



PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

July 23, 2015

Chairman Tim Walberg
Subcommittee on Workforce Protections
U.S. House of Representatives
2181 Rayburn HOB
Washington, D.C. 20515

Ranking Member Frederica Wilson
Subcommittee on Workforce Protections
U.S. House of Representatives
2181 Rayburn HOB
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of the Partnership to Protect Workplace Opportunity, we thank you for holding today's hearing on Department of Labor's (the Department) proposed regulation amending the exemptions for executive, administrative, professional, outside sales, and computer employees (the "EAP exemptions" or "white collar exemptions"). The Partnership consists of a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry (*See* <http://protectingopportunity.org> for additional information, including a list of partners). The Partnership's members believe that employees and employers alike are best served by a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. We believe the Department's proposal would negatively impact the ability of the Partnership's members to maintain that flexibility and clarity.

The Department proposes increasing the salary levels required for the white collar exemptions and the highly-compensated exemption and annual automatic updating of those levels. Currently, those salary levels are \$455 per week/\$23,660 per year for the white collar exemptions and \$100,000 per year for the highly compensated employees. Under the Department's proposal, the standard salary level would rise to \$970 per week or \$50,440 per year and the highly compensated employee standard would be set at \$122,148. The Department is thus proposing to more than *double* the minimum salary level required for the EAP exemptions. This is particularly noteworthy given a national, February 2015, survey from the polling company, inc./WomanTrend, which found roughly one-in-five adults (21 percent) would not increase the overtime salary threshold at all. In fact, a 65 percent majority preferred increasing the salary limit by no more than 50 percent, or to \$35,490 per year.

The Department claims the dramatic increase in the minimum salary requirement is needed to set a standard salary level for full-time salaried employees that "adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating a return to the more detailed long duties test."

We agree the Department should not return to the more detailed long duties test, which was effectively abandoned by DOL decades ago. Imposing the archaic long duties test on our modern economy would simply lead to less clarity and more litigation. The Department's dramatic increase to the minimum salary threshold is similarly unnecessary and damaging and would have negative consequences for employees, employers and the economy. The Department needs to take a more measured approach.

According to the Department's estimate, more than four million employees would need to be reclassified (to being non-exempt) as a result of the proposed minimum salary increase. This would result in less workplace autonomy and fewer opportunities for advancement, while forcing employees to closely track their hours to ensure compliance with overtime pay and other requirements. Employees would have less control over when and where they work.

The change to non-exempt status means that many employees would lose the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees would lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. Employers are also more reluctant to provide nonexempt employees with mobile devices or may place restrictions on their use, as employers need to account for any time employees spend on such devices. The Department simply ignores these consequences for employees in NPRM.

Similarly, the Department's proposal glosses over the fact that this proposed increase in the salary level would make it difficult to maintain part-time exempt positions. Under the current salary requirement, a part-time, pro-rated salary is sufficient to establish the exemption (provided that the pro-rated amount exceeds \$455 per week). The proposed new amount makes such an arrangement far more difficult, effectively eliminating some flexible workplace arrangements. If an employee's pro-rated salary is not in excess of the new salary amount, that employee would now need to meticulously record his or her working hours, even if he or she never approaches 40 hours, because the FLSA's "hours worked" recordkeeping obligations apply to all non-exempt employees.

In addition, nonexempt status can lead to fewer opportunities for career advancement. Again, changing to non-exempt status requires employers – and employees – to watch the clock. For example, employees who have reached or are near 40 hours of work in a week may need to skip additional training or other career-enhancing opportunities, because the employer is not able to pay overtime rates for that time.

Finally, when employees are converted to non-exempt status, they often find that they have lost their ability to earn incentive pay (e.g., bonuses). Under the existing rules, employers that provide incentive payments to hourly employees must include those payments in the employee's "regular pay rate" for purposes of calculating overtime pay rates, even if the bonus is provided months after the overtime takes place. Faced with the difficult recalculation of overtime rates—sometimes for every pay period in a year—employers often simply forgo these incentive payments to non-exempt employees rather than attempt to perform the required calculations.

Particularly troubling is the impact these increases would have on regions of the country where the cost of living is significantly lower than large metropolitan areas, the West Coast and

the Northeast. The proposed nationwide floor for exempt status would exceed not only California's current standard of \$720 per week, but also the California standard for 2016, which will be \$800 per week. When even California employers need to raise the salary level to maintain the exemption, it is clear that what is supposed to be a salary floor for exempt employees across the country simply fails in any meaningful way to account for regional economic differences.

In addition, the Department's proposal fails to account for the devastating impact such an increase is likely to have on certain sectors of the economy, such as retail, restaurant, not-for-profits, educational institutions, and state and local governments. An Oxford Economics report commissioned by the National Retail Federation estimates that 2,189,600 retail and restaurant workers, or 64 percent of exempt workers in the industry, would be affected by the increase in the salary level. Approximately 32 percent of these affected employees would be converted from salaried exempt status to hourly non-exempt status, while 11 percent would have their hours reduced. The report also found that the changes would cost retail and restaurant businesses \$8.4 billion per year.

The Department's decision to index the salary level for future increases would also be unprecedented and damaging. Both Congress and previous administrations have declined to do this throughout the history of the FLSA. The Department has proposed two possible methodologies that may be used for increasing the salary thresholds in coming years. As a result, the regulated community must now provide its comments on two different options, as well as any other options that may be identified by commenters (including, of course, the option not to require automatic, annual increases to the salary level). Determining the expected impact of the multiple methods will require significantly more in the way of economic analysis, as well as outreach to the Partnership's members as we attempt to determine the impact of the increase not only in the first year, but in the second year and the years beyond. Issues related to salary compression and the potential impact of essentially forced salary increases on future merit increases will also need to be considered and analyzed.

Finally, while the Department did not make any specific regulatory proposals with respect to the duties tests, the agency is "seeking additional information on the duties test for consideration in the final rule," and posed several questions. This type of vague inquiry is suitable for a Request for Information or Advanced Notice of Proposed Rulemaking, but it is not appropriate for a Notice of Proposed Rulemaking. The absence of a specific regulatory proposal complicates the ability of the regulated community to provide meaningful, substantive comments and is contrary to both the Administrative Procedure Act and the administration's goal of making the federal government policy setting more transparent.

Given these circumstances, the 60-day comment period provided by the Department is simply inadequate. Last week, the Partnership requested that the Department extend the comment period by 60 days, to November 3, 2015.

Thank you for convening today's hearing and for the opportunity to submit this letter for the record.

Sincerely,

The Partnership to Protect Workplace Opportunity and the following organizations:

4A's - American Association of Advertising Agencies

American Bakers Association

American Bankers Association

American Council of Engineering Companies

American Apparel & Footwear Association (AAFA)

American Hotel & Lodging Association

American Staffing Association

American Supply Association

Associated Builders and Contractors

Associated General Contractors

Auto Care Association

College and University Professional Association for Human Resources

Food Marketing Institute

HR Policy Association

Information Technology Alliance for Public Sector

International Association of Amusement Parks and Attractions

International Foodservice Distributors Association

International Franchise Association

International Public Management Association for Human Resources

Manufactured Housing Institute

National Association of Electrical Distributors

National Association of Home Builders

National Association of Manufacturers
National Association of Professional Insurance Agents
National Association of Wholesaler-Distributors
National Newspaper Association
National Automobile Dealers Association
National Council of Chain Restaurants
National Federation of Independent Business
National Grocers Association
National Lumber and Building Material Dealers Association
National Pest Management Association
National Public Employer Labor Relations Association
National Restaurant Association
National Retail Federation
National RV Dealers Association
Pennsylvania Food Merchants Association
Retail Industry Leaders Association
Small Business & Entrepreneurship Council
Society for Human Resource Management
Society of American Florists
U.S Chamber of Commerce
WorldatWork