel themselves been negatively impacted. However, under this requirement, you although they legally move from exempt to nonexempt status, that doesn't mean they have to move from salaried to hourly. They can retain that it they can retain all the benefits which they currently have. They can get the same travel and so on.

Our problem is this: Essentially, once someone is moved into exempt status, and they can be in exempt status at low incomes oh, by the way, this is quite different when you use a 10 percent or 20 percent or whatever the salary and say, well, this is way too high, of course, we have many more salaried workers today in a sense and much than we did, let's say, in 1975 in the following sense. In 1975, there were very few people at fast food restaurants who were considered managerial and therefore exempt. Now, this is a way of evading—

Chairman WALBERG. But that is all changing.

Dr. BELMAN. What?

Chairman WALBERG. That is all changing since the 1938, almost 80 years ago—

Dr. BELMAN. Right, but I'm saying that while your witnesses are claiming there have been huge changes in the economy, they go back and act as if who is considered salary is identical to what it was in 1975, and that's changed. People at much lower levels of education, at much lower pay levels get classified as salary in part to avoid paying overtime.

So what I'd say is there will no doubt be problems in adjusting to this, as there are with all these rules. We hear the same thing. Minimum wage, it's going to be disastrous if you raise it. It turns

out for lots of research in my most recent book from Upjohn What Does the Minimum Wage Do? suggests that employment effects are de minimis.

Chairman WALBERG. Well—

Dr. BELMAN. So what I would say is that—

Chairman WALBERG. I look forward to taking my time is it—

Dr. BELMAN. We tend to—

Chairman WALBERG. My time is expired here, and we will have further opportunity to discuss this.

Dr. BELMAN. Oh, good.

Chairman WALBERG. I know this is the key issue we are facing here dealing with a 1938 law trying to be applied and upgraded in ways that are challenging to say the least and difference of opinion on that.

Dr. BELMAN. We deal with the Constitution—

Chairman WALBERG. How you make it work today—

Dr. BELMAN.—which is over 200 years old, we seem to do okay.

Chairman WALBERG. I will hold myself back on that one. We will have a chance to talk about that later on after the hearing. I yield now to my colleague, Mr. Bishop.

Mr. BISHOP. No, I won't. I want to engage that one. To me, the world out there reacts to laws and the changes in laws. It does not react well when you have a bunch of unaccountable, unelected boards and departments and agencies promulgating rules that have dramatic impact, they may even impact long-existing law and precedent.

This is the concern that we have, and we do have opportunity to address issues that impact current law and the Constitution, but we do so through Article I of the Constitution, which has to do with Congress and the right of Congress, which has exclusive jurisdiction over the passage of laws.

Are you concerned at all, Dr. Belman, that departments and these unelected boards have so much authority to make such a dramatic change in the way we operate in our daily workplace?

Dr. BELMAN. I first have to admit I was born inside the Beltway before there was a Beltway, so I may be biased on that.

Mr. BISHOP. Well, that explains that.

Dr. BELMAN. Yes, absolutely. I would say that there are actually fairly substantial procedures to make sure that administrative rulemaking is reasonable, and if it appears not to be reasonable, parties who are concerned can sue to have those procedures overturned. So we have a pretty elaborate system of due process to address these things. I do not see in my own view that the most of the regulation I see are terribly unreasonable. There are parties who are negatively affected by them, just as there are parties who are positively affected, and in the hurly—

Mr. BISHOP. Can I ask you a question right there?

Dr. BELMAN. What?

Mr. BISHOP. Can I ask you a question right there because I don't have a lot of time.

Dr. BELMAN. Okay. Go ahead.

Mr. BISHOP. I want to capture that thought because you have got four people around you that have raised some really serious concerns. And I have heard, we have heard dramatic stories of impact.

And this is not coming from Congress, this is coming from these agencies and departments and Department of Labor specifically here changing law overnight, overnight that has dramatic impact.

So our concern is how we change that, that we can collect this information before the and the back to the old way, the way the Constitution intended it to be where we actually publicly discussed this, we debated, and we vote on it, and that is the process that we once knew. But now we have a different process, and it is creating havoc at every level of government, every level of business. And that is the problem that we have and that is what has created this and that is why the good Chairman is walking the earth here taking us with him to address this issue. So—

Dr. BELMAN. I would have to say that I respectfully disagree about the process. First of all, this isn't overnight. We have a fairly long, slow procedure for making rules.

Mr. BISHOP. But you heard from Dr. Wilson that it—

Dr. BELMAN. And secondly, I would say—

Mr. BISHOP.—immediately impacts people because of—

Dr. BELMAN.—these are—

Mr. BISHOP.—the suggestion that it could go into effect. As a business owner—

Dr. BELMAN. Would you agree that you have hand-chosen witnesses here—

Mr. BISHOP. As—

Dr. BELMAN.—20 percent of whom are speaking in favor of the rule. If we did—if we had a representative group—because the squeaky wheel gets the grease, you want testimony which is favorable to your point of view, you've got testimony which is dependably favorable—

Mr. BISHOP. I am engaging you right now. That is why. And if you—

Dr. BELMAN. What?

Mr. BISHOP. I am engaging you right now.

Chairman WALBERG. Mr. Belman, this is the normal process—

Dr. BELMAN. I agree with that.

Chairman WALBERG.—regardless of who is in the majority. And so it is what we deal with. We are delighted to have you here. You were invited here and you are holding your end—

Dr. BELMAN. And I'm delighted to be here.

Chairman WALBERG.—of the bargain.

Mr. BISHOP. I just want the record to reflect—

Dr. BELMAN. If I—

Chairman WALBERG. Mr. Bishop?

Mr. BISHOP.—that I like Mr. Belman. I like his input because you provide a necessary part of this conversation. We need to know where this is coming from and the other side of this. So your testimony is very important.

My concern is for members of Mr. Wilson's organization or these other folks out there and maybe people in the audience today who are directly impacted. Even by the suggestion of a rule, it causes a freezing effect for employers out there when rules like this get passed. And I may be wrong, Mr. Wilson, but that has a really serious impact on the economy.

Mr. WILSON. It can. I would just add in terms of Dr. Belman's characterization that there are these the there's an administrative procedure here in terms of how rules are published, proposed, and published as final, that works well in this particular area. I would argue that in the case of the proposed overtime rule that there's a really big problem with that and that is their request for comments on potential changes to the duties test. They didn't propose specific language that the public could respond to in terms of this is what we're going to this is how we're going to change the duties test, which are very vague, somewhat subjective, somewhat arcane, certainly dated when it comes to the professional computer professionals. And they didn't propose anything. They just asked a series of questions and said, so what you think we should do with the duties test?

The problem is that they didn't by not proposing a specific thing, employers have no idea what the final rule is going to look like. And there's some serious unintended consequences of just the misplacement of a comma in the duties test for managerial or executive employees can have a significant impact on litigation. And so without publishing specific proposals, they're sort of circumventing the traditional *Administrative Procedures Act* here and getting around it, which is of great concern to, I think, all employers that are out there.

Chairman WALBERG. The gentleman's time is expired. Mine has come back. Let me carry on with Mr. Wilson on that train of thought.

I would like to get your feedback on the Wage and Hour Division's change and this method of providing guidance. The Obama administration made a decision to provide so-called "administrator interpretations" to assist in clarifying the law as it relates to an entire industry, a category of employers. To quote from the Department of Labor's Web site, they say, "The Wage and Hour Division believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to a fact-specific requests submitted by individuals and organizations where a slight difference in the assumed facts may result in a different outcome."

Although opinion letters had been issued previously for decades, the administration decided it would self-select issues and make broad policy pronouncements. Has the Department of Labor frequently utilized administrative interpretations under FLSA to provide clarification of employers, and what impact has that had?

Mr. WILSON. No, it has not. This it's new. The administrator interpretive letters is new to this current administration. They suspended actually issuing opinion letters, which are authorized under the *Fair Labor Standards Act*. And the administrator interpretive letters are more akin actually to regulations that are not that don't go through notice and public comment.

And it's hard to say what deference these interpretation letters will get in the courts in the future, and there's always the threat by not going through notice and public comment that there's always the possibility that a future administration could simply resend the interpretive letter and you end up with a law that goes back and forth or the rules and regulations that ping-pong back

and forth over the course of four or eight years, which is really no way to run a government, let alone try to set the rules for an economy.

Chairman WALBERG. It doesn't provide certainty.

Mr. WILSON. It certainly doesn't, and that's what employers are really desperate for this point in time.

Chairman WALBERG. Mr. Meyer, while the Department of Labor seems intent on making it more difficult for workers to participate in the sharing economy, I would like to discuss what Congress might do to make it easier for these workers. According to your testimony, many of these workers would like portable benefits such as health costs and retirement savings. However, if sharing economy firms were to offer much benefits, this might endanger the independent contractor status of online users. What could Congress do that would assist in spurring on this sharing economy—

Mr. MEYER. Well—

Chairman WALBERG.—and encourage the benefits that are necessary and wanted as opposed to one-size-fits-all?

Mr. MEYER. Well, there is actually a letter signed by the CEOs of over 30 sharing economy companies bringing up the portable benefits or something they want to provide to their workers because, again, this work is transient, it's done in addition to other work, but hey, some workers really want this. And in the sharing economy, just as any other part of the economy, you have to compete for the best workers. And if you can't get them, your company is not going to succeed. But the more they offer, the more they start to resemble employers under the law.

And there's really no trust with the Department of Labor right now because they can just, through a blog post, decide that one of the six criteria for determining if someone is an employee doesn't matter anymore. So they don't have really any trust in the Department of Labor, and they're worried it that if they start giving workers access to these benefits that they want while workers don't want all the wage and hour protections something that comes up over and over again is the portable benefits, if they start doing that, next thing you know, they could be liable for providing all the wage and hour benefits.

Chairman WALBERG. With no choice in intermediate—what does it do to the intermediaries in this process?

Mr. MEYER. So what it would do for the intermediary is completely destroy their business model. I mean you could imagine an Uber driver signing onto the app and just sitting in the car getting paid minimum wage while they're also driving with another phone for Lyft. I mean, it's actually impossible.

Alan Krueger, the Princeton University professor, he released a paper where he agrees with me on all the wage and hour, that these are completely inapplicable. We disagree over the collective bargaining and some of the other protections, but wage and hour, it's really uncontroversial that these do not apply to intermediaries.

Chairman WALBERG. Just stifle?

Mr. MEYER. Yes. It would destroy the sharing economy.

Chairman WALBERG. Okay. Mr. Bishop, I yield to you.

Mr. BISHOP. Thank you, sir.

I wanted to pick up with Ms. Thomas and a question that you asked earlier. You indicated that your postdocs and research fellows consider themselves professionals. I mean, they are considered professionals. Do they consider themselves professionals?

Ms. THOMAS. Absolutely.

Mr. BISHOP. Sure.

Ms. THOMAS. Learned professionals, absolutely.

Mr. BISHOP. Would research at U of M I am concerned about the research grant system. You have a very important system in place, especially in Michigan with the three big research universities. Does this have an impact on the research grant system in our state?

Ms. THOMAS. It does have an impact in how we would conduct the work on an exempt or nonexempt basis in order to conduct the research. The work of a research assistant or associate, the work of a primary researcher, the work of the postdocs who are being trained for higher-level work in the academy is not subject to a 40-hour week. All of the nature of that work is performed as described by the researcher, by the grant itself, by the level of experimentation that they're doing. And so to impose nonexempt standards of hourly reporting, it's just incompatible with the work of research.

Mr. BISHOP. What is the net effect?

Ms. THOMAS. The net effect, as we are predicting, because, for instance, the NIH sets our stipend level, which is below the proposed threshold, would be the employment of fewer individuals in this area in order to ensure that they could remain exempt.

Mr. BISHOP. Mr. Chair, I don't know how long you would like us to go, but I am prepared to wrap up if you are.

Chairman WALBERG. Well, I am prepared to ask a few more questions.

Mr. BISHOP. Okay. I will yield back to you then.

Chairman WALBERG. Okay. Thank you. I appreciate that. I am just reveling in the fact of having more than five minutes of questioning. And that is nothing on my Chairman, Chairman Kline, who was with you yesterday. That is just the rules of the process and the time frame, but here we have a little bit more time. And I know you have a meeting to go to following, as do I. But while we have these people here, I would certainly like to ask a few more questions on my own.

Ms. McKeague, your written testimony highlights how FLSA hampers employers and their ability to provide workers with greater flexibility, and yet employees are increasingly demanding greater flexibility and control over how, when, and even why they work.

That is something, Mr. Meyer, I have been impressed with learning more about the millennial. There is a why to why you work beyond simply put food on the table, care for my family. There are soft, soft values that really are important and that we ought to be considering.

But back to Ms. McKeague here, the laws of prohibition on the use of comp time, for instance, in the private sector is one example of how the law curtails flexibility. Are there legitimate reasons for treating the public sector and the private sector differently in this regard?

Ms. MCKEAGUE. Not in my opinion. We're competing for the same employees often in the same field of knowledge. It puts us on an uneven footing.

Chairman WALBERG. And so you could use comp time very well?

Ms. MCKEAGUE. I would argue I could use compensatory time off perhaps more efficiently than the public sector could.

Chairman WALBERG. Dr. Belman, let me just turn to you to give you the opportunity to answer that as well. Is there a difference in public and private sector employees relative to things like this, compensatory time as being part of the benefits that would be offered?

Dr. BELMAN. I would say that the allowing compensatory time for public employees was very specifically done because at the time they had not had fair labor standards coverage. And so as a result, this was partially an adjustment to the concept that they were sovereign, that this was an extension of protections into a sector where it hadn't existed.

And particularly, the real the issue driving this was public safety employees who worked irregular hours, or potentially worked firefighters and so on very long hours in a given week. So in my view, comp time two issues, one, public sector different, and there's a reason why the extension of the fair labor standards into the public sector came with comp time.

The other thing which I would point to is it becomes almost unenforceable. You know, public sector we can be reasonably sure that they keep good payroll records and that they're very thoughtful about this, particularly in public safety. Private sector, a lot harder. I'm not saying that any particular organization, but from construction we know that there are a lot of employers who push the limits of the law and perhaps push well over it so that trying to administer comp time in a system in the private sector would be it would essentially gut the overtime provisions.

Chairman WALBERG. Mr. Wilson—

Mr. WILSON. Yes.

Chairman WALBERG.—there are differences between public and private sector employees. I think you accurately talked about some of the inception of the idea with public safety. But we have now gone beyond just thinking of safety but thinking of benefits, thinking of life values, thinking of flexibility for employees, thinking of single-parent families, we are thinking of advancement opportunities for females that frankly we didn't think about in the past, that we are considering right now, and rightly so. Mr. Wilson, respond to that, and then I will probably come back to Ms. McKeague on that issue of—

Mr. WILSON. Well, I would just add yes.

Chairman WALBERG.—the assertion that the private sector won't keep the records as well as the public sector.

Mr. WILSON. Well, I would just add in terms of public safety that, you know, in terms of hospitals, you know, the nurses, the technicians, there's a very key public safety component to that, particularly in an emergency situation that where comp time could be very useful in that particular industry.

So in the sense of, you know, voluntary for both employers and employees and the comp time arrangement and the private sector

would be a beneficial change to the law and would allow the private sector to have the same flexibility of benefits that the public sector employees currently enjoy.

Chairman WALBERG. Ms. McKeague?

Ms. MCKEAGUE. I'd like to give you a really clear example on the value of compensatory time off in the private sector. I work with a young woman, a recent hire at MHA who works in our human resources department. She was trained and educated very, very well at Michigan State University in the Broad School. I have a great deal of regard for Dr. Belman's work. So she's come to work with us. She worked with us first as an intern, then as a fellow, same sort of opportunity Mr. Meyer got. Now, she's a full-time, regular employee at the MHA.

In the last couple of weeks she's been working on closing on her new house, moving. I never have to wonder whether she's putting in the hours that she should put in, and I really don't care if she wants to work 10 hours today and six hours tomorrow because she needs to meet with the loan officer. She's the one who put together some of the research behind my testimony today. She's in the audience, Tori Martin, and she is one of the employees that, under these guidelines, I would have to move back to nonexempt status. And it would undermine everything she told me she values about working at MHA.

And, while I would agree with Dr. Belman that there are industries that have required greater scrutiny than others, we've worked really hard in the private sector to be an employer of choice. I wouldn't even be affected by these laws if the change had been 30 percent increase or under because we try to stay ahead of it and provide these sorts of opportunities. That's what those of us who are involved with SHRM do.

What really offends me is legislation like this that starts from the premise that none of us can be trusted to treat our employees correctly.

Mr. WILSON. I would also add that large employers keep very good records, most employers, nearly all employers. There are some that don't. And the Wage and Hour Division, their enforcement is appropriately focused on some of those industries. And where they go out and have directed investigations and they find that, you know, they take action against those employers that don't keep good records.

But the vast majority of employers keep records primarily for tax purposes because they have to comply with the IRS. Nobody wants the IRS coming down on them. And also primarily for potential litigation that may ensue. If you're not keeping good records, you're opening yourself up to litigation that could be very, very costly.

Chairman WALBERG. Well, compliance costs today, the most recent I have seen is about $1.9 trillion to businesses for just compliance, white paper costs of regulatory issues. So, Dr. Belman—

Dr. BELMAN. My answer to that is Walmart, the largest employer in the U.S., maybe was involved in a few wage and hour violations, seems to fall exactly into your category and clearly basically didn't care about that law. So I'm not sure what large employer—

Mr. WILSON. Well, actually, they did. They actually Walmart actually came to us to help them with what they referred to as their

arcane and somewhat outdated bonus structure system. And they came to us and we worked with them to work out the particular issues that they had with their between their exempted nonexempt employees. We worked it out to a mutual benefit of both the employer and the employees and the federal government on a satisfactory basis.

Dr. BELMAN. So how did you deal with locking employees into their stores for uncompensated overtime? Did you come up with a policy for that?

Mr. WILSON. That was after that those alleged violations were after I was there, after the I was out of the Department of Labor, so I can't address those particular issues. I'm just particularly speaking of the wage and hour investigations we conducted on Walmart back in 2005, 2006, I believe.

Dr. BELMAN. Okay. So—

Mr. WILSON. I can't address that.

Chairman WALBERG. There are certainly bad actors or mistakes both that take place. Our concern, though, in the governmental entity is making sure that we don't just regulate on the basis of the small number of bad actors or mistakes that take place, but we do something that fosters the growth of those that are doing the right thing for their employees.

Let me ask one final question, and I am glad there are no lights left so I can ask that final question. And I am going to go back to Mr. Meyer again. When individuals who provide services through online platforms are deemed to be employees, this can have a number of consequences for both the sharing economy company and the platform users. What has been the experience of sharing economy companies when they have shifted from an independent contractor model to an employer-employee model? And secondly, was this a good thing for the independent contractors?

Mr. MEYER. Well, one company I can speak of, Homejoy, it actually had to shut—

Chairman WALBERG. What was that?

Mr. MEYER. Homejoy. So think an Uber of housecleaning.

Chairman WALBERG. Okay.

Mr. MEYER. You can bring in find someone who's an independent—

Chairman WALBERG. Man alive, I am finding more all the time. Where are you guys coming up with these things?

Mr. MEYER. But so they had to shut down actually over employment classification questions. And the reason for this is the CEO said their labor costs went up about 40 percent. So their costs, because of added labor costs, it increased 40 percent. And this is right in line with what the Department of Labor's employment cost index shows, which is about a 30 percent increase to move to classifying employees.

And I just want to point out when you're working for multiple companies I mean, I have friends who work for Postmates, work for Uber, and have a full-time job also so why do you need these other companies then paying for your workers' comp or your unemployment? I could start I could do one ride for Uber this afternoon as a driver and then not work for four months, then do another ride. How does unemployment insurance figure into that?

So it just shows that this is a different nature of work where it's really entrepreneurial. You are working for yourself. We can't apply the same standards to a completely different model of work.

Chairman WALBERG. Yes. It was interesting, just last week, I took an Uber ride from my office downtown, and the driver that I had, very articulate, come to find out in the course of conversation he has four degrees, two doctoral degrees. And I asked what in the world are you doing driving Uber? Are you writing a book on experiences?

He says, you know, that might be an idea, he says, but no, I am paying off my student loan debt.

So there is an economy there that serves.

Well, I appreciate it. I don't want to belabor this, getting toward the end of the time, and I know that my colleague has to get to a veterans event of great importance. And we are going to spend a little bit more time here in this community college looking at what is going on here. But I would offer to my colleague an opportunity for any final comments that you would like to make.

Mr. BISHOP. Well, I had the opportunity to research, to be in the practice of law, to do what I have done over the years and see some of this firsthand for 25 years now. Before I came to Congress I was in the private sector. I was actually in the compliance officer arena. I was the chief counsel for a small company in the financial world. And we had the opportunity to face many, many compliance issues. And it was very difficult. It was very difficult for us to survive.

But the impact that every single law they came down, compliance issues, was to freeze what we were doing so that we could assess whether or not we could withstand what the new rule was. We didn't want to stick our neck out too far because we knew and when I say stick our neck out meaning we would like to hire more people, we would like to expand, but we're not going to until we can figure this whole thing out.

And now, Mr. Chairman, we live in a world where it is not government, seated government anymore that is doing this. It is agencies and the departments and different boards of unelected officials who don't face re-election, who don't have to face the reelection process and face, ultimately, voter accountability.

And to me that has raised all new problems in this country, especially in an economy that is just absolutely handcuffed right now, being choked out, and especially in the small business environment which is the backbone of our economy. We see small business holding on for life. They want to grow, they want to create jobs, but they just won't do it because this world is too crazy and there is too much government, too much regulation.

The rules that we have talked about tonight were created in an environment that did not give the people that really have to live with it the opportunity to weigh in, and they don't make sense. And it is embarrassing to a certain extent for members of Congress to be told that by constituents and by a panel like this and not be able to do a thing about it because we don't have the proper oversight to do so.

I am grateful to you and this Committee for bringing these issues forward so that we can discuss them in a public environment and so that we can raise awareness to those that are promulgating

these rules as to why rules like this should be given more consideration, more vetting, more public debate because in the end we are seeing more of the unintended consequences than we are of the actual intent of whatever the promulgating organization is that put the rule forward.

So, again, I am grateful for what you have provided us today, the time and those that have weighed in on this subject, thank you all for your testimony. I am hoping that in the future that Congress will have the opportunity to address this in a meaningful way so that we can bring some sense of calm and clarity to the law and that we can grow and expand this economy and that people will get hired and students that are in debt won't have to deal with this anymore and that maybe one day you and I can look at and be Uber drivers.

[Laughter.]

Chairman WALBERG. There is always that option, isn't it?

Mr. BISHOP. Or Homejoy, too, that sounds like a good idea.

Chairman WALBERG. Well, thank you. And thank you to the panel for taking your time to come here, and I hope it was a little bit do except for at least well, two of you this was closer to your home site as well doing it in the field hearing.

I, like my colleague here, had a life before Congress, and one of those areas was as a division manager in an institute of higher education, specifically in the area of development. And I had a whole team, national team that were salaried, every one of them. And every one of them had flexibility of being away from me most of the time but doing great work for the institution and stewardship in providing resources for major projects, too, over the course of to the tune of about $35 million over the course of time projects raised. And they spent a lot of time in the field. They needed flexibility.

I can't envision what impact this overtime reg would have on their functioning, which was amazing, the opportunities that they brought forward to students, faculty alike by their ability to serve the people that would provide the resources for international as well as national projects for this institution.

We certainly don't ever want to let it be said that there is a divide in the minds of this Committee or Congress on the fact that employers and employees ought to be treated well. We ought to encourage employers to expand, to be more successful, in turn, to be able to hire more people but to take care of the people they have, developing greater opportunities for them.

And I think that is why we wrestle with a 1938 law, almost 80 years, 80 years where it really hasn't been changed all that much. And every time we attempt to go into areas where I think would foster growth for employees as well as employers, the landmines begin to develop on issues that go no place in extending the successful opportunities for both sides. It becomes partisan.

And I have appreciated some of the efforts of issues we have talked with on our subcommittee and wish we could expand it still further to the full Congress to put aside the partisan politics issues and make sure we upgrade a law that could be very effective to expand the opportunity of this great country using free enterprise, using the market economy, using the creativity that is developing

within our new generations coming forward with the tools that they have and the flexibility that can make for a better life and not hold people back. And so that will continue to be our effort.

I would like to think that the bill that I have introduced would just do one simple thing, let's look at the economics. How does it truly impact both the employee and the employer and then find a way whereby we might upgrade the law but do positive things on both sides of the ledger to make sure that we continue to advance?

Any opportunities that we have had to travel internationally on our Congressional Delegation trips and see the competition that is out there, they are not sitting back. They are aggressively moving forward. We don't have that luxury anymore. In our DNA we have everything necessary to stay at the head of the pack unless we hold ourselves back. And my contention is that over a large bureaucracy allowed by unlimited government takes away the unlimited opportunity back in the districts.

So I appreciate this hearing today and thank you for each of you attending. I thank Lansing Community College again for giving us the opportunity for a great facility.

And with that, I will close the hearing. It is adjourned.

[Questions submitted for the record and their responses follow:]

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July 8, 2016

Ms. Laurita Thomas
Associate Vice President for Human Resources
University of Michigan
500 S. State Street
Ann Arbor, MI 48109

Dear Ms. Thomas:

Thank you for testifying at the March 29, 2016, Subcommittee on Workforce Protections hearing entitled "The 21st Century Workforce: How Current Rules and Regulations Affect Innovation and Flexibility in Michigan's Workplaces." I appreciate your participation.

Enclosed are additional questions submitted by a Committee member following the hearing. Please provide written responses no later than July 22, 2016, for inclusion in the official hearing record. The response should be sent to Jessica Goodman of the Committee staff, and she can be contacted at (202) 225-7101, should you have any questions.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg

TIM WALBERG
Chairman
Subcommittee on Workforce Protections

Questions for the Record
"The 21st Century Workforce: How Current Rules and Regulations Affect Innovation and Flexibility in Michigan's Workplaces"
Subcommittee on Workforce Protections
March 29, 2016

Questions from Representative Frederica Wilson (FL-24):

1. You testified that DOL's proposed salary threshold increase would cost U-M $34 million to implement. That estimate was, presumably, based on a calculation by someone at U-M with access to the university's records of salaries and hours worked.

    a. Please provide a worksheet with calculations for these estimates as well as assumptions used for such calculations.

    b. What percent of all U-M salaried employees are paid less than $50,440 but more than $23,660 a year? How many employees is that?

    c. How many of these employees worked in excess of 40 hours in a standard workweek in any of the past 52 weeks?

    d. What was the total number of overtime hours work for these salaried employees?

    e. Is this above information part of your current or past recordkeeping? If not, how was this information obtained?

    f. What percentage of U-M's overall budget does this $34 million figure represent?

    g. What percent of U-M's endowment is $34 million?

2. Why hasn't the University adopted the NAS Committee's recommendation, made in 2014, that postdoctoral students be paid a minimum of $50,000 a year?

<u>Questions from Representative Wilson (FL)</u>

1. You testified that DOL's proposed salary threshold increase would cost U-M $34 million to implement. That estimate was, presumably, based on calculation by someone at U-M with access to the university's records of salaries and hours worked.

a. **Please provide a worksheet with calculations for these estimates as well as assumptions used for these estimates.**

See Table A at the end of this document for the calculation for the projected potential of a $34 million cost impact based on the proposed $50,440 threshold.

The assumptions used for estimating costing were:

1) No base salary adjustments would be made for current full-time exempt staff below the proposed threshold.
2) Full-time exempt staff below the threshold work 5 hours of overtime per week, which would be paid at a time-and-one-half rate.
3) Part-time exempt staff below the threshold work 5 hours above their appointment per week, which would be paid at a straight-time rate.
4) The additional cost of benefits is approximately 40 percent.

b. **What percent of U-M salaried employees are paid less than $50,440 but more than $23,660 a year? How many employees is that?**

There are 3,282 (32%) of 10,353 exempt employees under the $50,440 threshold (this includes all jobs considered in-scope at the time of the analysis).

The total number of exempt (salaried) employees is 27,875 (this includes out-of-scope jobs such as instructional faculty and graduate student instructors, which are unaffected and thus were not part of the analysis).

c. **How many of these employees worked in excess of a 40-hour standard workweek in any of the past 52 weeks?**

Unknown. The University does not maintain records on hours worked for exempt employees.

d. **What was the total number of overtime hours worked for these salaried employees?**

Unknown. The University does not maintain records on hours worked for exempt employees.

e. **Is this above information part of your current or past record keeping? If not, how was this information obtained?**

The University does not maintain records on hours worked for exempt employees. As noted in the response to question 1.A., an assumption of 5 hours/week of overtime was used for costing purposes.

f. **What percent of U-M's overall budget does this $34 million represent?**

0.49 percent on a $6,905M operating budget.

g. **What percent of U-M's endowment does this $34 million represent?**

0.34 percent on a $9,952M market value of endowment. (Note: How endowment funds may be spent is usually restricted by the donor. Such funds can be used only for the specific purpose for which the endowment was established.)

2. **Why hasn't the University adopted the NAS Committee's recommendation, made in 2014, that postdoctoral students be paid a minimum of $50,000 a year.**

Constraints on the budget would make this increase difficult to implement. Additionally, agencies that fund research, such as the National Institutes of Health, often set stipends for postdocs well below this threshold. A phased approach for gradual increases to salary would be preferred.

Table A:

University Of Michigan FLSA Proposed Threshold Costing Estimate

	MODEL for Full Time: 5hrs/week of overtime @1.5 Time for full-time employees below proposed threshold of $50,440	MODEL for Part Time: Shrs/week of additional straight time for part-time employees below proposed threshold of $50,440	Total "OT" Costs
Additional Overtime Costs	$ 17,500,802	$ 6,802,492	$ 24,303,293
Benefit Cost Impact (approx 40%)	$ 7,000,321	$ 2,720,997	$ 9,721,317
Grand Total	$ 24,501,122	$ 9,523,488	**$ 34,024,611**

The assumptions used for costing were:

1. No base salary adjustments would be made for current full-time exempt staff below the proposed threshold.
2. Full-time exempt staff below the threshold work 5 hours of overtime per week, which would be paid at a time and one-half rate.
3. Part-time exempt staff below the threshold work 5 hours above appointment per week, which would be paid at a straight time rate.
4. The additional cost of benefits is approximately 40%.

[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]

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