PARTNERSHIP TO PROTECT

WORKPLACE OPPORTUNITY

The Honorable Tim Walberg
U.S. House of Representatives
418 Cannon HOB
Washington, D.C. 20515

The Honorable Frederica Wilson
U.S. House of Representatives
208 Cannon HOB
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

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

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

The Department claims the dramatic increase in the minimum salary requirement is needed to set a standard salary level for full-time salaried employees that "adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating a return to the more detailed long duties test." We agree the Department should not return to the more detailed long duties test, which was effectively abandoned by DOL decades ago. Imposing the archaic long duties test on our modern economy would simply lead to less clarity and more litigation. Only lawyers would benefit from such a change. The Department's dramatic increase to the minimum salary threshold is similarly, unnecessary and damaging, however, and will have negative consequences for employees, employers and the economy. The Department needs to take a more measured approach.

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

The change to non-exempt status means that many employees will lose the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees will lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. Employers may also cease providing employees with mobile devices, as any time spent checking them would now have to be accounted for.

In addition, making it more difficult to classify employees as exempt likely will eliminate career opportunities and prevent employee advancement through the loss of that status. Again, changing to non-exempt status requires employers – and employees – to watch the clock. For example, employees who have reached or are near 40 hours of work in a week may need to skip additional training or other career-enhancing opportunities because the employer is not able to pay overtime rates for that time.

Finally, when employees are converted to non-exempt status, they often find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime rates for hourly workers, many incentive payments must be included in a non-exempt employee's "regular rate" (*i.e.*, overtime) of pay. Faced with the difficult recalculation of overtime rates—sometimes for every pay period in a year—employers often simply forgo these incentive payments to non-exempt employees rather than attempt to perform the required calculations.

Particularly troubling is the impact of these increases to regions of the country where the cost of living is significantly lower than large metropolitan areas, the West Coast and the Northeast. The proposed nationwide <u>floor</u> for exempt status would exceed not only California's current standard of $720 per week, but also the California standard for 2016, which will be $800 per week. When even California employers need to raise the salary level to maintain the exemption, it is clear that what is supposed to be a salary floor for exempt employees across the country simply fails in any meaningful way to account for regional economic differences.

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

The report also found that the changes would cost retail and restaurant businesses $8.4 billion per year.

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

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

While the Department chose not to propose changes to the duties test, it did pose a series of questions that strongly suggest it intends to make changes to this area, and without providing proposed regulatory text first. Despite discussing the issues for months, the Department chose not to make specific regulatory proposals with respect to the duties tests. However, it also chose not to close off the possibility of regulatory action on the duties tests in a final rule. Rather than simplifying the regulatory process, the Department's chosen course of action complicates the ability of the regulated community to provide meaningful, substantive comments. This is contrary to thrust of the Administrative Procedure Act, and indeed even the administration's boast of being making the government policy setting more transparent.

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

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

Sincerely,

The Partnership to Protect Workplace Opportunity and the following organizations:

American Hotel & Lodging Association

Associated Builders and Contractors

College and University Professional Association for Human Resources

National Council of Chain Restaurants

National Retail Federation

National Restaurant Association

Society for Human Resource Management

U.S Chamber of Commerce