

October 24, 2023

Dear Representative:

On behalf of the Partnership to Protect Workplace Opportunity (PPWO or Partnership)¹ and the 87 undersigned organizations representing millions of private, public, nonprofit and educational entities, we ask that you urge Department of Labor’s (DOL or Department) to withdraw its proposed changes to the regulations governing the “white collar” employee exemptions to federal overtime pay requirements under the Fair Labor Standards Act (FLSA). If finalized, the proposal will dramatically and negatively impact businesses, nonprofits, colleges and universities, states, cities, towns and public schools as well as the workers they employ and the consumers, students and people they serve. Moreover, the costs and organizational changes required to comply with the proposal could immediately destabilize an economy that is already facing the dual threats of inflation and recession. Despite many stakeholders conveying these concerns to DOL during listening sessions and subsequent letters, the agency is rushing to enact the proposed changes, which could be effective as early as May 1, 2024. At the same time, the Department has failed to provide any evidence that the current regulations, which were last updated in 2019, are failing to protect employees. Instead, DOL relies on a 25-year-old study, two 1982 cases with divergent outcomes, and the current leadership’s preference for a test the Department effectively abandoned in 1991.

The FLSA requires employers track employees’ work hours and pay employees at 1.5 times their regular pay rate for every hour worked over 40 in a given workweek. This premium pay is known as overtime pay. The FLSA creates various exemptions from these overtime-pay requirements, including exemptions for executive, administrative and professional (EAP or “white collar”) employees. The FLSA tasks DOL with defining and delimiting the terms executive, administrative and professional employees “... from time to time by regulations.”

DOL first published such regulations in 1938 and has updated them eight times, most recently in 2019. Under the current version of the regulations, a person must satisfy three criteria to qualify as an exempt white-collar employee: first, they must be paid on a salary basis; second, that salary must be more than the minimum amount DOL has set (currently \$684/week, or \$35,568 annually); and third, their “primary duties” must be consistent with those common to executive, administrative, or professional positions.

On September 9, 2023, DOL proposed increasing the current minimum salary threshold by nearly 70 percent from \$684/week (\$35,568 annually) to a projected \$1158/week (\$60,209 annually).²

¹ PPWO is a coalition of a diverse group of associations and other stakeholders representing employers from the private, nonprofit and public sector with millions of employees across the country in almost every industry. Formed in 2014, the Partnership is dedicated to advocating for the interests of its members in the regulatory debate on changes to the FLSA overtime regulations. PPWO’s members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, employees’ career advancement opportunities, and clarity for employers when classifying employees.

² DOL proposes setting the threshold at the 35th percentile of weekly earnings for full-time salaried workers in the lowest wage Census region, which it projects will be \$1,158/week (\$60,209 annually) at the time the rule is finalized.

The Department is only providing 60 days to comment on the proposal, despite requests by stakeholders to extend this period, including a request by PPWO and 107 additional organizations³ and a separate request by 31 associations representing colleges and universities.⁴ In addition, DOL is providing employers with a mere 60 days to comply after the final rule is published. As referenced above, given DOL's time tables, we estimate employers will need to comply with these significant changes as soon as May 1, 2024.⁵ The Department also has proposed to automatically update the minimum salary requirement every three years.

Below we outline our concerns with the proposal in more detail.

The Comment Period Is Inadequate Given the Scope and Impact of the Rule

Sixty days is simply not enough time for employers and their representatives to collect the necessary data on: 1) which employees will be impacted; 2) what changes the employer may need to make; 3) projected costs for such changes; and 4) what alternatives DOL should consider that would be less burdensome. Collecting such data is a massive undertaking given that, by DOL's own estimate, the proposal will impact at least 3.4 million employees. As noted above, PPWO sent a letter signed by 107 additional organizations requesting an additional 60 days to comment on the proposal, and 31 associations representing colleges and universities sent a similar request. DOL denied these and other requests for additional time without providing any justification.

DOL's Proposal Is Completely Unnecessary Given the Regulation Was Updated in 2019

DOL's proposed increase is completely unnecessary at this time and inconsistent with historic norms. The Department has updated the salary level eight times since 1938, with updates occurring on average every 9.87 years, with the majority of updates in the seven- to nine-year range. DOL just increased the minimum salary in 2019 from \$23,660 to \$35,568. The jump from \$23,660 in 2019 to \$60,209 in 2024 would be a 154% increase in a six-year span. This is completely inconsistent with past updates, where increases in the minimum salary threshold have ranged from 5 to 50 percent and have never approached 154% in a six-year period. Such a rapid and dramatic increase is unprecedented, unnecessary, and threatens to harm employers, workers, and our economy.

DOL's Proposed Increase Would Hurt Private, Public, and Nonprofit Sectors, the Workers They Employ and the Customers, Students and People They Serve

DOL's proposed increase is simply too much for employers to absorb and will result in large numbers of employees being reclassified from exempt to hourly. Because the law requires employers to carefully monitor employees' hours and pay the overtime for every hour worked over forty in a given workweek, employers must treat hourly employees differently than exempt

DOL does not provide any justification for picking the 35th percentile, other than that it's less than the 40th percentile, which was found unlawful by a federal court.

³ Available at <https://protectingopportunity.org/ppwo-requests-extension-on-overtime-nprm-comment-period/>.

⁴ Available at <https://www.acenet.edu/Documents/Letter-DOL-Overtime-NPRM-Extension-101223.pdf>.

⁵ The comment period closes on November 7, 2023. We estimate DOL could release the final rule by March 1, 2024, if the agency takes 90 days to review comments and draft the final rule and the Office of Information and Regulatory Affairs takes several weeks to conduct its review of the final rule. DOL said in the proposal it will require compliance 60 days after the final rule is published, which would set the estimated compliance date for the proposed changes at May 1, 2024.

employees. This means that reclassification will have significant consequences for workers, including:

- limits on the ability of employers to provide, and employees to take advantage of, remote work and flexible scheduling options which have become increasingly popular since being introduced during the pandemic and also help alleviate the growing childcare crisis;
- limits on career advancement opportunities for employees;
- reductions in employee access to a variety of additional benefits, including incentive pay;
- limits on employers' ability to provide employees with mobile devices and remote electronic access, further limiting employee flexibility;
- employees in the same job classification (for the same employer) being classified and treated differently based on regional cost-of-living differences, facility profitability or other factors that impact budget;
- employees being reassigned or let go as employers make operational changes needed to achieve the organization's mission under new pay and staffing paradigms; and
- declines in employee morale, particularly in cases where peers remain exempt as exempt status is often seen as a higher status.

These consequences will be disproportionately borne by entry level workers, particularly those from rural and economically struggling areas or those graduating with degrees that do not traditionally command high salaries. Also, just because an employee may be reclassified as now eligible to earn overtime is no guarantee that they will actually earn overtime as the DOL presumes. Very likely their hours will be managed closely to avoid having to pay overtime so the employee will lose the advantages of being exempt and not earn any more compensation.

For employers, the ramifications of the rule will include vast legal, administrative and operational costs related to rapidly reassessing each worker's pay, position, and job duties as well as restructuring operations to meet organizational objectives under very different pay and staffing paradigms. Reclassifications, changes in duties and staffing, and adjustments to salaries to maintain exemption and the resulting pay compression (as one salary level is increased, those just above need to be increased as well) all come with significant costs. Employers will also face increased FLSA litigation triggered by errors that will occur during the rushed reclassification process and by employees who file suit because they have been negatively impacted by the mass reclassification.

As a result of these tremendous costs and burdens, private employers may be forced to reduce staff and offerings and find themselves less competitive globally. Nonprofits, schools and public entities, on the other hand, may simply need to reduce the number of people they serve, or the amount of services they can provide. In fact, during the 2015-2016 rulemaking process, many charitable nonprofits came forward and described how the dramatic increase to the threshold would negatively impact their mission and those they serve.⁶ Lastly, given the Department's proposal to

⁶ See DOL's Overtime Rule Hurts Charities and Non-Profits, available at <https://www.americanactionforum.org/insight/impact-dols-overtime-rule-non-profit-services/>.

increase the minimum salary threshold every three years, these are not one-time issues but will instead recur on a tri-annual basis.

DOL’s Proposed Increase Is Unlawful and Not Consistent with the Purpose of the Minimum Salary Requirement

The Department simply does not have the authority to exclude bona fide EAP employees from the exemption on salary alone. The Department has generally and fairly consistently recognized this limitation since 1940, when the agency acknowledged that the purpose of the minimum salary is to “provid[e] a ready method of screening out the obviously nonexempt employees.” In other words, the law permits DOL to set the minimum salary at a level where those earning under the minimum are clearly not exempt, but it does not permit DOL to set the minimum so high as to deprive bona fide EAP employees of exempt status. The salary test is to be a mere proxy for the duties test, not a replacement for the duties test.

In 2016, however, DOL decided to test the limits of its authority, but a federal district court found unlawful the agency’s final rule setting a historically high minimum salary threshold. In invalidating the rule, the court provided the following analysis of DOL’s responsibilities and limitations regulating the exemption:

Specifically, the Department’s authority is limited to determining the essential qualities of, precise signification of, or marking the limits of those “bona fide executive, administrative, or professional capacity” employees who perform exempt duties and should be exempt from overtime pay. With this said, the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1) Nor does the Department have the authority to categorically exclude those who perform “bona fide executive, administrative, or professional capacity” duties based on salary level alone. In fact, the Department admits, “[T]he Secretary does not have the authority under the FLSA to adopt a ‘salary only’ test for exemption.”

The Final Rule more than doubles the Department’s previous minimum salary level, increasing it from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually). This significant increase would essentially make an employee’s duties, functions, or tasks irrelevant if the employee’s salary falls below the new minimum salary level. As a result, entire categories of previously exempt employees who perform “bona fide executive, administrative, or professional capacity” duties would now qualify for the EAP exemption based on salary alone.⁷

Unfortunately, in its recent proposal, DOL again sets the minimum salary threshold at a level which will clearly exclude bona fide EAP employees from the exemption. While we believe this is patently obvious given the dramatic increase and projected number of impacted employees, DOL also admits this is the case in its analysis, which attempts to justify the rule.

⁷ *Nevada*, 275 F.Supp.3d 795 (E.D. Tex. 2017).

As mentioned above, one of DOL’s justifications for the proposed dramatic increase is the preference of DOL’s current leadership for a test the Department effectively abandoned in 1991. DOL engages in a strained and rather convoluted attempt to justify why the 1991 rule is relevant to setting the current minimum. In doing so, DOL admits that “1.6 million currently exempt employees who meet the standard duties test” would fall below the proposed minimum salary threshold even though these employees would have met the criteria for exemptions under the 1991 test. The Department dismisses this impact claiming that the affected population “makes up less than six percent of all currently exempt, salaried white-collar employees.”

While we think the impacted population is much larger than what DOL’s analysis concludes, this is beside the point. The law does not permit DOL to disqualify employees from exemptions based on salary alone, and DOL admits the proposal will do so for 1.6 million workers and six percent of all currently exempt, salaried white-collar workers, which is not even arguably a *de minimis* population.

Automatic Increases Are Unlawful and Will Exacerbate Current - and Drive Future - Inflation

DOL has proposed updating the minimum salary threshold by pegging it to the 35th percentile of weekly earnings for full-time salaried workers in the lowest wage Census region. These automatic updates are likely unlawful given the FLSA explicitly requires DOL to “define...from time to time by regulations of the Secretary subject to the provisions of [the Administrative Procedure Act]”⁸ The Department recognized its lack of authority to index the salary level in its 2004 rulemaking, and it acknowledged as much in the 2015 Proposed Rule, noting that it determined “nothing in the legislative or regulatory history . . . would support indexing or automatic increases.” The Department was correct in 2004, and nothing has occurred since that time to justify a different conclusion.

More importantly, the automatic increases proposed by DOL will cause dramatic and unpredictable changes to the exemptions over time. This is because DOL’s changes to the minimum salary will significantly impact the earnings of full-time salaried workers in the lowest wage Census region—the exact data pool DOL will rely on for the next update. For example, if the rule goes into effect as proposed in 2024 and increases the minimum salary for exemptions to \$60,209, there will be far fewer full-time salaried workers making under that amount in 2027 when DOL performs the next update. Thus the 2024 change will have impacted the 2027 threshold by reducing the number of full-time salaried workers that earn less than \$60,209. This will occur again in 2030, when the 2027 minimum salary threshold necessarily impacts what full-time salaried workers earn and so on. As a result, the minimum salary threshold will quickly ratchet upwards driving wage inflation rather than responding to economic circumstances. This is particularly the case given the dramatic increase in the rapid cadence of updates the Department has proposed, where the rule rather than the market becomes the dominate determiner for setting wages for almost all entry level and many other exempt EAP positions.

Again, we ask you to urge DOL to withdraw its proposal. The Department has not provided adequate justification for the proposed increase and automatic updates, both of which are unlawful, inconsistent with historic norms, and will harm businesses, nonprofits, colleges and universities,

⁸ 29 U.S.C. 213 (a)(1).

states, cities, towns and public schools as well as the workers they employ and the consumers, students and people they serve.

Sincerely,

AASA, The School Superintendents Association
Agricultural Retailers Association
Air Conditioning Contractors of America
AICC, The Independent Packaging Association
American Bakers Association
American Bus Association
American Car Rental Association
American Frozen Food Institute
American Foundry Society
American Hotel & Lodging Association
AmericanHort
American Pipeline Contractors Association
American Road & Transportation Builders Association
American Society of Association Executives
American Society of Travel Advisors
American Supply Association
Associated Builders and Contractors
Associated General Contractors of America
Associated Equipment Distributors
Association of School Business Officials International (ASBO)
Building Service Contractors Association International
College and University Professional Association for Human Resources
Construction Industry Round Table
Education Market Association
Electronic Transactions Association
FMI - The Food Industry Association
Global Cold Chain Alliance
HR Policy Association
IAAPA, The Global Association for the Attractions Industry
Independent Electrical Contractors
Independent Insurance Agents & Brokers of America
International Bottled Water Association
International Franchise Association
International Foodservice Distributors Association
ISSA, the Worldwide Cleaning Industry Association
MEMA, The Vehicle Suppliers Association
Manufactured Housing Institute
Manufacturers' Agents Association for the Foodservice Industry (MAFSI).
National Association of College Stores
National Association of Convenience Stores

National Association of Concessionaires
National Association of Home Builders
National Association of Independent Colleges and Universities
National Association of Landscape Professionals
National Association of Professional Insurance Agents
National Association of Theatre Owners
National Association of Wholesaler-Distributors
National Association of Independent Colleges and Universities
National Club Association
National Association of College and University Business Officers
National Confectioners Association
National Cotton Ginners Association
National Council of Farmer Cooperatives
National Council of Chain Restaurants
National Federation of Independent Business
National Funeral Directors Association
National Grain and Feed Association
National Grocers Association
National Lumber & Building Material Dealers Association
National Marine Distributors Association
National Newspaper Association
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Small Business Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
National Wooden Pallet & Container Association
NATSO, Representing America's Travel Plazas and Truckstops
Ohio Society of CPAs
Outdoor Power Equipment and Engine Service Association
Pennsylvania Food Merchants Association
Pet Industry Distributors Association
Portland Cement Association
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
Saturation Mailers Coalition
Service Station Dealers of America and Allied Trades (SSDA-AT)
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council
The Transportation Alliance
Tire Industry Association (TIA)
Transportation Intermediaries Association (TIA)
U.S. Chamber of Commerce



PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

Workplace Solutions Association