DOL Questions About Duties Tests Should Concern Employers

By Allen Smith 7/8/2015

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Employers breathed a collective sigh of relief when the Department of Labor (DOL) issued its proposed overtime rule and announced it was not proposing specific regulatory changes to the duties tests for determining exempt employees at this time. But that doesn't mean the DOL won't at some point down the road, cautioned John Thompson, an attorney with Fisher & Phillips in Atlanta.

"The main takeaways as to the duties tests are that DOL remains very interested in making them harder to meet and employers should not assume that there will be another opportunity to comment upon changes in those tests," Thompson told *SHRM Online*.

Department's Questions

The department seeks comments on a number of questions about the duties tests in its discussion of proposed regulatory revisions, asking:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum amount be?
- Should the department look to California law, requiring that more than 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty, as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?
- Does the single-standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the department reconsider its decision to eliminate the long- and short-duties test structure?
- Is the concurrent duties regulation for executive employees—allowing the performance of exempt and nonexempt duties concurrently—working well or does it need to be modified? Alternatively, should there be a limitation on the amount of nonexempt work that an exempt worker can perform? To what extent are exempt lower-level executive employees performing nonexempt work?

'Ambush Rulemaking'?

"I think employers should anticipate that the DOL will make changes to the duty requirements and, in essence, engage in 'ambush rulemaking,' which denies employers a meaningful opportunity to comment on concrete proposals," said Lee Schreter, an attorney with Littler in Atlanta.

Tammy McCutchen, an attorney with Littler in Washington, D.C., and former Wage and Hour Division administrator, asserted at the Society for Human Resource Management 2015 Annual Conference & Exposition on July 1, 2015, "An argument could be made that under the APA [Administrative Procedure Act], DOL is effectively precluded from making changes because they have not given the public notice and the opportunity to comment." But she emphasized that the "DOL has not stated that they will make no changes to the duties tests and has asked for comments on some specific changes."

Employers should still steel themselves for the possibility of a double whammy—an increase in the salary level and more stringent duties tests, according to Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and a former acting administrator of the Wage and Hour Division.

He remarked that "Employers could have a final rule that includes both a markedly higher salary level and more stringent duties tests that limit the amount of nonexempt work that an exempt employee may perform, all of which may result in fewer exempt employees and may necessitate changes to their business models."

But the department instead may opt to first raise the salary level and then tackle the duties tests., according to David Barron, an attorney with Cozen O'Connor in Houston. "DOL appears to be taking these changes in steps to avoid two battles at once," he said. "Employers should expect the salary level increase early next year, followed by some tinkering with the duties test regulations in late 2016."

The rosiest scenario for employers would be if the DOL doesn't change the duties tests, which remains a possibility. "The DOL does not appear convinced that a change in the duties tests is warranted, given the increase in the minimum salary level and the agency's long-standing belief that the salary level is the best single test of exempt status," noted Allan Bloom, an attorney with Proskauer in New York City.

That said, "The DOL remains free to simply insert its preferred changes to the job duties test in the final rule without any further comment," observed Michael Arnold, an attorney with Mintz Levin in New York City. "Many expect that is the course it will take," even though this would "undercut the purpose and effectiveness of the notice-and-comment period."

Possible Tradeoffs

"The department has implied through its requests for comments that if employers do not agree with the increased salary-basis test across the board for all industries and regions, the department may implement a two-tiered system, where employers can choose either the uniform proposed salary basis, or a lower salary basis coupled with a California-style 50 percent primary duties requirement," said Joel O'Malley, an attorney with Dorsey & Whitney in Minneapolis.

"It's unclear to me what the department's tolerance level is on lowering the salary level from the proposal. I'd guess that they would not drop it more than the 30th percentile, but that drop would come with significantly more stringent duties requirements," said Alexander Passantino, an attorney with Seyfarth Shaw in Washington, D.C., and former Wage and Hour Division acting administrator. "It seems to me that the department made a decision to set up a battle between those industries that would be OK with a salary increase in exchange for no duties test changes and those for whom a salary increase would cause massive problems with their staffing models. The comments here will be very interesting."

Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor (https://twitter.com/SHRMlegaleditor).

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Proposed Overtime Rule Puts Focus on Compliance

Limiting white-collar exemptions is likely to increase class-action suits under the Fair Labor Standards Act

By Stephen Miller, CEBS 7/1/2015

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This article was revised on 7/10/2015.

LAS VEGAS—The Department of Labor's (DOL's) proposed rule (/legalissues/federalresources/pages/dol-announces-ot-changes.aspx) to limit the Fair Labor Standards Act's (FLSA's) white-collar exemptions is likely, when finalized, to add to "the explosion of class-action litigation under the wage and hour statute," cautioned Robert A. Boonin, an attorney in law firm Dykema's Detroit and Ann Arbor, Mich., offices.

Boonin spoke at the Society for Human Resource Management's 2015 Annual Conference & Exposition on June 30, the day the proposal was released. The proposed rule subsequenty was published in the *Federal Register* (http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf) on July 6, 2015.

Changes to Salary-Level Test

Under the proposed rule:

- The salary threshold under which employees would be nonexempt—required to receive overtime pay (regular hourly rate x 1.5 for all hours worked beyond 40 hours per week)—would be the 40th percentile of weekly earnings in the U.S. The DOL projects that the 40th percentile weekly wage in the final rule, expected to take effect in 2016, would be $970, or $50,440 per year for a full-time worker. Afterward, the salary-level threshold would be updated annually based either on the percentile or inflation.

- Earning above the $50,440 annual ($970 per week) salalary level does not automatically classify an employee as exempt from mandatory overtime pay, as the duties test (http://washingtonovertimelaw.com/Duties_Test.html) comes into play.

- Highly compensated employees (HCEs), however, may generally be considered exempt without regard to the duties test; the propsed rule raises the HCE salary threshold from $100,000 to $122,148.

Boonin noted that the proposal would alter the FLSA's salary-level test by more than doubling the salary threshold from the current level of $23,660 per year to $50,440. "That is huge," Boonin said, and is likely to affect millions of employees currently considered exempt from overtime.

To avoid paying overtime to employees who would need to be reclassified as nonexempt, employers could increase the employees' salaries to at least $50,440. ("That would be the employees' preference," Boonin noted.) Alternatively, employers could reduce the hours of these employees, or they could pay a lower hourly rate so that, when multiplied by time-and-one-half, weekly compensation remains unchanged.

These "may be steps employers feel compelled to take" but they could leave employees unhappy, Boonin said. However, "At the end of the day, employers are going to figure out how to make this work" so it doesn't hurt their bottom line, he noted.

Changes to Duties Test Possible

While focusing on the salary-level test, the DOL did not specifically address revising the other main prong for determining exempt status, the duties test (http://washingtonovertimelaw.com/Duties_Test.html), Boonin said. However, the DOL solicited comments on a series of questions regarding the duties test, including:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?
- Should the DOL look to California's requirement (/templatestools/toolkits/pages/californiacomplyingwithcaliforniaovertimeandwagepaymentlaw.aspx) that to be classified as exempt the employee should engage in exempt duties at least 50 percent of the time each week? (Additionally, the DOL is asking for comments on the "long test"—discarded in the 2004 rule revision—which limited the amount of nonexempt duties.)

Asking such questions "indicates changes to the duties test could be added in the final rule," Boonin observed.

The DOL is accepting comments on the proposed rule through Sept. 4, 2015.

Defining Exempt Duties: A California Model?

Currently, a worker's primary duties are determined by emphasizing the character of the job as a whole, noted Tammy McCutchen (:% 20http:/edit.shrm.org/hrdisciplines/compensation/articles/pages/prepare-to-reclassify-employees.aspx), former administrator of the DOL's Wage and Hour Division under President George W. Bush and an employment attorney with Littler, when she addressed SHRM's 2015 Employment Law & Legislative Conference in Washington, D.C., last March.

One possibility regarding future changes in the duties test, McCutchen said, would be adoption of California's requirement that 50 percent or more of an employee's time must be spent on overtime-exempt duties each week for the position to be classifiable as exempt. While the DOL might view adoption of a percentage threshold as a way to reduce ambiguity, in practice this could mean "conducting a time study for every employee," McCutchen said.

Eliminating the concurrent duties exemption (http://www.employmentlawhandbook.com/federal-employment-and-labor-laws/flsa/exemptions/executive/concurrent-duties/) would particularly affect employees whose primary duty is to manage a small enterprise or a subdivision of a larger enterprise while also undertaking nonexempt tasks, she pointed out.

Stepped-Up Enforcement

Some 90 percent of employment class actions are wage and hour cases, Boonin pointed out, and "the DOL estimates that 70 percent of employers are violating the FLSA in some way." Under the Obama administration, Secretary of Labor Thomas Perez and Wage and Hour Division Administrator David Weil have been committed to stepped-up enforcement.

The financial consequences of FLSA violations can be steep and include:

- Amount of unpaid overtime for the past two to three years, depending on the statute of limitations.
- Fines, interest and possible criminal sanctions.
- Attorney fees for prevailing employees' attorneys. "We can generally settle for damages, but the fight is almost always about attorneys' fees," Boonin noted, which can amount to millions of dollars.

Common Pitfalls

To avoid enforcement actions and lawsuits, employers can take steps to avoid common FLSA pitfalls. At the top of that list is making sure employees are not misclassified as exempt.

» As part of the FLSA's primary duties test, an exempt employee must exercise "independent judgment and discretion" with respect to "matters of significance," Boonin explained. This includes having "authority to formulate, affect, interpret or implement management policies or operating practices."

While that might sound clear-cut, it's the crux of most FLSA litigation.

For instance, "administrative assistants are frequently misclassified," Boonin said. "Only 2 percent probably have sufficient exercise of independent judgment and discretion to be exempt."

The classifications of low-level accountants (if they're really bookkeepers), stockbrokers and entry-level engineers also can trip up employers. So can the classifications of assistant managers and low-level supervisors. "It can be a question of how much of their jobs are nonexempt duties as opposed to actual management," particularly in small firms and retail operations, Boonin said.

Off-the-clock working violations are another problem for employers, including failure to pay for all time worked by not properly recording all work time. "The workday includes the period between the commencement and completion of an employee's principal activities," Boonin noted, but that can be subjective.

To avoid being sued, he said, employers should have a safe harbor policy in writing that tells employees, "If we make a mistake with overtime time in error, you let us know and we will correct it."

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September 4, 2015

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

Re: RIN 1235-AA11; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

Dear Ms. Ziegler;

The Society for Human Resource Management (SHRM) is pleased to submit these comments in response to the notice of proposed rulemaking published in the *Federal Register* by the Department of Labor's (DOL's) Wage and Hour Division (WHD) on July 6, 2015.[1] The proposal seeks to revise the regulations implementing the Fair Labor Standards Act's (FLSA's) exemption for executive, administrative, professional, outside sales, and certain computer employees.

In addition to SHRM, these comments are endorsed by the SHRM affiliates listed on the signatory page. These affiliates include SHRM state councils and SHRM local chapters as well as the Council for Global Immigration ("CFGI"). CFGI is a nonprofit trade association and strategic affiliate of SHRM, comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals.

While SHRM would support a reasonable increase to the rule's minimum salary threshold, the proposed level is too high. In addition, we do not support the proposal to automatically adjust salary levels under the rule. We support the position taken in the proposal to refrain from making any changes to the existing duties test, although we express serious concern

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 80 Fed. Reg. 38,515.

that the Department is considering further restricting the executive exemption, in particular. Finally, we think the Department's proposal to permit some amount of nondiscretionary bonus payments to count toward the minimum salary level is valid but too restrictive to be widely used.

Statement of Interest

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

I. While Some Increase in the Salary Threshold Is Justified, the Proposed Increase Is Too High and Will Have a Significant Negative Impact on Employers and Employees.

DOL has proposed increasing the minimum salary threshold that must be paid in order for executive, administrative, and professional employees to qualify for exemption from $455 per week to approximately $970 per week. SHRM has a record of supporting reasonable increases in the salary threshold, and we were pleased to support the increase proposed in 2003 and implemented in 2004. While we agree that it is again time to update the threshold, the proposed increase in the salary level is too high and will present significant challenges for many employers and employees. This is particularly true among nonprofit organizations, state and local governments, and organizations based in certain regions of the country with lower costs of living and lower incomes. Our comments below address first the methodology chosen by the Department for setting the salary level and then some of the adverse consequences that will flow from establishing an inappropriately high salary threshold.

Significant Changes to the Methodology for Setting the Minimum Salary Threshold Are Not Warranted

DOL has proposed establishing the new salary threshold at the 40th percentile of earnings for full-time salaried employees. This is a significant change in the method by which DOL has historically set the minimum salary level. As described in more detail below, DOL has historically set the salary threshold "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the

tests."[2] In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, in part due to the elimination of the long duties test. This regulatory history reflects both Democratic and Republican administrations adjusting the salary level between 10 and 20 percent while taking into consideration regional and industry differences.

DOL now argues, however, that a salary level "significantly lower than the 40th percentile of full-time salaried employees would pose an unacceptable risk of inappropriate classification of overtime-protected employees without a change in the standard duties test." The Department claims that the adjustment is needed because the 2004 salary level increase did not appropriately account for changes caused by abandonment of the long duties test for relatively lower-paid employees.

<u>The proposed salary threshold is based on incorrect assumptions about the purpose of the salary test</u>

In the preamble to the proposed rule, DOL summarizes selected regulatory history of the salary threshold and its adjustments over the years in order to justify its proposed approach to establish the new salary threshold. However, that summary does not fairly portray the history and purpose behind the threshold.

DOL's regulations have long been structured to provide a three part test for most employees to determine whether they are exempt under the FLSA's exemption for executive, administrative, and professional employees. This test consists of (1) being paid on a salary basis that does not fluctuate, (2) being paid a salary that meets or exceeds the established regulatory threshold, and (3) meeting one of several enumerated duties tests.

While the role of the salary threshold, or salary level, test has always been important, it has not been the primary focus of the regulations. Indeed, from the earliest days, DOL has acknowledged limits on its ability to set a salary under the regulations. This was made clear in the 1949 Weiss Report, which observed that "The Administrator is not authorized to set wages or salaries for executive, administrative, and professional employees."[3] Instead, these tests are

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[2] Report and Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (*hereinafter* Kantor Report) at 6-7.

[3] Report and Recommendations on Proposed Revisions of Regulations, Part 651, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (*hereinafter* Weiss Report) at 11.

"essentially guides to help in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories."[4]

In its proposal, DOL improperly inflates the role of the salary threshold test and, as a result, makes it the sole arbiter of the determination. Instead of serving as a method to exclude the obviously non-exempt, the proposed salary threshold will instead serve as a bar to millions of employees who otherwise perform the duties of exempt professionals.

In the preamble to the proposal, DOL asserts that the current salary threshold is ineffective because it does not screen out large portions of workers who fail the duties test and therefore "does not serve the intended purpose of simplifying application of the exemption by reducing the number of employees for whom employers must perform a duties analysis."[5]

However, simplification in order to reduce the number of employees subject to the duties tests has never been the purpose of the salary threshold. As stated in the 1949 Weiss Report, the salary threshold levels "have simplified enforcement by providing a ready method of screening out the obviously non-exempt employees, making an analysis of duties in such cases unnecessary. … In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations."[6]

In other words, the Department found the salary threshold to be an appropriate proxy for the duties tests when used to screen out employees who would obviously not meet the duties tests in the first place. As such, there was value in the objectivity and simplicity of the salary threshold test. Until now, the salary threshold has never been used to limit the application of the exemption to large numbers of employees who will meet the requirements of the duties tests. This is evidenced in the 1949 Weiss Report, which states "There was no evidence, moreover, that the salary tests had in the past resulted in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the act as bona fide executive, administrative, or professional employees."[7] Similarly, in 1958, the Kantor Report observed "there have been no indications that the salary tests have resulted in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees."[8]

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[4] *Id.*
[5] 80 Fed. Reg. at 38,529.
[6] Weiss Report at 8.
[7] Weiss Report at 9.
[8] Kantor Report at 3.

However, DOL now estimates that if its proposed salary threshold is adopted, 25 percent of employees who currently meet the duties test will not meet the proposed salary threshold.[9] This new methodology improperly changes the careful balance in the regulations to focus much more on the wages an employee earns than the job performed.

The proposed salary level should take into account differences in salary based on geographical region, industry, and business size

Historically, in setting the salary threshold, DOL has considered the impact on a broad range of businesses operating in the United States. As observed in the Weiss Report:

> To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary. By and large, however, if the salary levels are selected carefully and if they approximate the prevailing minimum salaries for this type of personnel and are about the generally prevailing levels for non-exempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the Divisions as to the exempt status of the particular individuals.[10]

In 1958, the Department considered wage data grouped by geographic region, broad industry groups, number of employees, and size of city. It then set the minimum salary level "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[11]

In its 1958 analysis, the Department first considered the executive exemption. It examined actual salaries paid to executives in the lowest-wage region, the South. It then considered salaries paid in establishments with seven or fewer employees and in those with eight to 19 employees. It also considered salaries paid in towns with a population less than 2,500. Finally, it considered salaries paid to executives in the lowest wage industry, services. DOL conducted a similar exercise for administrative and professional employees.[12]

DOL followed similar methodology in 1963 and 1970. In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent. In the 2004 rulemaking, DOL justified this deviation, in

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[9] 80 Fed. Reg. at 38,529.
[10] Weiss Report at 11-12.
[11] Kantor Report at 6-7.
[12] Kantor Report at 7-8.

part, due to changes in the duties tests. In particular, DOL eliminated most of the long test and instead adopted modified versions of the old short test as a new standard test. DOL's 2004 analysis also included in-depth review of salaries in particular regions and industries.[13]

DOL's current proposal has not included any in-depth review of regional variations in pay and cost of living or variations due to industry or sector. Such analyses must be done to ensure that the salary threshold will not have a significant adverse impact on a wide variety of employers and employees.

According to a report published last year in the *Nonprofit Times*, the average salary for the Chief Executive Officer of small nonprofits was $59,510 in 2013.[14] Importantly, this salary level is an average. Many small nonprofit CEOs in the sample likely earned salaries below the proposed salary threshold. These numbers are consistent with other reported data. For example, the American Society of Association Executives has reported that its 2014 survey of compensation practices of nonprofit organizations found that the low end of the range of reported annual compensation of CEOs at nonprofit organizations was $37,500.[15]

The Chief Executive Officer of a small nonprofit would, in almost all circumstances, meet the duties test as an exempt executive employee. Yet DOL's proposed rule will lead to significant additional restrictions imposed on those CEOs earning less than the proposed salary threshold. In addition, many other senior staff at small nonprofits may also be exempt under the duties test, but may be reclassified based on the significant increase in the salary threshold. According to the *Nonprofit Times*, average salaries for additional small nonprofit executives in 2013 were:

Chief Financial Officer	$40,000
Chief Operating Officer	$41,813
Chief Development Officer	$56,000
Communications/PR Director	$59,600
Chief Program Officer	$41,970[16]

[13] In preparing to issue its proposed rule in 2003, the Department retained an outside consultant, CONSAD Research Corporation, to prepare an in-depth economic analysis. No such analysis has been made publicly available as part of the current rulemaking.

[14] Special Report: NPT Salary & Benefits Study (Feb. 1, 2014) at 3, *available at* http://www.thenonprofittimes.com/wp-content/uploads/2014/01/2-1-14_SpecRep_SalaryBenefits.pdf. Small nonprofits are those with revenues under $500,000 per year.

[15] American Society of Association Executives, Comments on the Department of Labor's Notice of Proposed Rulemaking to Revise FLSA Regulations, at 2, *available at* http://asae.cms-plus.com/files/ASAE%20Overtime%20Rule%20Comments%208.4.2015.pdf.

[16] Special Report: NPT Salary & Benefits Study (Feb. 1, 2014) at 3.

In addition to considering how the proposed salary threshold would apply to low wage sectors, and particularly nonprofits, DOL should have undertaken greater analysis of how the rule would apply in particular geographical regions and in small businesses. In preparing our response to this proposal, SHRM received feedback from our members with numerous examples of employers in retail, service and nonprofit organizations that will be adversely affected by the proposed regulation. One member, for example, expressed concerns about how DOL's proposal would reduce and diminish the services provided to at-risk youth by her organization:

> At our nonprofit organization, we prioritize a continuity of care model that ensures that the at-risk youth population receives services and care from the same therapists and supervisors. Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of the primary professional. Under this overtime proposal, continuity of care would be undermined by limiting the ability of therapists to effectively respond to clients' clinical needs, as well as their school and work schedules.
>
> Furthermore, currently many exempt employees are available during non-traditional hours and overnight on a regular basis to provide crisis services or supervisory response to crisis as needed. In our residential setting, managers commonly work longer hours and shift their schedules to ensure their presence during anticipated difficult admissions and discharges or, again, if client behaviors are elevated and unsafe, in order to provide direction and support to staff members.
>
> Limiting managers' availability to their units risks jeopardizing client care and staff safety and violates state regulation. If the overtime regulations were to be implemented, my organization would likely have to decrease services because, as noted earlier, we would not be able to afford the additional overtime pay. In addition, we would be forced to reduce our client base and unfortunately underserve our county and family stakeholders.

The proposal's impact on different geographic regions raises similar concerns. Simple on-line tools demonstrate that, when taking cost of living into account, a $55,000 annual salary in Washington, DC, is comparable to a salary of just over $35,000 in Martinsburg, WV; a salary of $75,000 in San Francisco is comparable to a salary of $47,500 in Fresno; and a salary of $60,000 in Trenton, NJ, is comparable to a salary of $46,800 in Rochester, NY.[17] Yet, DOL's

[17] Examples obtained through CNN Money's Cost of Living Calculator, *available at* http://money.cnn.com/calculator/pf/cost-of-living/ (citing the Council for Community and Economic Research for source data).

proposal contains no meaningful analysis to determine the impact on jobs in regions with low cost of living. The Department's proposed salary threshold is one-size-fits all, there are no regional variations. That would not necessarily be a problem if the Department appropriately considered regional variations in selecting the salary threshold, but it did not.

While DOL has provided some analysis with respect to the rule's impact on small businesses as part of its Initial Regulatory Flexibility Analysis, a more thorough review is warranted. As noted in the Weiss Report:

> The importance of giving careful consideration to the effect of a higher salary test on small establishments should be apparent when it is realized that about 500,000 of the 638,000 establishments covered by the act have less than 20 employees. The salary test for bona fide executives must not be so high as to exclude large numbers of executives of small establishments from the exemption. In these establishments, as in the large ones, the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption.[18]

A review of Census data indicates that there were more than 5.7 million firms operating more than 7.4 million establishments in 2012.[19] More than 5.1 million of these firms employ fewer than 20 employees each. All together, these very small firms employed more than 20.4 million people. This same dataset demonstrates that a total of more than 5.7 million firms had fewer than 500 employees and employed 56 million employees.

The Department's analysis, however, did little meaningful analysis of the impact of the rule on this population aside from estimate the number of workers who would likely be affected by the rule change. The Department did not in any way examine the particular impact that reclassification could have on small entities, instead applying the same analysis it had undertaken for larger firms.[20]

DOL's methodology does not account for the adverse impact of the proposed change in the salary threshold that will be felt most acutely in nonprofits and other low-wage sectors, in lower cost-of-living regions, and small businesses. DOL should examine the particular impacts that large scale reclassification is likely to have prior to establishing its proposed salary threshold.

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[18] Weiss Report at 15.
[19] Statistics of U.S. Businesses (SUBS), *available at* http://www.census.gov/econ/susb/.
[20] 80 Fed. Reg. at 38,605.

Maintaining current methodology for setting the salary level does not pose a significant risk of inappropriate classification

In the current proposal, DOL now argues that a salary level "significantly lower than the 40th percentile of full-time salaried workers would pose an unacceptable risk of inappropriate classification of overtime-protected employees without a change in the standard duties test." The Department claims that the adjustment is needed because the 2004 salary level increase did not appropriately account for changes caused by abandonment of the long duties test for relatively lower-paid employees.

However, the Department's analysis fails because DOL has not provided any significant analysis demonstrating whether the new salary threshold will operate as an effective proxy for those employees who would be unlikely to satisfy the duties tests. In fact its analysis shows the opposite. According to the proposal, some 4.6 million salaried white collar employees pass the duties test but earn less than the Department's proposed salary threshold.[21]

In addition, as detailed above, it is not the sole job of the salary threshold to limit all risk of inappropriate classification. This is the primary role of the duties test. While the duties test was changed in 2004, there is no compelling evidence that these changes resulted in mass misclassification of employees. Indeed, all the evidence of the impact of the 2004 revisions shows a dramatic increase in the number of employees classified as non-exempt rather than exempt. In response to the proposed changes to the overtime regulations, SHRM Research conducted the 2015 SHRM Overtime Regulations Survey in June 2015. Of members who reported reclassifying employees after the 2004 overtime regulations revision, three times more organizations reclassified employees from exempt to non-exempt than the other way around. In addition, 82 percent of members made no change to employee classification after the 2004 update.

While there will likely always be some employers that struggle when applying the duties tests in particular cases, this is not sufficient reason to significantly restrict access to the exemption through a significantly increased salary threshold.

In short, in addition to mischaracterizing the purpose of the salary threshold test, DOL has not made a sufficient case to so significantly alter the methodology for setting the salary threshold under the regulations. We respectfully disagree with the Department's revised methodology and urge it to revisit these matters using the previous methodology so that a more appropriate salary adjustment may be considered.

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[21] 80 Fed. Reg. at 38,559.

Dramatic Salary Threshold Increase Will Negatively Impact Many Employers and Employees

The proposal seeks to effectively double the minimum salary threshold. According to the Department's own economic analysis, some 4.6 million employees would be directly affected by the salary level increase because they currently earn a salary higher than the current threshold of $455 per week but less than the proposed salary threshold. However, only 988,000 of these employees work more than 40 hours in a week. Should the proposed regulation be finalized in its current form, employers will need to decide whether to increase salaries so that the employees remain exempt or reclassify employees as non-exempt. In addition, employers may find it necessary to restructure jobs and business models, for example by decreasing the number of lower-level management positions.

While only 988,000 employees are likely to see any benefits from the regulation in terms of additional salary, overtime wages, or additional time off, far more employees are likely to experience negative consequences of reclassification, including reduced workplace flexibility, loss of professional status, and reduced access to opportunity to gain needed experience. This is because 3.7 million employees who earn less than the proposed minimum salary threshold do not regularly work more than 40 hours in a week. They will not reap any reward from the Department's proposal in the form of additional compensation or time off. Indeed, they are the employees who are most likely to be reclassified to a non-exempt status.

Reclassification of employees to non-exempt status can have several significant adverse consequences. In the 2015 SHRM Overtime Regulations Survey, we asked members how likely certain scenarios would be if DOL's revised regulation led to an increase in eligibility for overtime pay. In that survey, the most significant result identified was the implementation of restrictive overtime policies leading to potential reduction in employees working overtime, with 70 percent of respondents indicating that would be a likely outcome. Decreased workplace flexibility and autonomy was the next most significant change, with 67 percent responding that such a change would be likely.

In addition to loss of workplace flexibility and more restrictive overtime policies, additional adverse consequences that employees will experience due to reclassification are loss of opportunity, more restrictions on job sharing or working part-time exempt jobs.

<u>Restrictions on Hours Scheduled</u>

Reclassification will pose significant challenges for both employers and employees. If employers are required to reclassify individuals as non-exempt, they will be more likely to adjust schedules in such a way as to minimize the potential for unplanned overtime costs. This may be

especially true in sectors of the economy less able to pass on the costs associated with new wage mandates, such as the nonprofit sector that is more dependent upon charitable contributions, member dues, or state and federal grants.

As we have discussed the Department's proposal with SHRM members around the country, it is clear that many employers reclassifying employees will take further steps to ensure that such employees do not work more than 40 hours in a week, including restructuring jobs to rely on more part-time employees. For example, as described by one SHRM member:

> We are a not for profit. We are not in a position to pay overtime at the mid-manager staff level. We would be forced to cut all employee hours to part time to ensure no overtime. Alternative 1: 4 days/week at 9 hours... they would be 36-hour employees and lose 4 hours of pay. Alternative 2: they all go to 3 days/week, all employees work 24 hours a week.

Loss of Workplace Flexibility

According to the 2014 National Study of Employers, a report released by the Families and Work Institute (FWI) and SHRM, human resource professionals believe the most effective way to attract and retain the best people is to provide workplace flexibility.[22] Moreover, a large majority of employees – 87 percent – report that the flexibility offered would be "extremely" or "very" important in deciding whether to take a new job.[23] The report indicates that from 2008 to 2014 workplace flexibility for full-time employees increased. For example, more employers are offering some employees the option to telecommute occasionally, with 67 percent providing this option in 2014 compared to 50 percent in 2008.

Given the importance of this issue to our members, SHRM has a strong track record of advocating for public policy proposals that encourage or incentivize employers to create effective and flexible workplaces. To that end, the Society formed a multiyear partnership with the FWI to educate HR professionals about the business benefits of workplace flexibility. The primary goal of the partnership is to transform the way employers view and adopt workplace flexibility by combining the influence and reach of the world's largest association devoted to human resource management with the research and expertise of a widely respected organization specializing in workplace effectiveness.

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[22] Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.
[23] National Study of the Changing Workforce (2008). Families and Work Institute.

DOL's current proposal runs counter to SHRM's longstanding support of encouraging greater workplace flexibility because many employees who are reclassified will lose access to workplace flexibility options.

Due to concerns about off-the-clock work and recordkeeping responsibilities, many employers do not permit non-exempt employees to check email or otherwise work when away from the office or outside of their normal, fixed work schedule. The ability to perform work outside of the office allows employers to offer many more flexible work arrangements for employees, including the ability to attend to a wide variety of family or personal needs, knowing that the employee can be reached if needed or that work can be completed outside of the fixed work schedule.

Our members report that reclassifying employees as non-exempt could force employees to utilize vacation time to cover appointments instead of having the flexibility as an exempt professional to leave a few hours early. Furthermore, non-exempt employees are often restricted from accessing certain online training platforms from their homes because of challenges associated with tracking those hours and the inability to pay overtime. Phones, watches and other "smart" devices commonly enjoyed by today's workforce will present challenges to the newly classified non-exempt employees.

The restriction in flexibility is one reason why many employees view reclassification as akin to a demotion, causing a decline in morale. Being classified as exempt promotes a sense of responsibility and ownership in the company as well as the ability to control when and where work gets done. Many employees have worked to attain that exempt classification through advanced training, continuing education and years of experience. If forced to reclassify, employees will believe their sense of status in an organization as a true professional has been removed. Our members report supervisors who are emotionally attached to their professional status will certainly view reclassification as a demotion to their career. As described in greater detail by one SHRM member:

> The proposed changes to FLSA will result in our location managers, most of our [human resources (HR)] team as well as many other professionals losing their exempt status. Of course the HR team is well aware of the changes and they are angry and frustrated with the changes. Currently they have the flexibility to extend their lunch periods, come in later or leave early if their duties are complete. Moving these roles to non-exempt will remove that flexibility. In addition, they feel like the exempt status they have worked for and achieved is being taken away thus taking away an achievement they have worked hard to achieve either through advanced education or through a combination of education and years of experience. The

exempt classification carries a professional status which provides the individuals the opportunity to plan their work loads and schedule their time accordingly. If this regulation passes they will be denied that opportunity to schedule their work, take extra time at lunch, leave early to attend to personal responsibilities because they will now have to get in their hours. They will have to be at work even if they have completed their responsibilities or they won't receive their same compensation.

Job Sharing and Part-Time Exempt Work

The ability to job share or work in part-time exempt jobs will also be significantly curtailed if the minimum salary threshold is raised substantially. Currently, two employees could share an exempt job, with each working the equivalent of half-time. But if each earns less than $970 per week, then neither will be eligible for exempt status. This could cause employers to offer fewer part-time exempt options and instead only hire a single full-time employee for such positions, further limiting workplace flexibility.

Loss of Opportunity for Professional Development and Career Advancement

The Department acknowledges the loss of employee autonomy by stating in the preamble that "not all workers would prefer to work fewer hours, and thus some of these workers might" view reclassification negatively. DOL is correct that many employees want the opportunity provided by being able to work additional hours. An employee whose hours are limited does not have the discretion to take on extra work that may lead to greater experience or provide additional opportunity for career development. For example, a lower-level manager who is non-exempt will have less opportunity to participate in important decision-making that happens after hours or take advantage of work conferences and networking.

In addition, many employers have self-paced training programs that exempt employees are free to take at their pleasure. Exempt employees also typically enjoy a richer benefits package that non-exempt employees. For example, exempt employees are often provided a higher basic life insurance policy, more flexible and generous leave packages, different bonus options, and may have access to more options for retirement savings.

Non-exempt employees typically have more limited benefit programs and may have more limited professional development and career advancement opportunities due to the strict recordkeeping requirements applicable to non-exempt employees and the desire to limit overtime expenses.

While DOL's proposal acknowledges that the proposed rule may have some adverse effect on employees, the consequences of reclassification are not considered in any depth. Of course, the Department could mitigate the impact of these negative consequences by more appropriately setting the salary threshold so that it serves as a reasonable proxy for those employees unlikely to pass the duties test.

II. The Minimum Salary Threshold Should Not Be Automatically Increased.

In addition to significantly increasing the proposed salary level, the proposed rule also seeks to establish a mechanism for automatically updating the standard salary threshold. This proposed automatic annual update to the salary threshold is a significant change in the method by which DOL has historically adjusted the salary level. In fact, automatic updates have been considered in the past but consistently rejected as a method of updating the salary level. The proposed regulatory text simply states that the salary level will be updated each year through a notice in the *Federal Register* published at least 60 days in advance of taking effect. The Department states that it has not included proposed regulatory text because it has not decided which approach to take in making annual updates.

In the proposal's preamble, DOL states that it is considering two alternative methodologies for updating the salary threshold, the "fixed percentile" approach and the "CPI-U" approach. The fixed percentile approach would periodically evaluate what specific salary level is equivalent to the 40th percentile of full-time salaried workers while the CPI-U approach would adjust the salary level based on changes in the consumer price index for all urban consumers. In the preamble, DOL states that it believes either methodology would produce roughly similar salary thresholds in the future.

We appreciate the Department's desire to create a mechanism to help ensure that the salary level remains a meaningful test to distinguish between bona fide exempt and non-exempt employees. We also agree that the Department could and should review the salary level on a more systematic basis while providing the regulated community with the opportunity for notice and comment, but we cannot support the mechanism suggested to automatically adjust the salary threshold in the current proposed regulation for the reasons discussed below.

Automatic Salary Adjustments Pose Serious Compliance Challenges

First, our members have expressed significant concern that automatic increases in the salary threshold could pose real practical challenges to effective compensation practices. Regularly mandated inflationary increases would significantly impair the ability of employers to manage merit increases for employees at or near the salary threshold. For example, consider an

employer with a pool of ten exempt employees performing similar jobs earning $975 per week ($50,700 per year) in 2016, above the proposed salary level of $970. The employer budgets a three percent increase for annual salary increases, which is a total pool of about $15,210. The employer may wish to provide the same three percent increase to all employees, or it may decide to base salary adjustments on merit, awarding higher raises to good or excellent performers and lower increases or no increase to average or poor performers.

However, consider the impact of a mandated two percent increase in the salary threshold. In this example, an employer would be required to adjust all ten salaries up to $989 per week in order to maintain their exempt status, reducing the total amount available for merit increases to $7,930. While the employer could still distribute the remaining funds in the manner it sees fit, by utilizing almost half of the budgeted funds with mandated increases, it will be harder to award larger increases to excellent performers.

This is one reason why the Department's proposal is likely to cause significant salary compression issues, especially as implemented over time. After several years of mandated salary level increases, the gap in pay between more senior and less senior, more experienced and less experienced, or more productive and less productive employees will become smaller over time, creating significant morale problems and other management challenges.

In addition, we are concerned that automatic adjustments to the salary threshold will not account for the ways in which the workforce changes over time. National average salaries may continue to rise, but this does not mean that all salaries in all industries and in all regions will also rise at the same rate and at the same pace. Ensuring that adjustments to the minimum salary threshold are made through notice and comment rulemaking helps ensure that geographical and sectoral disparities are accounted for. The Department largely dismisses this concern in the preamble to its proposal, stating that it can always engage in notice and comment rulemaking at a later date should such changes occur. However, we question whether this is realistic. The burden should be on the Department to carefully examine the impact of any new salary threshold, including regional and sectoral disparities, and allow for public comment before it is implemented.

The Department's Methodology for Automatic Increases Will Rapidly Increase the Salary Level in Future Years

The Department has indicated that one of the methods it is considering using to calculate automatic adjustments to the salary threshold is to adjust the salary regularly so that it stays at the 40th percentile of earnings for full-time salaried workers. However, as time goes on and as employees who earn less than the salary threshold are reclassified, there will be fewer relatively

lower-paid employees within the dataset used to determine the 40th percentile of earnings for full-time salaried employees. In other words, in each successive year, the salary adjustment will be based on a smaller and smaller pool of employees earning higher and higher wages.

Basing automatic updates on such data is not appropriate as it will create a salary threshold that rises much more rapidly than any reasonable measure of wages or inflation and will only serve to reduce access to the exemption.

The Timing of Any Increase Must Account for Budget Constraints

The Department has suggested that it will make salary level increases available 60 days in advance. However, many employers budget for labor costs well in advance of 60 days. In fact, many, such as municipal employers, may have relatively inflexible budgets set considerably in advance of their fiscal year. They will have few options to respond to increases made to the salary threshold during a fiscal year and more constraints on doing so. Should the final regulations include automatic adjustments, DOL should provide at least one year notice to the regulated community to ensure that appropriate planning can be undertaken to budget for such increases.

III. The Department Should Not Make Substantive Changes to the Duties Tests Without First Making a Specific Proposal Available for Notice and Comment.

The Department has not proposed any changes to the duties tests for executive, administrative, professional, outside sales, or computer employees although the preamble to the proposal includes a series of questions primarily focused on whether changes should be made to the executive duties test. We address the substantive issues raised in the proposal below. However, we must first emphasize that we do not believe it would be appropriate or lawful for the Department to include substantive changes to the duties test in a final rule without first making specific proposals available for notice and comment.

The Administrative Procedure Act (APA) requires notice and comment rulemaking for informal rules, such as the current proposal issued by the Department. The purpose of the notice and comment requirement is, in part, to ensure that the regulated community has sufficient notice of proposed changes to which they will be bound so that they have an opportunity to respond to the proposal and offer the regulator opinions, facts, and other information that will be helpful in crafting a final rule.

In the preamble to the proposal, the Department invites comments on a handful of questions, including a very general question asking whether any changes should be made to the

duties tests. However, asking general questions in a notice of proposed rulemaking does not provide the regulated community with sufficient information to adequately assess the impact of any eventual proposal. Indeed, federal case law makes it clear that in notice and comment rulemaking the proposed rule must "fairly apprise interested parties of the scope and substance of a substantially revised final rule."[24]

The Department's regulations are complex and include several provisions that work together in an integrated scheme for determining the scope of the FLSA's exemptions. Calling for comments on provisions that may need to be updated is appropriate, even commendable. However, it is not sufficient for the regulated community to assess the potential impact of any change. Instead, should the Department decide to move forward with any proposed changes to the duties tests, it should issue another proposed rule describing proposed changes or alternatives in detail before proceeding to a final regulation.

Further, publishing a proposal with any specific changes to the duties tests will help ensure that the Department's proposal is in compliance with the Paperwork Reduction Act, Regulatory Flexibility Act, Executive Orders 12866 and 13563, and other regulatory process requirements. Compliance with these laws and Executive Orders will help ensure that the public has a better understanding of the economic impact of the proposed change and alternatives considered.

IV. The Executive Duties Test Should Not Be Further Limited.

The Department asks several questions related to the duties test for executive employees. The questions suggest that the Department is concerned that the current regulations allow employees who are properly classified as non-exempt to be too easily swept up into the executive exemption. The Department's proposed solution to this perceived problem is to very significantly increase the salary threshold. The proposal suggests, however, that the Department may be considering further restrictions on the use of the executive exemption as an alternative or in addition to the proposed increase in the minimum salary level.

All of the questions DOL asks with respect to the executive exemption suffer from the same flawed presupposition: that the performance of non-exempt job tasks and performance of exempt duties are mutually exclusive. Just because a manager spends 60 percent of his or her time on tasks commonly viewed as non-exempt does not mean that only 40 percent of time is spent performing exempt duties. Indeed, it is quite possible that the employee spends 100 percent of his or her time performing exempt management duties even though he or she is spending a large portion of time performing job tasks that are viewed as non-exempt.

[24] Chocolate Manufacturers Association of the United States v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

The regulation's current structure is robust enough to ensure that only those employees with a primary duty of management may be exempt and includes several examples demonstrating how employees may or may not be exempt depending on the facts of each case. While the concurrent duties provision was adopted as part of the 2004 revisions, it was not a new concept at the time. In fact, prior to the adoption of the 2004 regulations, many court decisions had embraced the view that an individual's primary duty may be management even though he or she spent considerable time performing non-exempt tasks.[25]

Furthermore, the Department should recognize that many employers today operate within flatter organizational structures, with fewer staff in support roles and many employees performing a combination of exempt and non-exempt work. In fact, the 2015 SHRM Overtime Regulations Survey indicates that two-thirds (66%) of organizations employ exempt employees who must regularly perform non-exempt tasks. Of those organizations, four out of five reported that up to 40% of their total exempt workforce must perform non-exempt work while *simultaneously* conducting exempt work.

While this phenomenon occurs in many modern workplaces, it is even more common for nonprofits and small businesses to employ a workforce that must pitch in and work at the front desk, answer client phone calls and check in on clients. If overtime regulations are modified to eliminate the ability of employees to perform concurrent duties and maintain their exempt status, many organizations would need to be restricted in ways that diminish the services being provided.

SHRM members from California report substantial burdens in compliance with that state's rule requiring that a majority of time be spent exclusively on exempt duties to qualify for exemption. Employers in California have struggled mightily to construct systems that document that managers spend a majority of their time on exempt duties, but still face significant compliance and litigation challenges.

California's rule has not helped reduce litigation or made the rules simpler to apply. In contrast, SHRM members have reported significantly increased litigation focusing on the percentage of time spent on particular tasks and how particular job duties are characterized. In short, California's rule provides a strong cautionary tale warning against a rigid examination of percent of time spent on job tasks and in favor of an examination as to what the employee's most important duties are. Additional costs would also be imposed as employers develop systems that

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[25] See, e.g., Jones v. Virginia Oil Co., Inc., 69 Fed. Appx. 663 (4th Cir. 2003); Murray v. Stuckey's Inc., 939 F.2d 614 (8th Cir. 1991); Donovan v. Burger King Corp., 672 F.2d 614 (8th Cir. 1991); Horne v. Crown Central Petroleum, Inc. 775 F. Supp. 189 (D.S.C. 1991).

attempt to track the amount of time that otherwise exempt employees spend performing specific job tasks.

For these reasons, while the percentage of time spent performing particular tasks may be one of many indicators as to an individual's true primary duty, it is not a good proxy for weeding out the obviously non-exempt.

Another consideration relevant to the Department's questions as to whether the regulations should examine the percentage of time working on specific tasks is the Department's prior use of the sole charge exception. While the Department characterizes the old long test, with its limitation on the amount of non-exempt work, as a requirement that applied to all employees whose salaries were not sufficient to qualify for the short test, this is somewhat misleading because it omits the fact that since at least 1940 the percentage limitation contained an important exception, under the executive exemption, for individuals in sole charge of an independent establishment.[26] In other words, the regulations recognized that there were circumstances where relatively lower-paid individuals should still be considered exempt even though they may spend a significant portion of time performing non-exempt tasks.

This should not be surprising. As recognized as early as the 1940 Stein Report, in examining those employees who may be exempt from the act, even though less-well paid than others, it was recognized that exempt positions offer "compensating advantages that may be found in the nature of the employment to justify the denial of the benefits of the [FLSA]."[27] Further, it was recognized that it was "the entire definition," not merely the salary proviso, which provided protection from abuse.[28]

As described further in the Stein Report discussing the executive exemption:

> More importantly, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always, accompanied by more tangible advantages, such as paid vacation and sick leave. Still more important is the fact that executives have greater security of tenure than almost any other group of workers. … Thus even the lower paid executives enjoy certain prerogatives that must be given weight.[29]

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[26] See, for example, 29 C.F.R. § 541.1(f), as published in the *Federal Register* on October 15, 1940. 5 Fed Reg. 4,077.
[27] Executive, Administrative, Professional … Outside Salesman Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) (*hereinafter* Stein Report) at 21.
[28] *Id.*
[29] *Id.* at 21-22.

To be clear, SHRM does not support a return to the long test or any duties test requiring an exacting measure of the amount of time spent on specific job duties. However, if the Department is to reinstate a provision that closely examines the percentage of time spent performing work tasks, it should also examine the policy reasons that justified the sole charge exception.

Finally, because the Department has not proposed any specific changes to the duties tests, none of its economic analyses have accounted for such changes. If DOL were to suddenly impose a percentage limitation on the amount of time spent performing specific tasks, it could dramatically increase the size of the workforce that must be reclassified as well as increase costs of recordkeeping. This impact could vary considerably depending on what percentage of non-exempt work DOL felt was too much to qualify for exemption.

V. The Salary Level Increase for Highly Compensated Employees Is Acceptable But Should Not Be Annually Increased.

The proposal would increase the total annual compensation amount for using the highly compensated employee test from $100,000 per year to $122,148 and would adjust the level annually. As with its proposed annual increase in the minimum salary threshold, the Department would publish notices of total compensation level adjustments 60 days in advance. The Department is also proposing to annually adjust the total compensation amount.

The highly compensated employee test serves two useful purposes. First, it allows employers to focus compliance resources on properly ensuring relatively lower-paid employees are classified correctly by creating a simpler analysis to determine exempt status for many highly compensated employees. Second, it can help reduce frivolous or non-meritorious litigation by highly compensated employees, again freeing resources to address issues of relatively lower-paid employees. We support the highly compensated employee test and the Department's decision to retain the test.

Unlike the proposed increase to the minimum salary level test, the proposed increase to the total compensation amount for highly compensated employees has been calculated using a relatively similar methodology to that used when the level was first established in 2004. The proposed increase in the total compensation amount seems appropriate in this context and we, therefore, agree with the proposal.

However, the Department has also proposed making annual adjustments to the total compensation amount. As with the proposed annual adjustments of the minimum salary threshold, the proposal states that the Department is considering two options. The first would base the total compensation amount on the annualized value of the 90th percentile of weekly wages for full-time salaried employees. The second would adjust the level based on changes in the CPI-U.

SHRM does not support automatically updating the total compensation amount for the same reasons we do not support automatically updating the minimum salary threshold. In particular, because utilizing the rulemaking process for salary level increases will help ensure that the impact of any change is more thoroughly considered before implementation.

VI. Including Some Amount of Nondiscretionary Bonus Payments Toward the Salary Threshold Is Appropriate; However the Proposal Is Too Limiting To Be of Much Utility.

In the preamble to the proposal, the Department states that it is considering permitting minimum salary threshold determinations to be made by including a limited portion of certain nondiscretionary bonus payments. As described in the preamble, the Department believes that the amount of nondiscretionary bonus payments that could be included should be strictly limited to no more than 10 percent of the minimum salary level. In addition, the Department is considering strictly limiting the time period in which the nondiscretionary bonus must be paid to monthly or more frequently.

We appreciate and commend the Department's willingness to consider inclusion of nondiscretionary bonuses toward the minimum salary level. However, we are concerned that the proposal under consideration is too limited to be of much utility as few nondiscretionary bonus plans are likely to meet the strict tests under consideration by the Department. Increasing the portion of the minimum salary level that could be paid through nondiscretionary bonuses and lengthening the period of time over which such payments must be made would make this option more attractive for a greater variety of employers.

VII. Additional Examples of Exempt and Non-exempt Work Should Be Subject to Notice and Comment.

In the preamble to the proposal, the Department notes that the regulations currently contain several sections describing particular jobs and assessing whether those jobs are more likely to be exempt or non-exempt, such as those for exempt administrative employees (Section 541.203), learned professionals (Section 541.301(e)), and executive and administrative computer

employees (Section 541.402). The Department then calls for comments on specific additional examples that should be added.

While we believe that examples are an important component of the current regulations and can help stakeholders more clearly see the reasoning behind DOL's regulations, we do not believe that it is appropriate to publish examples in the final rule without first making them available for public comment. Should DOL decide to add additional examples to the rules, or to modify existing examples, it should provide notice to the regulated community of the specific changes contemplated and an opportunity for comment.

VIII. Effective Date of Salary Increases.

While DOL's proposal includes a discussion of when notice of automatic increases of the salary level may be provided, it does not provide any indication of the Department's thinking as to when the initial salary threshold may go into effect. If the increase in the salary threshold is significant, employers will need more time to make important business decisions related to whether to reclassify employees, change rates of compensation, or restructure their workforce such as by hiring more part-time employees or downsizing. In addition, HR departments will need to change their human resource information systems (HRISs) and payroll systems, and make adjustments to employee benefit packages. Equally important, given the potential impact on the workplace, employers need time to develop a communication strategy to educate employees in order to minimize the effects on morale resulting from reclassifying employees to non-exempt positions.

In 2004, the Department established an effective date for its final revisions that was 120 days after publication of its final rule. Based on our experience at that time, compliance within that window was extremely challenging for employers. Optimally, the Department would provide employers with at least one year to prepare for implementation of the new regulation. At a minimum, we urge the Department to ensure that any initial salary threshold increase, or other changes made to its revisions, take effect at least 120 days after publication.

Furthermore, should the Department finalize a rule with a salary level increase as proposed, or similar, it should consider implementing the increase in phases. A phased-in approach will provide some flexibility to employers. Implementing the increase over time will provide more of an opportunity for employers to gather information about hours worked by currently non-exempt employees and assess how to address potential reclassification of those jobs. Further, phased-in implementation will give employers more time to plan and budget for any increased expenses, be it in the form of labor costs, recordkeeping, and the like.

Conclusion

The Society for Human Resource Management believes that DOL's proposed increase to the salary threshold is too high. While we would support a more reasonable increase, we do not support the methodology used by the Department and have serious concerns about the adverse impact such a change would have upon both employers and employees. In addition, we do not support automatic updates of the salary level test or the test for highly compensated employees as such changes should only be done through notice and comment rulemaking after an analysis of the proposed impact on different sectors of the economy and different geographic regions. Finally, we support the decision taken in the proposal to not alter any of the duties tests at this time.

Thank you for your consideration of these comments.

Respectfully Submitted,

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NORTH CENTRAL ARKANSAS SHRM
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WHDI WAGE & HOUR DEFENSE INSTITUTE

NATIONAL NETWORK. LOCAL KNOWLEDGE.

Mary Ziegler
Director of the Division of Regulations, Legislation,
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U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Submitted Electronically Through Federal eRulemaking Portal

Re: RIN 1235-AA11: USDOL Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Ms. Ziegler:

The Wage & Hour Defense Institute ("WHDI") of the Litigation Counsel of America is comprised of highly talented and experienced wage and hour defense attorneys from across the United States. WHDI serves as a nationwide network and meeting ground for top-tier wage and hour practitioners to engage in professional development. WHDI holds periodic conferences, meetings and colloquia for, among other things, influencing wage and hour law and policy. A list of our members is attached.

Summary of WHDI View

Exemptions are "[a]mong the most heavily litigated provisions of the Fair Labor Standards Act (FLSA)." ABA/BNA THE FAIR LABOR STANDARDS ACT, at page 4-4 (2nd ed. 2010). Since President Obama's March 13, 2014 memo to the U.S. Secretary of Labor directing USDOL to "propose revisions to modernize and streamline" the FLSA overtime regulations, WHDI members have carefully followed the process, collectively reviewed hundreds of pre-proposal comments in legal publications, and thoroughly reviewed the July 6, 2015 Proposed Rules.

In our view, the Proposed Rules fail to comply with the Presidential directive "to modernize and streamline the existing overtime regulations." On the contrary, the Proposed Rules deliberately add another layer of complexity to an already overly complex, nuanced set of overtime regulations that employers, employees, payroll administrators, union representatives, accountants, attorneys, arbitrators, courts, and administrative agencies find vague, confusing, and lacking in plain meaning. Interpretation is frequently uncertain and highly debatable. The administration of exempt classifications causes billions of dollars of expense annually. Wage

and hour class actions and collective actions are the most frequent type of class actions in federal court and most state court systems. Individual wage and hour claims are among the most common civil suits in the country. The Proposed Rules fail to acknowledge, let alone address, this fundamental failure of the current regulatory scheme. Instead, the Proposed Rules maintain and exacerbate the status quo, create false expectations among employees who may be reclassified, and misrepresent the need for a salary level requirement.

The Salary Threshold Is Not a "Minimum Wage" for Exempt Employees

As a matter of common sense and economic reality, to attract and retain exempt employees, employers must appropriately compensate them based on their skill and the nature of services expected. The so-called "white-collar exemptions" (executive, administrative, and professional) are exemptions from both minimum wage and overtime pay. The FLSA makes no mention of a salary level requirement for these white-collar exemptions and, in fact, exempts executive, administrative and professional employees from minimum wage to begin with. 29 U.S.C. §213(a). So why is the Department proposing a rule involving the salary level of exempt workers?

The Department's explanation, as set forth in the NPRM, essentially boils down to: "because we've always done so." The NPRM lists two historical reasons. First, the Department claims a salary level is "the best single test" of exempt status. But, if that were the case, why not define exempt status based on a salary level and leave it at that? Many, perhaps most, employers, employees, and other interested parties would welcome an exemption test based solely on a salary level. Employees below that salary level would be non-exempt. It would be very easy and efficient to administer. There already is something akin to that in the existing highly compensated employee exemption. Yet, the Proposed Rules make no mention of this approach, despite widespread support, nor any explanation as to why it would not be a feasible way to "modernize and simplify the overtime regulations."

Second, the Department claims that a minimum salary level provides "a valuable and easily applied index to the 'bona fide' character of the employment for which the exemption is claimed." Really? If an employee's primary duty is the performance of exempt work, how does a salary level make it simpler or easier to ascertain "the 'bona fide' character of the employment for which the exemption is claimed"? It does not. As we know from the thousands of cases litigated annually on the issue of misclassification, the salary level, if met, only means that the exempt duties question can be considered. It is a threshold question and separate factor that has no bearing on the primary duty analysis. It doesn't make the duties analysis any simpler or easier. The only thing that the salary-level test does is deny an employer the right to demonstrate that an employee qualifies as exempt even though his or her primary duty is performing exempt work regardless of the salary level. As it stands, the salary-level test has no bearing on exempt duties and is used only to thwart otherwise legitimate claims of exempt status. Raising the salary level, as the Department proposes to do, does nothing to simplify or make easier an employer's ability to determine whether a particular employee is exempt. Indeed, raising the salary level will unfairly disqualify thousands or even millions of employees from exempt status where it has been undisputed (and in many cases previously established by court

or agency review) that the employees are exempt and their primary duty is performing exempt work.

The bottom line is that the Proposed Rules neither modernize nor simplify the overtime regulations, but rather perpetuate and expand the misuse of salary levels in defining exempt status.

No Rationale for a One-Size-Fits-All Salary Level

Not only is a salary level an illegitimate factor in determining exempt status, the Department presents no rationale as to why a single-level salary should be imposed on all industries, geographic regions, and types of exemptions. A single-level salary does not account for regional differences, business size, for-profit versus non-profit organizations, industry custom and practice, or type of exemption. Why should the salary level for exempt status be the same for New York City as for Walla Walla, Washington? Why should the salary level for an exempt position at Acme Investment Company be the same as the salary threshold for an exempt position at the local food bank? Why should the salary threshold be the same for administrators as it is for professionals or executives? These questions are highly relevant and important, yet the Proposed Rules simply ignore them.

The Department Has Misled the Public as to the Impact of the Proposed Rules

Employers generally set a salary for a particular position based on factors related to market competitiveness such as type of position, size of employer, geographic market, industry standards, market competition, education and training, experience, skill, and effort. To the extent a position requires more than 40 hours per week, the employer and the employee presumably take that into account when the employer sets the salary and the employee accepts the job. Consequently, the salary for the position that is currently exempt generally has an "overtime" recognition factor built into the salary structure.

Eligibility for overtime pay does not mean that a formerly exempt worker is entitled to more pay for the same job upon being reclassified.

Nothing in the FLSA requires an employer to raise the pay for any position simply because the U.S. Department of Labor changes the classification rules so that the position becomes non-exempt. The employer can reconfigure the compensation formula so that the total earnings for the newly non-exempt employee, including overtime pay, does not exceed the amount of salary received by the employee for the same job when the employee was classified as exempt. In fact, such a restructuring of the compensation will necessarily be based on projections of expected hours worked.

Nevertheless, the "pay raise" sloganeering of the Department has deliberately misled employers, employees, and the public to believe that raising the salary threshold will automatically increase the take-home pay of workers who are currently receiving salaries of less than $50,440 per year and work more than 40 hours per week.

The Department should be transparent and inform the public that if an exempt position is reclassified as non-exempt, there is no requirement that the employer treat the salary paid for the old exempt position as the 40-hour base pay for the new position. Rather, the employer is free to set a base pay or hourly rate that, when used to calculate overtime pay, results in approximately the same total compensation as when the employee was paid a salary so long as that pay is at least minimum wage for all compensable hours worked. The FLSA does not determine what the pay rate is for a non-exempt position other than to require that it be at least minimum wage.

Further, many salaried exempt employees do not regularly work a significant amount of overtime. Thus, instead of these workers receiving the purported pay increase by virtue of the Department's proposed salary level increase, they will more likely lose their exempt status and not work much, if any, overtime. How have these workers been helped?

Again, the Department should make clear that its change to the salary level does not change the fact that there is no obligation on the part of an employer to set the base pay for a new non-exempt position at any particular hourly rate so long as it is at least minimum wage.

Negative Impact on Employee Relations and Other Collateral Damages

Based on our collective experience counseling employers regarding thousands of actual or potential exempt reclassification, we know that transitioning employees to non-exempt status not only creates major administrative costs due to training on recordkeeping, time-reporting, meal/rest periods, unauthorized overtime, and numerous other requirements affecting hourly employees, but employers must take appropriate monitoring and enforcement action to enforce rules that workers resent and would reject if the wage/hour law allowed them to do so. Morale suffers when formerly exempt employees are involuntarily converted to non-exempt status. They see it as a demotion. They prefer the freedom to manage their own time and be paid a fixed salary rather than "punch a clock" and have their reported hours constantly scrutinized and arbitrarily fixed.

Also, some exempt employees enjoy additional benefits or perks that they will lose when re-classified as non-exempt employees.

Automatic Annual Increase in Salary Level

As we explained, the salary-level test is a flawed concept and the Proposed Rules only exacerbate its misuse. The proposal to automatically bake in an annual increase is an unprecedented abuse. Previous changes to the salary level have required a specific proposed rule and comments prior to adoption. The Department's efforts here are a blatant attempt to skirt such a formal process for implementing future increases.

Until we know the effects of the current Proposed Rules (should they be adopted), there is no justification for an automatic increase. An automatic increase eliminates the ability of the public to address the salary-level test in relation to changing policies and subsequent economic circumstances (will there be a decrease if there is deflation?). Instead, an automatic increase creates a self-perpetuating mechanism that ignores unintended consequences and forces

employers to annually re-compute the new salary level and evaluate how to deal with it. Perhaps more importantly, regardless of an employer's financial success or stability, such automatic increases would require the employer to provide commensurate raises so that its exempt employees near the threshold retain their exempt status. This will create logistical and administrative uncertainty as employers are forced to re-evaluate the exempt status of certain job positions annually.

The Proposed Rules Will Likely Increase Litigation

Complex and confusing wage and hour laws have spawned an epidemic of claims and lawsuits. The Proposed Rules will make this shameful situation worse in two ways. First, by reclassifying millions of exempt employees as non-exempt employees, there is every reason to believe that the myriad of disputes – regarding what is compensable time, the accuracy of time records, compliance with rest/meal period requirements, pre- and post-shift use of electronic devices, and other questions already deluging courts and agencies – will increase in the same proportion among the new non-exempt employees as for the current cohort of non-exempt employees. These employees will have to become accustomed to the new practices associated with being a non-exempt worker, including recording their time accurately, not working before and after scheduled shift times, not checking their emails at home; and their employers will likely experience some resistance in having these employees comply with the rules underlying their new status. This difficult process will be exacerbated by the fact that many job positions will become non-exempt for the first time in the living memory of anyone working in them or supervising them due to the economics of the job not justifying the extraordinary increase in salary that the proposed regulations mandate. Thus, the employees and employers will have no frame of reference for carrying on the job or supervising it other than as a salaried exempt employee. Second, the new salary level will create additional claims, particularly against small employers who mistakenly fail to understand or apply the new salary level correctly or who fail to understand how to administer "salary basis" issues properly.

The Proposed Regulations Will Impact Collective Bargaining Obligations

There are many exempt employees whose salaries are controlled by collective bargaining agreements. This includes many professionals and administrative employees, particularly in the public, not-for-profit and health care sectors, in positions such as nurses, social workers, finance, accounting and non-executive managerial positions. Salaries below the proposed new threshold are not uncommon in the entry level pay grades or salary structures in non-profits or rural areas. These salaries are locked for the duration of the applicable collective bargaining agreements. If such a dramatic and sudden increase to the salary level threshold occurs as proposed, then the exempt status of many employees could be lost without the employer having an opportunity to negotiate over the impact of the employees' losing their exempt status. Should their salaries be increased? If not, how should their overtime rates be calculated? To what extent can they be required to record their time or work so that they minimize overtime? Are they appropriately placed in a bargaining unit of otherwise exempt employees, or should they move to the units of other hourly and non-exempt employees? The potential burden that will be imposed on collective bargaining negotiations, as well as the inherent leverage that will be given at least initially to labor unions, cannot be underestimated.

The Proposed Regulations are silent as to these issues, but the likelihood that those questions will be asked and debated at the job site is high. It is also likely that the parties will differ in their view of the best approach to take, and that will result in more litigation under the FLSA, as well as a potential slew of arbitration demands and unfair labor practice charges.

Requesting Comments on a Hypothetical Change to Primary Duty Test Is Improper

Despite years to consider the issue, the Department failed to present a proposed change to the primary duty rule as part of the NPRM. Nevertheless, the Department attempts to create a placeholder to change to the primary duty test by inviting comments on a ghost Proposed Rule. The implication is that the Department might address the primary duty test in the final rules. Such an attempt would be wholly improper under the Administrative Procedures Act, as well as violate any semblance of reasonableness and due process. In the absence of a proposal regarding the primary duty test, there is nothing to comment on in the rulemaking process. The Department is free to seek input from the public on the primary duty test (and, presumably, has been doing so informally for years) outside of the formal rulemaking process.

The Department Should Have Allowed a Longer Comment Period

Given the enormous and broad impact of the Proposed Rules, which the Department itself touts, the Department should have extended the comment period at least until November 4, 2015, to allow a reasonable opportunity for interested parties to review the proposal and thoughtfully respond. The NPRM is lengthy (nearly 100 pages) yet provides for a comment period that is shorter than what was provided in 2003 for a significantly shorter proposal. The old saw that "your failure to plan is not my emergency" applies. The Department has had years to come up with a proposal. Then, it gave itself 16 months from the time of the President's directive until the NPRM was published. Now after spending years formulating the Proposed Rules, the Department is running roughshod over the public by limiting it to a 60-day comment period on a highly complex and controversial proposed rule change that will likely impact the vast majority of employers in the United States.

Conclusion

In sum, the Proposed Regulations, if adopted, will have dramatic and damaging consequences for both employers and employees, many of which the Department fails to acknowledge. Moreover, the very predicate that the salary level test is appropriate is questionable. Why should employees who are deemed to be exempt executive, administrative or professional employees today lose that status upon the implementation of the new regulations when the duties of their jobs have not changed an iota? If there's a proper purpose for a salary level test, it would be to serve as a proxy for exempt status, but not a prerequisite for exempt status where the employees are performing the duties of an executive, administrative or professional.

The Proposed Regulations perpetuate and exacerbate a flawed regulation and should not be adopted. Considering the scope of the potential impact, the public should be allowed more time to provide its input. And, as to the timing of implementation of any final rules, the

Department must take into consideration that– if they resemble the Proposed Rules – the final rules will require employers to undertake a major revamping of the compensation systems and practices that have long been in place at the great majority of workplaces.

Sincerely,

Wage & Hour Defense Institute

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Attachment: WHDI Member List

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Regulatory Update

Comment Period Closes on Proposed Overtime Changes

9/11/2015 Permissions

On September 4, 2015, SHRM submitted comments to the Department of Labor (DOL) on the proposed changes to the 541 overtime regulations. Despite the request of SHRM and more than 600 other organizations and individuals asking for an extension of the comment period, DOL provided just 60 days for public comment.

Within that time frame, however, SHRM members were very engaged on the issue, with 50 SHRM state councils and 307 SHRM chapters as well as SHRM's strategic affiliate, the Council for Global Immigration, signing on to SHRM's comment letter. In addition, through a special portal created by SHRM, individual SHRM members sent over 800 letters to DOL and close to 3,000 letters to Capitol Hill expressing their concerns with the proposed regulation.

Below is a summary of the key concerns expressed in **SHRM's comment letter (/Advocacy/PublicPolicyStatusReports/Courts-Regulations/Documents/SHRM%20541%20FINAL%20SUBMITTED%209%204.pdf)**:

Salary Threshold

- The proposed salary threshold ($970/week, or $50,440/year, in 2016) is an increase of more than 100% of the current threshold and is so substantial that it will have a significant impact on nearly every workplace.
- DOL improperly based the new salary threshold on the 40th percentile of earnings for full-time salaried employees, a complete departure from the methodology used since the law was enacted.
- The new salary threshold will have more-pronounced negative effects on employers based in certain regions of the country with lower costs of living and lower levels of compensation, as well as in the nonprofit sector. SHRM members working at nonprofits have indicated that they will need to cut services in response to the new salary threshold.

Potential Changes to the Duties Test

- DOL's proposed regulation does not propose specific changes to the duties test but asks for input on whether the duties test should be updated. SHRM points out that if DOL decides to make changes to the duties test, SHRM believe that the agency is legally required to publish those changes for public notice and comment.

SHRM also chaired the Partnership to Protect Workplace Opportunity, the lead voice of the employer community responding to the regulation. SHRM also chaired the Partnership to Protect Workplace Opportunity, the lead voice of the employer community responding to the regulation. **The partnership's comment letter (http://protectingopportunity.org/)**was signed by 133 national organizations.

According to the *Regulations.gov* comment portal, DOL received more than 245,000 comment letters. The agency must review these comments before publishing a final regulation, likely in 2016.

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DOL Faulted on Enforcement of Wage and Hour Laws (/Publications/HRNews/Pages/EnforcementofWageLaws.aspx)

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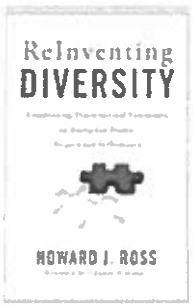

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Webcast: Reinventing HR (http://www.shrm.org/multimedia/webcasts/Pages/18bykronos.aspx) Distinguished panel looks at key HCM trends. August 19, 2 p.m. E / 11 a.m. P

Conference: Lead(HR) (http://store.shrm.org/bookstore/hr-law-posters.html) Oct. 7-9, 2015. Develop your leadership skillset.

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SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Fair Labor Standards Act Overtime Regulations

November 2015

Produced by the SHRM® Government Affairs Department

Background: One of the key provisions of the Fair Labor Standards Act (FLSA) governs overtime pay. The FLSA requires that employees be paid overtime at a rate of at least one and a half times their regular rate of pay for all hours worked over 40 hours in a workweek, unless they qualify for an exemption. Employees that qualify for an exemption are called "exempt" employees. Employees who do not meet requirements for an exemption and must, therefore, be paid overtime for all hours worked over 40 hours in a workweek, are referred to as "non-exempt."

To be exempt, employees must meet certain tests regarding their job duties, be paid on a salary basis, and be paid more than the salary level that is periodically set through regulation by the Department of Labor (DOL). Under the current regulations, employees must be paid more than $455 per week ($23,660 per year) to qualify for exemption. Commonly-used exemptions include the "white collar" exemptions (executive, administrative and professional) as well as the computer employee and outside sales exemptions. There is also a "highly-compensated" exemption with its own salary level which may apply to highly paid employees. The FLSA statute delegates to the Secretary of Labor the authority to define the terms of the exemptions. DOL has modified the regulations several times, most recently in 2004 when they increased the salary level and simplified the duties test.

Issue: On March 13, 2014, President Barack Obama directed the DOL, through Presidential Memorandum, to "modernize and streamline" the FLSA overtime regulations. On June 30, 2015, DOL published proposed changes to regulations defining the "white collar" overtime exemptions. Proposed changes include:

Salary level:

- Raising the salary level to the equivalent of the 40th percentile of weekly earnings for full-time salaried workers as tracked by Bureau of Labor Statistics (BLS). DOL estimates that the 40th percentile will increase to $970 per week or $50,440 annually in 2016, when the rule is expected to go into effect. In past rulemakings, DOL has set the salary level using a methodology that looked at lower wage industries and set the level using a lower percentile in order to identify the obviously non-exempt.
- Raising the salary level for highly compensated employees to the annualized value of the 90th percentile of weekly earnings for full-time salaried workers ($122,148/year).
- Adding a new provision to automatically update the salary levels every year. DOL asked for public comment on whether the automatic update should be pegged to the 40th and 90th percentiles or to changes in inflation. In the past, DOL has periodically reviewed and updated the salary level in the overtime rules instead of using an automatic update.
- Under the new salary level, a substantial number of employees, in a variety of different industries who are currently classified as exempt, would be made subject to the overtime requirements.

Duties tests:

- DOL does not make changes to the duties test in the proposed rule. Instead, they ask for public input on whether, in light of the proposed salary increase, any changes to the duties test are warranted.
- It is not clear whether DOL will make changes to the duties test in the final rule. SHRM believes that if DOL makes changes, they should first spell out any proposals and engage in notice and comment rulemaking to allow stakeholders the ability to evaluate the impact.

Outlook: As a leader on this issue, SHRM chairs the Partnership to Protect Workplace Opportunity, the employer community coalition dedicated to responding to the overtime regulations. Both SHRM and the Partnership submitted comments to DOL on September 4, 2015. A final rule is not expected until late spring/summer 2016 with an effective date a minimum of 30 days after publication. If DOL does not make changes in the final rule in response to concerns outlined by SHRM and the employer community, legislative attempts to block or delay the rule are expected next year.

SHRM Position: SHRM appreciates the administration's interest in updating the salary level. However, using a different methodology and a higher salary level set at the 40th percentile of weekly earnings ($50,440/year in 2016 est.) presents challenges for employers whose salaries tend to be lower, such as small employers, non-profits, employers in certain industries, and employers in lower cost of living areas of the country such as the Southeast and Midwest.

Of equal concern, SHRM opposes automatic increases which have been considered in the past but rejected. Automatic increases ignore economic variations of industry and location and make it hard for HR to manage merit increases for those near the salary level. In addition, as more employees become non-exempt due to the dramatic increase in the proposed salary level, the need for those employees to track time to ensure they are not working overtime will limit their workplace flexibility. SHRM is also concerned that the DOL may make changes to the duties test in the final rule that would further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and nonexempt work concurrently.

Late Release of Overtime Rule Could Mean Short Implementation Period

By Allen Smith 11/13/2015 Permissions

The Department of Labor (DOL) will not release its final rule revising which workers are and are not eligible for overtime until late 2016, Solicitor of Labor Patricia Smith told an American Bar Association conference Nov. 5. That suggests that the time between publication of the final rule and its effective date will be short, according to Paul DeCamp, an attorney with Jackson Lewis in its Washington, D.C., region office, and a former administrator of the Wage and Hour Division.

The Wall Street Journal reported Smith's assertion, which the newspaper article said "elicited 'gasps' from the audience at the American Bar Association's Labor and Employment Law conference in Philadelphia."

"The later the final rule is published, the smaller the window of time the department can allow before the new regulations become effective," DeCamp said.

"In 2004 [the last time the Fair Labor Standards Act (FLSA) overtime rules were overhauled], the department provided 120 days for employers to review the new regulations and to make the necessary changes in their practices," he said. "In 2016, the department might find itself with a much shorter window, perhaps only 30 or 60 days, between when they publish the final rule and when the rule has to go into effect."

The proposed rule (/legalissues/federalresources/pages/shrm-proposed-overtime-rule-salary-level-high.aspx) was released on June 30 of this year and received more than 250,000 comments during the comment period this summer.

If employers really do have as little as 30 days to implement the final rule, they may prepare to reclassify workers by getting ready now for different possible scenarios under the final rule; do their best to reclassify after the final rule; or—on the riskier side—wait until after the presidential election in hopes that, should a Republican prevail, the rule might be revoked.

"I think the later the release, the better for employers," said Jeffrey Ruzal, an attorney with Epstein Becker & Green in New York City. "A later release gives employers a longer runway to audit their workforce and address any potential misclassification issues."

Ruzal added, "Employers can and should act now to make any adjustments necessary to avoid imminent noncompliance."

"Frankly, having a final rule before late summer or early fall [of 2016] was probably an optimistic prediction, given the volume of comments filed and number of other U.S. DOL regulatory initiatives," said Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and a former acting administrator of the Wage and Hour Division.

Presidential Election

The pressure on the Labor Department to make the rule effective as soon as possible after its publication arises from the possibility that a Republican may win the White House.

"Depending on how the November elections go, it is possible that the president-elect—if Republican—could provide clear enough assurances following the election that employers might be willing to ride things out for a few weeks at the end of the term rather than converting employees, knowing that help is right around the corner," DeCamp said. "In that case, the next president might revoke the regulations even if they have already gone into effect, at least so long as a mass conversion to nonexempt status has not already occurred."

In addition, DeCamp said the later the final rule comes out, the greater the chances of litigation to run out the clock until the next president can revoke the rule.

"The department needs to have the rule become final before the next president takes office, at least if that president is Republican, because otherwise the next president could undo the rule. The department needs employers to convert everyone who is going to be converted to nonexempt before there is an opportunity for the next president to undo the rule. Because once employers convert people, they are much less likely to convert them back," DeCamp added.

"Of course, this whole discussion is moot if a Democrat wins in November," he noted. Democratic presidential candidate and former Secretary of State Hillary Clinton has come out in favor of the Department of Labor's overtime pay proposal (http://www.newsmax.com/Newsfront/overtime-pay-hours-workers/2015/06/30/id/652860/).

Phased-In Effective Date?

Another possibility, however, is a phased-in effective date, which is rumored to be gaining favor on Capitol Hill.

"A phase-in that exceeds the term for this administration is possible but would probably mean that the president-elect is a Democrat," Robinson said. "It also would depend on whether the final rule only increases the salary level or contains some duties tests (/legalissues/federalresources/pages/dol-questions-duties-tests.aspx) changes, too. The more changes that the final rule makes, the greater the chance that this administration may allow time to phase it in. However, if the final rule only contains a major salary level increase, the less likely there will be any phase-in."

Phased-in effective dates have been used with minimum wage laws in some cities this year (/legalissues/employmentlawareas/pages/minimum-wage-increases.aspx), noted Robert Hingula, an attorney with Polsinelli in Kansas City, Mo. Hingula said it's not beyond the realm of possibility for the raised salary threshold to be increased on a phased-in basis to make it more manageable.

He also thinks the DOL might listen to employers' pleas for a longer implementation period and not make the final overtime rule take effect until the beginning or middle of 2017, regardless of how the presidential election turns out.

While Republicans may try to block a raise in the salary level if they win the White House, Hingula noted that there is support in both parties for raising it some—just not necessarily more than doubling it from the current $455 a week to the DOL's proposed $970 a week with annual raises.

"We'll have to wait and see," Hingula said.

Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor (https://twitter.com/SHRMlegaleditor).

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TOP PICKS: WORKPLACE DEMOGRAPHICS

Final Overtime Rule's Release Date Remains Uncertain

By Allen Smith 2/17/2016

It's still anyone's guess when the final overtime rule will be released. The later in the year it is published, though, the greater the chances that the rule will be overturned by the next Congress and president or the courts.

While Secretary of Labor Thomas Perez told Bloomberg BNA in a Dec. 16, 2015, interview that he was "confident" the final rule would be issued by spring 2016, the Labor Department's regulatory agenda pegged July 2016 as the release date. The department typically does not release rules before their projected regulatory agenda dates. Moreover, the department has not yet sent the proposed final rule to the Office of Management and Budget (OMB) for review, which can be a time-consuming process.

Labor Department projections on the final rule's publication range from late spring to late summer to early fall, noted Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and former acting administrator of the department's Wage and Hour Division.

"Secretary Perez keeps saying spring," noted Alexander Passantino, an attorney with Seyfarth Shaw in Washington, D.C., and another former acting administrator of the Wage and Hour Division. "In reality, those dates are not that far apart," referring to May and July of this year.

Part of the impetus for publishing a rule by May of this year is that final rules submitted to Congress after May 16, 2016, may be rejected in 2017 by a new Congress and new president under the Congressional Review Act (CRA), if Congress remains controlled by Republicans and Republicans win the White House. Such a rejection may be a long shot, though—the CRA mechanism has been used to successfully overturn only one agency final rule: a 2000 Occupational Safety and Health Administration rule related to workplace ergonomics standards, according to the Library of Congress' Congressional Research Service.

Nonetheless, Passantino said he was sure that the Labor Department was feeling pressure to issue a final rule by May 16. "The AFL-CIO has a website petition asking the administration to finalize the rulemaking to avoid CRA coverage," he noted. "Regardless of the pressure, however, the department is legally obligated to review the nearly 300,000 comments it received. And it must prepare the appropriate preamble and economic analysis. All of that takes time."

Rule's Impact

According to the Labor Department, the overtime rule's new minimum salary threshold increase (from $455 per week/$23,660 per year to $970 per week/$50,440 per year) for exempt workers and annual increases in the minimum salary threshold will result in 10 million employees being reclassified from exempt to nonexempt over the next 10 years. In 2016 alone, 4.6 million workers face reclassification. The minimum salary threshold triggers exempt status—exempt, that is, from overtime pay.

"Many are concerned the department has underestimated the impact of the rule and that far more employees will be affected," the Society for Human Resource Management and other associations stated in a Feb. 11, 2016, letter to Congress. "Public-sector employees, who often are paid less than their private-sector counterparts and tend to receive more of their compensation in benefits, which are not counted in the salary threshold calculation, will be particularly impacted."

OMB's Office of Information and Regulatory Affairs (OIRA) must review the regulatory flexibility analysis and cost projections to ensure that they are sound and rational, Robinson noted. The office also is obligated to meet with interested parties. A failure by OIRA and OMB to conduct an adequate due diligence review of a proposed final rule could be fodder for litigation, he added.

Passantino said employers should be considering now how they might deal with a salary threshold increase to $50,440 per year. "Regardless of when the final rule is published, they are looking at, probably, 60 days for an effective date. An employer hoping to come into compliance without having thought about the issues prior to that time is going to be way behind the eight ball."

Legal Challenge?

Paul DeCamp, an attorney with Jackson Lewis in the firm's Washington, D.C., office and a former administrator of the Wage and Hour Division, remarked, "The odds of litigation over the rule are pretty close to 100 percent. It is very difficult to envision any realistic scenario in which this regulation does not end up in litigation."

He added, "If the department waits too long, it raises the risk that one cranky judge in a forum of a plaintiff's choosing could enjoin the regulations long enough to run out the clock on this administration, which becomes either a game changer or a nonevent, depending on who replaces President Obama."

Michelle Steltz

From: Michelle Steltz
Sent: Friday, March 18, 2016 11:56 AM
To: Dan Kahl; Gail Kahl; Gina Schenk; Lucy Klym; Lindsey Wright
Subject: Anti - Overtime Bill introduced

So while we were in the board meeting this was going on...

As the Department of Labor's (DOL's) overtime rule hurtles toward finalization, advancing to the Office of Management and Budget (OMB) March 14, House and Senate Republicans stepped in and introduced legislation March 17 calling for the rule to be stopped in its tracks.

"This mandate on employers will hurt the lowest paid American workers the most, by reducing their opportunities for a promotion or a better job and making it all but impossible for workers to negotiate flexible schedules," said Senate Health, Education, Labor and Pensions Chairman Lamar Alexander, R-Tenn., when introducing the bill. Alexander said small independent colleges in Tennessee estimate the rule would cost each of their schools a minimum of $1.3 million—"a giant figure that may cost the colleges' students in tuition hikes and cost employees in job cuts."

As proposed, the rule recommended setting the salary threshold for exempt employees at $50,440 annually, up 113 percent from the current $23,660 annually. It also called for annual automatic increases to the salary threshold and suggested that the duties tests might be made more stringent, requiring managers to spend at least half of their time on managerial functions.

Bill's Proposals

The Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773) would:

- Nullify the proposed rule.
- Require the DOL to first conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers.
- Prohibit automatic increases in the salary threshold.
- Require that any future changes to the duties test must be subject to notice and comment.

The legislation "provides a clear vehicle to push back on the overtime rule," said Lisa Horn, a spokeswoman for Partnership to Protect Workplace Opportunity (PPWO) and director of congressional affairs with the Society for Human Resource Management (SHRM). "Both Republicans and Democrats have expressed concerns about the unintended consequences of this rule, and this bill provides a reasonable approach to updating the overtime rules in a way that that works for both employers and employees." The PPWO is a group of more than 60 employer organizations and companies representing the broad employer community's response to the proposed overtime rule changes.

"The rule heading to OMB started the clock, essentially, and this legislation signifies the Hill's response," Horn said. "Having just had nearly 200 members on Capitol Hill [March 16] advocating for legislation to address the overtime proposal, SHRM welcomes this development and looks forward to supporting the legislation." SHRM members

made visits to Capitol Hill to talk to congressional leaders as part of the SHRM Employment Law & Legislative Conference.

Take Two

James Swartz, an attorney with Polsinelli in Atlanta, said the bill seeks "to nullify the proposed white-collar exemption regulations, and to require the Department of Labor to start its rulemaking process over, including an economic impact analysis that integrates the criteria identified in the proposed legislation."

While some Democrats have expressed concern about the proposed overtime rule, Swartz said the bill "is not a bipartisan affair. Senate and House Republicans are attempting to force the DOL and, more pointedly, this administration, to delay the implementation of the new rules." He said the Congressional Review Act "looms here, as it gives Congress 60 legislative days to effectively veto (via resolution) any regulation following OMB review. If Congressional Republicans can slow down the OMB review, they may be able to extend those 60 days past the inauguration of a new president. While President Obama—or a President Clinton or Sanders—would likely veto such a Congressional disapproval resolution, causing the rule to become effective, a President Trump or Kasich or Cruz or TBD [to be determined] likely would allow the disapproval to stand, thereby scuttling" the DOL rule.

"What's interesting is that the bill only addresses what employers are fearing will be in the final regulations. No one knows if some of the concerns raised by the bill, concerns that were raised in many of the comments provided to the DOL, exist in the version submitted earlier this week to the OMB," said Robert Boonin, an attorney with Dykema in Detroit and Ann Arbor, Mich., and immediate past chair of the Wage and Hour Defense Institute. "The bill, though, would be more powerful than resolutions objecting to the regulations brought under the Congressional Review Act since it not only serves to negate the new regulations, it also lays out the ground rules for how future changes may be made."

The Wage and Hour Defense Institute serves as a nationwide network and meeting ground for top-tier practitioners to engage in professional development in what has become a highly nuanced area of the law

- See more at: https://www.shrm.org/legalissues/federalresources/pages/overtime-rule-bill-introduced.aspx?utm_source=Friday%20-%20HR%20Daily%20PublishThis%20Template%20(5)&utm_medium=email&utm_content=March%2018,%202016&MID=01534869&LN=Steltz&spMailingID=25016186&spUserID=ODM1OTI3NTYyMzIS1&spJobID=763156158&spReportId=NzYzMTU2MTU4S0#sthash.B1Mi4WjH.dpuf

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SHRM Criticizes Proposed Overtime Rule at House Hearing

By Allen Smith 3/30/2016 Permissions

The proposed increase of the salary threshold for overtime pay from $23,660 to $50,440 per year, as of this year, is "too much, too fast," testified Nancy McKeague, SHRM-SCP, senior vice president and chief of staff at Michigan Health & Hospital Association (MHA) in Okemos, Mich.

Testifying March 29 on behalf of the Society for Human Resource Management (SHRM) before the U.S. House Committee on Education and the Workforce at a field hearing in Michigan, McKeague said that exempt or nonexempt classification decisions are particularly challenging, as they rely on objective and subjective factors.

She noted that the position of executive director of the MHA's foundation, established to support hospitals and community partners, was challenging to classify because the individual supervised only one employee. Ultimately, the executive director position was classified as exempt under the white-collar exemptions because of her autonomy, her experience and the MHA's confidence in her judgment, noted McKeague, who is a member of the SHRM Labor Relations Special Expertise Panel.

The jump in the salary threshold—a 113 percent increase, moving the salary level to the 40th percentile of earnings for all full-time salaried workers—presents significant challenges to small employers, she said. The MHA already was trying to stay ahead of the salary threshold for exempt employees, pegging their salaries at least at 30 percent of earnings for all full-time salaried workers, McKeague said, adding that she is offended by the way the rule "starts with the premise that none of us treat employees correctly."

She observed in written testimony that, "As for the impact on MHA, we will need to reclassify 7 percent of our workforce, costing $35,000 in additional payroll cost in the first year alone." The rule's automatic increases in the salary threshold would require more increases in payroll costs, as well as 401(k) contributions and life insurance premiums, she said.

"In addition, reclassifying employees and adjusting salaries in response to the new salary threshold will likely cause wage compression issues with entry-level and midlevel employees' salaries nearing the level of their managers," McKeague remarked. "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."

McKeague expressed SHRM's support for the Protecting Workplace Advancement and Opportunity Act, H.R. 4773, (http://thomas.loc.gov/cgi-bin/query/z?c114:H.R.4773:) to nullify the current overtime proposal. She noted that the bill would not prevent the Department of Labor (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," she stated. The bill also would prohibit automatic increases to the salary threshold.

No Disastrous Effects?

Dale Belman, a professor at Michigan State University's School of Labor and Industrial Relations in East Lansing, Mich., countered that the DOL rule would not have disastrous effects.

The current salary threshold level is below the U.S. poverty level, he said, adding that the proposed change in the salary threshold would "not quite restore where we were in 1975," referring to the salary threshold's percentage of earnings for all full-time workers.

Significant Costs

However, Laurita Thomas, associate vice president for human resources at the University of Michigan in Ann Arbor, Mich., said the DOL's rule was "cost-prohibitive," and would affect 3,100 people at the university. She estimated that it would cost the university alone $34 million, and cost the entire university system $60 million for its 11 institutions.

University research could be inhibited as a result, she said, predicting that the overtime rule would force the university to employ fewer postdoctoral researchers.

Rep. Rob Bishop, R-Utah, asked Thomas whether the rule would impact tuition. Thomas answered, "It is inconceivable to me that it would not affect tuition."

Thomas faulted the rule for having a short implementation period, suggesting that it would be more palatable if its implementation were phased in over several years.

Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor (https://twitter.com/SHRMlegaleditor).