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COMMITTEE ON  
EDUCATION AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

November 7, 2023

The Honorable Julie A. Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**RE: RIN 1235-AA39, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees**

Dear Acting Secretary Su:

We write in opposition to the Department of Labor's (DOL) proposed rule entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees."<sup>1</sup> This proposed rule would have a devastating impact on America's small businesses, nonprofits, colleges, universities, and other employers who have fought so hard to recover from President Biden's failed economic policies. DOL should reconsider this dangerous effort, spend more time hearing from workers and employers about the effect this rule will have on their industries, and withdraw the proposed rule.

Despite many requests from affected stakeholders, DOL has refused to extend the comment period past the initial 60-day window closing on November 7. As the Committee wrote previously,<sup>2</sup> 60 days to comment on this proposed rule is not a "reasonable and meaningful" window of time, as is required by the *Administrative Procedure Act*.<sup>3</sup> This is partially because some of the information that would be needed to reflect the impact of this rule accurately does not yet exist. An additional 60 days should have been granted to address the concerns raised by many employers who have been unable to compile the data necessary to demonstrate the specific challenges posed by the proposed rule.

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62,152 (proposed Sept. 8, 2023) [hereinafter Proposed Rule].

<sup>2</sup> Letter from Chairwoman Virginia Foxx to Acting Secretary Julie Sue (Oct. 20, 2023), [https://edworkforce.house.gov/uploadedfiles/10.20.23\\_extension\\_request\\_letter\\_-\\_overtime\\_rule.pdf](https://edworkforce.house.gov/uploadedfiles/10.20.23_extension_request_letter_-_overtime_rule.pdf).

<sup>3</sup> *Forester v. Consumer Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977).

The *Fair Labor Standards Act* (FLSA) is the foundation of U.S. wage-and-hour laws and establishes protections for workers. However, since its enactment in 1938, the law has not received the updates necessary to modernize its requirements to fit today's workforce properly. The FLSA should provide clarity employers need in order to comply with regulations. However, the FLSA is often overly complex, confusing employers and posing challenges for both employers and workers. The proposed overtime rule fails to address the serious need to simplify FLSA regulations and will add more burdensome and confusing rules to the existing complex regulatory environment.

### **Overtime Salary Threshold**

In 2016, the Obama DOL issued a final overtime rule with a salary threshold of \$913 per week (\$47,476 annually), an increase from \$455 per week (\$23,660 annually).<sup>4</sup> Twenty-one states and 50 business groups challenged DOL's rule in the U.S. District Court for the Eastern District of Texas. In November 2016, the court issued a preliminary injunction blocking the final rule from taking effect because DOL's interpretation of the FLSA overtime provision was deemed arbitrary and capricious.<sup>5</sup> The court subsequently invalidated the rule in August 2017.<sup>6</sup>

Overtime regulations were last revised by DOL in September 2019 during the Trump administration. Among other changes, the final rule raised the salary threshold for exempt employees from \$455 per week (\$23,660 annually) to the current standard of \$684 per week (\$35,568 annually).<sup>7</sup> To keep up to date with evolving pay practices, the rule allowed employers to use nondiscretionary bonuses and incentive payments that are paid at least annually to satisfy up to 10 percent of the salary threshold.<sup>8</sup> The rule also raised the highly compensated employee (HCE) threshold from \$100,000 to \$107,432.<sup>9</sup> DOL under President Trump published a rule that responsibly updated the salary threshold and considered extensive stakeholder feedback before issuing the final rule.

The same cannot be said about the rushed efforts of the current DOL to push through a rule which makes changes as extreme as they are unnecessary. The rule updates overtime requirements under the FLSA and—less than four years after the previous rulemaking—again raises the salary threshold for employees subject to the FLSA to be considered exempt from overtime pay by roughly 55 percent, from the current standard of \$684 per week (\$35,568 annually) to \$1,059 per week (\$55,068 annually).<sup>10</sup> The proposed increase is consistent with the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region published by the Bureau of Labor Statistics, which is currently the South region.<sup>11</sup> The

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<sup>4</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,393 (May 23, 2016).

<sup>5</sup> Nevada v. DOL, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

<sup>6</sup> Nevada v. DOL, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

<sup>7</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,231 (Sept. 27, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Proposed Rule, *supra* note 1, at 62,169.

<sup>11</sup> <https://www.bls.gov/eag/home.htm>.

proposed rule increases the salary threshold for HCEs from \$107,432 to \$143,988, consistent with the 85th percentile of weekly earnings for full-time salaried workers nationally.<sup>12</sup>

Additionally, the rule proposes that the salary threshold for employees to receive overtime based on the specified salary level percentile criteria will be automatically updated every three years.<sup>13</sup>

### **Increased Costs for Small Businesses**

The Small Business Administration's Office of Advocacy recently held a roundtable with stakeholders who will be affected by the proposed rule. DOL has estimated the proposed rule will cost small entities roughly \$4,000 in the first year, with a range of \$2,000-\$140,000.<sup>14</sup> However, many small businesses, nonprofits, and governmental jurisdictions with a population of fewer than 50,000 previously indicated that, should this rule go into effect, it will cost them much more than DOL estimates.<sup>15</sup>

While more information is still needed, preliminary estimates have shown the proposed rule would impose significant regulatory burdens on businesses, limit workplace flexibility, and make it more difficult for workers to earn higher wages and climb the economic ladder.<sup>16</sup> It is misleading to claim, as DOL has<sup>17</sup>, that this proposed rule will result in workers getting a pay raise. In fact, while some employees may earn additional income, the proposed rule will increase compliance challenges for employers, force businesses to scale back hours for many nonexempt employees, and reclassify employees or undergo significant layoffs in order to comply. Small employers who are already dealing with high inflation, a higher cost of labor, and other challenges stand to be hit hard by this rule.

### **Limiting Career Advancement for Employees**

Being considered an "exempt" employee has several benefits. However, under the proposed rule, many employees at businesses of all sizes will no longer be able to pursue professional development opportunities with the same flexibility as exempt employees. Rather than allowing workers to pursue opportunities that will advance their career ambitions and increase their lifetime earnings, employers will be forced to cut hours and pay more attention to timekeeping than their actual investment in employees. The Partnership to Protect Workplace Opportunity states regarding the negative consequences of the proposed rule,

These consequences will be disproportionately borne by entry level workers, particularly those from rural and economically struggling areas or those graduating with degrees that do not traditionally command high salaries. Also,

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<sup>12</sup> Proposed Rule, *supra* note 1, at 62,153.

<sup>13</sup> *Id.* at 62,152.

<sup>14</sup> <https://advocacy.sba.gov/2023/09/14/small-business-virtual-roundtable-meetings-multiple-dates/>.

<sup>15</sup> *Id.*

<sup>16</sup> JAMES SCHERK & RACHEL OGLESBY, AM. FIRST POL'Y INST., PROPOSED OVERTIME RULE WOULD HURT WORKERS, LIMIT FLEXIBILITY (Sept. 19, 2023), <https://americafirstpolicy.com/latest/expert-insight-proposed-overtime-rule-would-hurt-workers-limit-flexibility>.

<sup>17</sup> <https://www.dol.gov/newsroom/releases/whd/whd20230830>.

just because an employee may be reclassified as now eligible to earn overtime is no guarantee that they will actually earn overtime as the DOL presumes. Very likely, their hours will be managed closely to avoid having to pay overtime, so the employee will lose the advantages of being exempt and not earn any more compensation.<sup>18</sup>

### **Damage to Nonprofits and Postsecondary Education**

Colleges and universities have a highly skilled, diverse, complex workforce to manage. Reclassifying employees as nonexempt would reduce flexibility and limit career development and advancement opportunities. Setting up new systems to track employees' hours will make it harder for employers to offer remote work arrangements, and higher administrative costs are likely to force institutions of higher education to reduce services and hike tuition rates. Taxpayers will also suffer with a lower return on investment for federal research grants awarded to academic institutions, where more grant funding will need to be used for administrative burdens, less will be devoted to conducting the research itself.

The proposed rule would also substantially increase costs for nonprofit organizations, reduce donation collections, and make those organizations less competitive in recruiting and retaining employees compared to the private sector. In testimony received at previous hearings on the issue, witnesses from nonprofit organizations expressed concerns with DOL's one-size-fits-all approach.<sup>19</sup> Many nonprofits will be forced to reclassify employees who will face increased restrictions on the hours they can work, thus limiting opportunities and access to flexible work schedules. If employers are forced to increase salaries to comply with the new threshold, the increased costs will hit many nonprofits hard, particularly injuring charitable organizations' ability to collect donations and provide services. A nonprofit employer testified that the Obama administration's 2016 salary threshold would have increased payroll costs "by nearly \$1 million annually, affecting over 50 percent of our workforce."<sup>20</sup>

### **Conclusion**

A new overtime salary threshold coming less than four years after the prior increase is premature and unnecessary. Due in large part to the administration's radical policies, small employers have faced persistent inflation and higher operating costs. These negative effects came after a global pandemic during which they were forced to close their businesses and facilities and stretched them to their limits to find ways to keep employees on the payroll. This is not the right time to add to the still increasing costs of labor, compliance, payroll, and administration. DOL needs to withdraw this harmful rule. DOL should also work with Congress to simplify federal labor

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<sup>18</sup> [http://protectingopportunity.org/wp-content/uploads/2023/10/PPWO\\_Overtime-House-Letter\\_OCT-24-2023.pdf](http://protectingopportunity.org/wp-content/uploads/2023/10/PPWO_Overtime-House-Letter_OCT-24-2023.pdf).

<sup>19</sup> See, e.g., *The Administration's Overtime Rule and Its Consequences for Workers, Students, Nonprofits, and Small Businesses: Hearing Before the H. Comm. on Educ. & the Workforce*, 114th Cong. 9-19 (2016) (statement of Tina Sharby, Chief Hum. Resources Officer, Easter Seals NH, Inc.).

<sup>20</sup> *An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 114th Cong. 243 (2016) (statement of Nancy Duncan, Associate Vice President of Hum. Resources, Operation Smile).

The Honorable Julie A. Su

November 7, 2023

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laws—such as the FLSA—that confuse small employers. Employers need 21st century federal employment laws so job creators find it easier, not harder, to invest in America’s workers.

Sincerely,



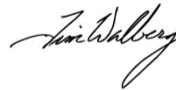
Virginia Foxx  
Chairwoman



Kevin Kiley  
Chairman  
Subcommittee on Workforce  
Protections



Glenn “GT” Thompson  
Member of Congress



Tim Walberg  
Member of Congress



Elise M. Stefanik  
Member of Congress



Rick W. Allen  
Member of Congress



James Comer  
Member of Congress



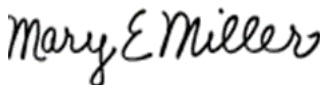
Lloyd Smucker  
Member of Congress



Burgess Owens  
Member of Congress



Bob Good  
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