



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.

The proposed salary threshold is based on incorrect assumptions about the purpose of the salary test

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

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

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

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.thenonproffitimes.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.

¹⁸ Weiss Report at 15.

¹⁹ Statistics of U.S. Businesses (SUBS), available at <http://www.census.gov/econ/subs/>.

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.

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.

Restrictions on Hours Scheduled

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.

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 than 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

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

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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