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The Honorable Jessica Looman
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

VIA ELECTRONIC FILING: www.regulations.gov

RE: Notice of proposed rulemaking, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; RIN 1235–AA39; 88 Fed. Reg. 62152 (September 8, 2023)

Dear Administrator Looman:

The United States Chamber of Commerce (the "Chamber") submits these comments in response to the proposal of the Department of Labor (the "Department" or USDOL), as published in the *Federal Register*, 88 FR 62152, on September 8, 2023, to revise the regulations at 29 C.F.R. Part 541, defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in section 13(a)(1) of the Fair Labor Standards Act ("FLSA"), 27 U.S.C. § 213(a)(1).

The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. An important function of the Chamber is to represent the interests of its members in federal employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces.

The Department's proposed changes to the regulations at 29 C.F.R. Part 541 (the "Part 541" or "white collar" regulations), if finalized, will have significant impact on our members. We write to express our concerns with the Department's proposal and urge its withdrawal.

INTRODUCTION

In general, the Proposed Rule is a rehashed attempt to push through changes to the minimum salary level applicable to the executive, administrative, and professional exemptions in Section 13(a)(1) without legal or factual support creating an untenable situation. As explained in detail below, the Proposed Rule should be withdrawn entirely, given its inability

to satisfy the legal standards applicable based upon the Department's previous failed attempt to increase the salary requirements, and because of the practical implications that the Proposed Rule will have on both employees and businesses alike.

The Proposed Rule would create a monetary hurdle to qualifying for the traditional white-collar exemptions to the FLSA, change the purposes of the salary level, and substitute the Department's notion of "fairness" instead of focusing on what is required or permitted by law. The Proposed Rule: (a) fails to account for the purpose of the minimum salary level; (b) fails to tie the minimum salary level to an appropriate figure or statistic; (c) improperly attempts to increase the minimum salary level automatically every three years; (d) improperly ignores the substantial negative impacts this rulemaking will have on workers, including decreased flexibility remote workers enjoy, a potential lowering of overall take-home pay and benefits packages, and an unwanted change to their professional status; and (e) negatively impacts business operations and the economy, which will lead to increased inflation and costs to consumers at a time when this economy simply cannot handle additional factors pushing inflation up. Any reasonable review of this rule will show that it will cripple small businesses, non-profit employers, and others, who simply cannot keep up with the pace at which this Proposed Rule will increase the costs of business and operation. Finally, the Proposed Rule substantially increases the level of remuneration required to satisfy the Highly Compensated Employee exemption, correspondingly, without meaningful support.

The Proposed Rule completely ignores a critical fact—the salary threshold was not created to set a "fair" salary level for those individuals who may qualify for the white-collar exemptions. It was developed to be a proxy for the distinction between employees performing exempt duties and those not performing exempt duties. Any use of this Proposed Rule (or any salary level) that definitively rules out many employees from the 13(a)(1) exemptions when their job duties would otherwise qualify them for the executive, administrative, or professional exemptions is unlawful and improper, and inconsistent with the intent of Congress under both the FLSA and Administrative Procedure Act ("APA").

The DOL fails to account for the obvious practical impact it will have—workers will lose their ability to work from home and the flexibility they have enjoyed in salaried exempt positions, particularly since the COVID-19 pandemic changed the face of the American workplace in 2020. Whether an employee chooses to work in an asynchronous manner, or simply takes the afternoon off to attend a parent-teacher conference, workers around the country enjoy the flexibility that is provided by being classified as exempt under the white-collar exemptions. The Proposed Rule will jeopardize this freedom because an hourly position simply cannot offer employees the same workplace flexibility.

A dominant theme from the Department's failed attempt to increase the minimum salary in 2016, was that employees who are reclassified from exempt to non-exempt in response to a huge increase in the minimum salary (increasing the minimum salary from the present level of $684 per week to the proposed level of $1,059 is an increase of 55% in just 4 years—let alone the potential increase of nearly 70% if the Department uses its proposed 2024 figures of $1,158 per week or $60,209 for a full-year worker identified in footnote 3 of

the Proposed Rule) could make less money, and they will lose out on opportunities for promotion and pay increases that traditional salaried exempt workers enjoy. In other words, this Proposed Rule provides significant downside, with no benefit to the workers it purportedly intends to help.

For these reasons, and as discussed in detail below, the Chamber urges that the Department reconsiders its proposal and either rescind the Proposed Rule in its entirety or, at the very least, substantially reduce the proposed increases, give employers ample time to implement any final rule, and remove any requirement for automatic increases in the minimum salary level.

DISCUSSION

A. Purpose of a Minimum Salary Level

The Department is presenting a false narrative in the Proposed Rule. The Department suggests that the minimum salary was intended to be a fair salary level for average exempt employees similar to a minimum wage for non-exempt workers. This, however, is simply not historically accurate and is not the purpose of the minimum salary level. To fully realize the purpose of the minimum salary level, the exemptions themselves and the inclusion of a pay requirement must be viewed in their historical and statutory contexts. The proposal violates both the FLSA and APA.

1. Purpose of the FLSA's Overtime Requirement

The FLSA, enacted by Congress in 1938 during the Great Depression, generally requires covered employers to pay their employees at least the federal minimum wage (currently, $7.25 per hour) for all hours worked and overtime pay at one and one-half times an employee's regular rate of pay for all hours worked over 40 in a single workweek.[1] The overtime provision, however, serves a different purpose. As stated by the U.S. Supreme Court:

> By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.[2]

The "Maximum Hours" requirement as enacted reflects the primary objective. To the extent the objective was two-fold, they were consistent: "The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health."[3] The payment of overtime as an objective is necessarily subordinate because it is in direct conflict. On the

[1] 29 U.S.C. §§ 206 (minimum wage), 207 (overtime).
[2] See Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 577-78 (1942).
[3] Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48 (1943).

other hand, the "Minimum Wages" section reflects Congress' objectives with respect to wage regulation. Indeed, "the form of the act itself in setting up two sections of standards, Section 6 for wages and Section 7 for hours, emphasizes the duality of the Congressional purpose" in enacting the FLSA.[4]

Congress recognized, however, that these requirements *would not* and *could not* further the reduction in hours goal *universally* due to the nature of some work. As a result, the FLSA has come to incorporate dozens of partial or complete exemptions from the Act's overtime requirements—including, from the outset, the white-collar exemptions.

2. Purpose of the White-Collar Exemptions

Congress included the white-collar exemptions at Section 13(a)(1) of the original 1938 Act. Though it has been slightly revised over the years, at its essence the law always has exempted from both the minimum wage and overtime requirements any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman.[5] The law always specifically authorized the Department to define and delimit such terms within its role as an executive-administrative agency.[6] Even so, the Department has not operated in a vacuum. It sees these exemptions as being premised on two policy considerations grounded in legislative history:

> First, the type of work exempt employees perform is difficult to standardize to any time frame and cannot be easily spread to other workers and 40 hours in a week making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. Second, exempted workers typically earn salaries well above the minimum wage and are presumed to enjoy other privileges to compensate them for their long hours of work. These include, for example, above-average fringe benefits and better opportunities for advancement setting them apart from nonexempt workers entitled to overtime pay.[7]

Even presuming that wages are an appropriate consideration in defining the exemptions, by the Department's own terms it is not a determinative one.[8]

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[4] *Id.* at 578 (observing that the structure of the statute supports the position that the FLSA was designed to combat two related but distinct evils: "the evil of 'overwork' as well as 'underpay.'").
[5] 52 Stat. 1060, 1067 (June 25, 1938); 29 U.S.C. § 213(a)(1).
[6] *Id.*
[7] 88 FR 62152, 2023 NPRM at 62154, *citing* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981). *See also* Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 FR 22122, 22124 (April 23, 2004) (hereinafter "2004 Final Rule").
[8] The Chamber notes an emerging debate about whether the FLSA permits the use of a salary threshold led by Justice Kavanaugh's comment (joined by Justice Alito) in his dissent in *Helix Energy Sols. Grp., Inc.* wondering whether the Department's regulations identifying a salary threshold are "inconsistent with the Fair Labor Standards Act." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 67–68 (2023) (Kavanaugh, J., dissenting).

3. Role of the Pay Requirement

The Department first issued regulations to define and delimit the white-collar exemptions on October 20, 1938, at 29 C.F.R. Part 541. The original regulations, only two columns in the Federal Register, established the job duties employees must perform to qualify for the exemptions and set a minimum salary level for exemption at $30 per week, which since being set, has increased only *eight* times in eighty-five years.[9] In comparison, the Final Rule containing the current minimum salary level ($684 per week) was published less than four years before this Proposed Rule.[10]

Since 1940, the Part 541 regulations have included three tests that employees must meet before qualifying for exemptions: *First*, the employees must have a primary duty of performing the exempt executive, administrative, professional, computer or outside sales job duties.[11] *Second*, employees must be paid at least a set amount on a "salary basis." An employee is paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[12] *Third*, that set amount paid must meet the minimum threshold.[13]

As noted above, the legality of an enforceable pay requirement incorporated for most white collar exempt employees is debatable, but the role it has played is clear.[14] For as long as the overtime requirement and these exemptions have existed, the mere existence of the pay requirement certainly and *continuously* has made at least *some* employees *in*eligible

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[9] 3 FR 2518 (Oct. 20, 1938); 5 FR 4077 (Oct. 10, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 29 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7091 (Feb. 19, 1975); 69 FR 22122 (April 23, 2004); 84 FR 51230 (Sept. 27, 2019).

[10] The period from 2015-2019 will be discussed elsewhere. Since 2019, however, the landscape for employers has changed dramatically due to the COVID-19 pandemic and the inflation that followed, creating a substantial cost increase to employers in nearly all areas.

[11] 29 C.F.R. § 541.100 (executives); 29 C.F.R. § 541.200 (administrative employees); 29 C.F.R. § 541.300 (professionals); 29 C.F.R. § 541.400 (computer); 29 C.F.R. § 541.500 (outside sales); 29 C.F.R. § 541.601 (highly compensated employees).

[12] Notably, teachers, doctors, lawyers, and outside sales employees are not subject to the salary level and salary basis tests discussed. 29 C.F.R. § 541.303(d) (teachers); 29 C.F.R. § 541.304(d) (doctors and lawyers); 29 C.F.R. § 541.500(c) (outside sales). In addition, exempt computer employees may be paid by the hour. 29 U.S.C. § 213(a)(17); 541.29 C.F.R. § 541.400(b). A variety of exemptions enacted elsewhere in the FLSA do not include *any* pay-related requirement. Such a precondition is the exception, not the norm, for FLSA exemptions. Further, where the commonly-relied upon overtime-only exemption at Section 7(i) of the FLSA has a pay component, that is a *statutory* requirement set forth by *Congress*. Section 13(a) contains no similar language nor any indication that pay should be a factor.

[13] These three parts are set forth in the NPRM at 62154, but in a distinctly different order that exemplifies the misplaced emphasis on an employee's pay. Moreover, the description of the salary *basis* test, as well as the Department's use of the term "salary" alone to refer to it, is too restrictive in its focus on a traditional salary. To the extent reference is made to "salary" in the Chamber's comments, it specifically includes other guarantee arrangements that meet the salary basis test.

[14] *See Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 67-68 (2023).

despite otherwise qualifying for an exemption via the duties test.[15] In contrast, *never* has a *single* employee been made *eligible* for a white collar exemption because of a lower threshold, even during times that, according to the Department, the requirement has been outpaced by wages to the point of being allegedly ineffective.

To the extent that the intertwined pay requirement has *any* legitimate purpose, the Proposed Rule's minimum salary level exceeds it. The stated purpose of the salary level test is to provide a ready method of "screening out the obviously nonexempt employees."[16] Specifically, "[t]he salary tests in the regulations are 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."[17] Thus, while there is some authority that the salary level selected may "deny exemption to a *few* employees who might not unreasonably be exempted," the Department ignores congressional intent to its peril by setting the minimum salary level for the applicable exemptions so high as to bar millions of otherwise exempt employees because the salary level should not be set at a level that would result "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."*[18]

4. Prohibited Purpose For the Minimum Salary Level

In light of this context, what *cannot* be the purpose of any salary threshold is likewise clear. Section 13(a)(1) of the Act *exempts* executive, administrative, and professional employees from the FLSA minimum wage and overtime requirements. Thus, although Congress granted the Department authority to define and delimit the white-collar exemptions, the agency has long acknowledged that it "is *not authorized* to set wages or salaries for executive, administrative and professional employees. Consequently, improving the conditions of such employees is *not the objective* of the regulations."[19]

The Department's touting of the Proposed Rule as an effort to "restore and extend overtime protections" and "guarantee overtime pay" reflects an inappropriate framework or, more accurately, its unsuitable frame of mind for the task at hand.[20] The Department's

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[15] This is not an overstatement. To illustrate, there are entrepreneurial individuals who perform these duties but seek a small ownership stake and the opportunity for financial growth—not the steady income the Department's exemptions require. Requiring even one cent be paid on any basis excludes employees that fit squarely within the two policy considerations accompanying the Proposed Rule.

[16] 1949 Weiss Report at 8. *See also* 1958 Kantor Report at 2-3 ("They furnish a practical guide to the *investigator* as well as to employers and employees in borderline cases, and *simplify enforcement*.") (emphasis added).

[17] 1949 Weiss Report at 11. *See also* 1958 Kantor Report at 2-3.

[18] 1949 Weiss Report at 6 and 9 (emphasis added).

[19] *Id.* at 11 (emphasis added).

[20] *See Department of Labor Announces Proposal to Restore, Extend Overtime Protections for 3.6 Million Low-Paid Salaried Workers* (Aug. 30, 2023) https://www.dol.gov/newsroom/releases/whd/whd20230830.

approach violates not only the FLSA, but also the APA. Under the APA, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."[21]

To the extent that the Department views the question as one of protection or fairness, these might be laudable, collateral results of the rulemaking…but they are not considerations to be found in Section 13(a)(1). Instead, the Department's *sole* responsibility and *only* authority is to define and delimit the exemptions as a means of carrying out *Congress'* judgment by "*amplifying and describing more precisely the type of employees to whom the exemption would be applicable*."[22] This entails nothing more or less than articulating the nature and essential qualities of, that is, the descriptive characteristics of, employees employed in the relevant capacities. Any explicit or implicit concern regarding the amount of an exempt employee's pay is a legitimate pursuit only for the purpose of excluding those who are obviously non-exempt. It cannot be overemphasized that endeavoring in any way to facilitate employees' monetary betterment is a fundamentally different matter of policymaking to be addressed, if at all, by Congress. The Department is not authorized to set pay directly or tailor the enumerated factors with the *aim* of increasing the wages of exempt employees or otherwise affecting the wages received by those rendered non-exempt. The salary threshold is merely a proxy for the duties test.

Accordingly, "[a]ny increase in the salary levels from those contained in the present regulations must, therefore, have as its primary objective the drawing of a line separating exempt from nonexempt employees rather than the improvement of the status of such employees."[23] The Chamber submits that, as further discussed herein, the Department has failed that primary objective by proposing a minimum salary level that will be found to have eclipsed the duties tests (just like it did in 2016), in the pursuit of increasing compensation for exempt employees.

B. The Proposed Minimum Salary Level is Unsupported by Data and History

The Department proposes to increase "the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South)", which it pins at $1,059 per week or $55068 per year. Footnote 3 to the Proposed Rule, however, expressly concedes that this weekly salary figure is just a placeholder of sorts, and that the faulty data being relied upon by the Department could conceivably result in a minimum salary that exceeds $60,000 for a full-year employee by the time the Department publishes a Final Rule.[24] The Department relies upon data that does not provide meaningful information about salaried exempt workers, while ignoring relevant geographic and industry

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[21] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2).

[22] 1940 Stein Report at 2 (emphasis added).

[23] 1949 Weiss Report at 11. *See also* 1958 Kantor Report at 2-3.

[24] 2023 NPRM at 62152-53.

factors and then justifies the end results by trying to compare this information to dated standards related to duties tests that have not existed for almost two decades.

1. The Department's Reliance Upon Faulty Statistics

Regulations of "general applicability . . . must be drawn in general terms to apply to many thousands of different situations throughout the country."[25] As the Department stated in 1949: "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."[26] Thus, to avoid excluding millions of employees from the exemption who do perform exempt job duties, the Department has recognized that:

> The same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries.[27]

As discussed in more detail below, the Department's proposal to increase the minimum salary level for the white-collar exemptions based on the 35th percentile of earnings for non-hourly workers—resulting in a minimum annual salary level of at least $55,068—acknowledges but then ignores these accepted purposes and principles with little or no justification.[28] In the past, the Department has used data limited to exempt employees.[29] Today, the Department uses earnings data for all "non-hourly" paid employees, whether the

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[25] 1949 Weiss Report at 9 (emphasis added).

[26] *Id.* at 11.

[27] 1958 Kantor Report at 5. *See also* 1940 Stein Report at 32 ("Furthermore, these figures are averages, and the Act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude."); 1949 Weiss Report at 11-12 ("Any new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees."); 1949 Weiss Report at 14 ("Consideration must also be given to the fact that executives in many of the smaller establishments are not as well paid as executives employed by larger enterprises."); 1949 Weiss Report at 15 ("The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption.").

[28] To be clear, the Chamber is not advocating for multiple thresholds at this time. The lines between different industries, geographical areas, and the abundance of remote work have only become more blurred in recent years and multiple thresholds would leave some employers with no choice but to apply the highest threshold to ensure compliance. The Chamber is, however, advocating that the Department ensure that the single threshold be low enough to account for *all* of these variances and not cripple small business, non-profits, and others.

[29] Even this pool has been too limited, however, because it did not include the *lower* salaries of employees deemed non-exempt *despite* meeting the duties tests. See 2023 NPRM 62161 ("To set the salary levels, the Department considered data collected during 1955 WHD investigations on the 'actual salaries paid' to employees who 'qualified for exemption' (*i.e.*, met the applicable *salary and duties* tests in place at the time)") (emphasis added).

employees meet any duties tests, another exemption, have a combination of pay components, etc., with no reasonable basis for distinguishing salaries of exempt versus non-exempt employees. In the past, the Department also has looked to salaries of exempt employees in the lowest-wage region, the smallest size establishment group, the smallest-sized city group, and the lowest-wage industry. Though the Department has limited its data to the lowest-wage region, it ignores the disproportionate impact that doing so will have for employers falling in these other groups within and outside of the South. Further, the Department previously has looked to the 10th, 15th, and 20th percentiles of exempt employee salaries. Presently, the Department proposes using the 35th percentile of earnings (of this irrelevant pool) based on the mistaken justification that the current standard duties tests are fundamentally the old "short" tests. On the whole, the Department's result-oriented methodology cannot be relied upon to support the proposed annual $55,068 minimum salary level. Instead, the minimum salary level should not be increased at this time as employers attempt to reach a balance after the conclusion of the pandemic, and any future increase should not only be limited by the Department's Congressional mandate, but, when enacted, must rely upon better data, and at a minimum, continue reliance upon the 20th percentile of available wage data (at the highest).

a. The 35th Percentile is an Outlier

With few exceptions, the Department has historically set the minimum salary level for exemption by studying the salaries actually paid to exempt employees and setting the salary at no higher than the 20th percentile in the lowest-wage regions, the smallest size establishment groups, the smallest-sized cities, and the lowest-wage industries. A brief summary is warranted.

- In 1949, the Department set a salary level lower than the data indicated to account for lower-wage industries and small businesses.[30]
- The Department set the salary level in 1958 so that "no more than about 10 percent of those in the lowest-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."[31]
- In 1963, the Department increased the salary level to "bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958."[32]
- The Department adopted a minimum salary level for executives of $125 per week in 1970, when salary data indicated that nationwide "20 percent received less than $130 per week, whereas only 12 percent of such executive employees in the

[30] 1949 Weiss Report at 12-15.

[31] 1958 Kantor Report at 7-8.

[32] 28 FR 7002, 7004 (July 9, 1963).

West and 14 percent in the Northeast received salaries of less than $130 per week."[33]

- The Department returned to this trend in 2004.[34] It set the minimum salary level at $455 per week, the 20th percentile for salaried employees in the South region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the "short" and "long" test structure and because the data included nonexempt salaried employees."[35]
- Finally, in 2019 the Department ultimately followed the 2004 methodology and set the minimum salary level at $684 per week (annualizing to $35,568)—equal to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail sector nationwide.[36]

The Proposed Rule's departure from the 20th percentile in favor of the 35th percentile reflects a resurrection of the failed rationale from 2016 when the Department attempted to use the 40th percentile.[37] In a nutshell, the Department's methodology targets a minimum salary level (1) close to what the pre-2004 short test would have produced as applied to contemporaneous data or (2) at least above what the pre-2004 long test would have produced. Though the Department has selected a somewhat lower percentile than in 2016, its continued hyper-focus on the old "two-test system" is unsound.[38]

b. Consolidation of the "Long" and "Short" Tests to Reach the 35th Percentile Is Indefensible

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[33] 35 FR 883, 884 (Jan. 22, 1970).

[34] In one instance, the Department based a rushed salary increase on the Consumer Price Index, rather than a percentile, but also stated that the increase was not "to be considered a precedent."40 FR 7091, 7092 (Feb. 19, 1975).

[35] 2004 Final Rule at 22168-69 & Table 3.

[36] 2019 Final Rule at 51260 & Table 4.

[37] That rule faced immediate legal challenges and was enjoined nationwide in *Nevada v. United States Department of Labor*, 218 F.Supp.3d 520 (E.D. Tex. Nov. 22, 2016). In that case, Judge Mazzant found that raising the minimum salary level to $913 per week, a rate well below the current level in the Proposed Rule, constituted an unlawful exercise of authority by the Department because such a high minimum salary level would supplant the duties test, thus exceeding the Department's delegated authority from Congress. The Court also found that setting the minimum salary level at $913 per week was not a permissible construction of the Fair Labor Standards Act and did not comport with Congress's intent because it was not set low enough to screen out only the obviously non-exempt employees, stating "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption." *Id.*, at 531.

[38] The Department proceeds as though not only would *any* employee falling below the long test's minimum salary level fail to meet the long test's duties, but as though *any* employee meeting the short test's minimum salary level from 1949 to 2004 would have failed to *meet* the long test's duties simply because the employer was not required to establish it in those instances.

To the extent that eliminating the "two-test system" should guide the setting of the "one-test system" minimum salary level, that was done in 2004. The Department's assertion that the 2004 salary level was too low to adequately compensate for changes in the duties is a stale point and problematic for several reasons.

The 1958 data did not include retail employees, who generally earned less than the production employees who were included in that data.[39] Thus, an expanded 1958 data set that had included retail employees would have yielded a lower dollar threshold corresponding to the 10th percentile than the dollar threshold actually recommended in 1958 making extrapolation from 1958 data without some kind of reduction to the percentile unsupportable.[40]

In addition, the 2004 standard duties tests are not an exact equivalent to the old "long" or "short" tests. For example, the pre-2004 "short" test for the executive exemption required only that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly directing the work of two or more other employees.[41] The 2004 regulations added a third requirement: "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."[42] Thus, in 2004 the standard duties test for the executive exemption became more difficult to meet than the "short" test. The rationale provided for the proposed methodology for increasing the salary level ignores that the Department painstakingly evaluated the exemption tests as a whole at that time.

While the current standard duties tests do not include a 20 percent restriction (40 percent in retail or services establishments) on work activities that are not directly related to an employee's exempt duty, this does not have the significance that the Department currently would give it. The emphasis placed on this aspect fails to appreciate the continued importance of the "primary duty" principles, the application of which includes analysis of non-exempt work performed and its relation to the employee's exempt work.[43]

Relatedly, because of the 29 years that passed between the salary level increases of 1975 and 2004, the salary levels for exemption under the "long" duties tests, on which the Department so heavily relies in selecting a higher percentile, were below the minimum wage for a 40-hour workweek beginning in 1991 (when minimum wage increased to $4.25 per hour).[44] Essentially, as the Department acquiesces, the "short" duties tests were the only

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[39] *See, e.g.,* 28 FR at 7005; 28 FR at 9506.

[40] Perhaps most instructive is that the Department rejected salary levels specific to retail employees at the 29th and 32nd percentiles, instead adopting salary levels at the 13th and 19th percentiles. 28 FR at 7005.

[41] 68 FR 15560 (April 23, 2003).

[42] 29 C.F.R. § 541.100.

[43] 29 C.F.R. § 541.700 (primary duty); 29 C.F.R. § 541.702 (exempt and nonexempt work).

[44] This is particularly significant given that the one basis given for looking at an exempt employee's pay is in relation to the current federal minimum wage. Report of the Minimum Wage Study Commission,

relevant tests functioning to distinguish between exempt and non-exempt employees long before 2004.[45] The Department's reasons then for not returning to a 20 percent restriction, defunct for 25 years, are even more compelling today.[46]

Even without these significant faults in its analysis, the Department has failed to justify looking to the 35th percentile any more than it could justify the 40th percentile in 2016. The Department does not appear to have seriously considered basing the minimum salary level on lower industries, rural areas, charitable and/or non-profit entities, small businesses, or other employers that often struggle to compete in a tight labor market (such as public employers). Nor did the Department adequately explore options other than the percentile method. The 35th percentile methodology is an outlier—reverse engineered to achieve a pre-determined, desired result. Simply stated, this result failed judicial challenge in 2016, and it is likely to fail judicial challenge again if the Proposed Rule is not withdrawn, resulting in a significant expenditure of money and time for a predictable result.

2. Identifying the Relevant Data

While the Department hopes to have cleared the obstacles presented by its failed 2016 Final Rule, this attempt does not pass any such muster. To have any hope of properly defining and delimiting these exemptions with a salary basis requirement and a minimum salary level that does not eclipse the accompanying duties test, the Department must be precise in gathering and describing the relevant data and narrowing that data until it is funneled down to the relevant salaries in light of both the Department's narrow directive and the cautions highlighted in most prior rulemakings. As such, the Department should rely on data that focuses on the following:

Relevant Employers:[47]

- Limit the pool of employers to the lowest-wage Census Region (such as the South).
    - Limit the pool of employers to those in rural areas.
        - Limit the pool of employers to those in the lowest-wage industries (such as retail).
            - Limit the pool of employers to the lowest-wage types of entities (such as small businesses, small non-profits or small public employers).

Volume IV, pp. 236 and 240 (June 1981) (typically salaries are well above the federal minimum wage). Notably, the Department cannot wholly ignore the current federal minimum wage in doing so, even if it believes it is ineffective in areas. That said, this reference to minimum wage in exemption-related authorities should not be misconstrued as meaning the minimum salary level is a minimum wage for salaried-exempt employees.

[45] 2023 NPRM at 62164 and 62177.

[46] 2004 Final Rule at 22126-28.

[47] The Department claims to have weighed these factors to varying degrees in different rulemakings but seems to consistently miss the point that "salaries in the South" and "salaries in retail" are not the same as "salaries in retail in the South."

Relevant Employees:[48]

- Limit the pool of employees to those meeting the *duties* test for one of these exemptions *and* being classified as exempt on that basis.
    - Limit the pool of employees to those paid on a salary basis and for which the pay requirement would apply.[49]
        - Limit the pay to the portion paid on a salary basis[50] and, thus, excluding all other forms of pay that might be wholly unrelated or exceed the predetermined amount (in the case of a traditional guarantee relied upon to meet the salary basis requirement).
- Likewise evaluate those meeting a relevant duties test but not being classified as exempt on this basis, in a manner such as:
    - Group A: Salary meets the minimum salary level but another exemption also applies.
    - Group B: Salary meets the minimum level but the employer is foregoing all federal exemptions (e.g. – misinformed, cannot meet state law exemption, other business decision, etc.).
    - Group C: Salary falls below the current minimum level.

Painstaking effort should be taken to exclude employees that (regardless of salary) do not meet any of the duties tests. Only after focusing on the relevant data pool, and against this background, should the Department look to percentiles or other factors. But the Department admits that its proposal would ensure that millions of currently exempt employees gain overtime protection, even though they should qualify for the overtime exemption based on their duties.[51] The fact that millions of white-collar employees would qualify for the exemption based on their duties, but do not qualify for the exemption because their salary level, confirms that the proposal's salary level is not an adequate proxy for the duties test.

C. Total Annual Compensation Requirements for the Highly Compensated Employee Exemption

The Chamber's criticisms of the minimum salary threshold apply with equal force to the Department's rationales relating to its minimum-compensation proposal for the highly-

[48] Non-hourly is not the same as salary; salaried and exempt is not the same as salaried-exempt; and so on.
[49] For example, this would exclude teachers, but also would exclude doctors and lawyers.
[50] This data would remain relevant to the total annual compensation requirement, but that is only relevant to employees meeting the minimum salary level because the highly-compensated employee exemption requires both.
[51] 88 Fed. Reg. at 62154.

compensated-employee exemption.[52] The Department's proposal to increase the total annual compensation required under this variation of the exemptions to the 85th percentile of full-time salaried workers nationally (annualized to $143,988, but apparently due to increase in the final rule based upon footnote 3 to the Proposed Rule). The Department should likewise use an appropriate data pool as discussed above before considering a percentile or other factors.

While total annual compensation, as opposed to just salary, would be measured, this pool should likewise be limited to salaried-exempt employees given that the highly-compensated-employee exemption is limited to employees meeting both aspects of the salary test. For example, the total annual compensation of an exclusively commissioned employee meeting the overtime-only exemption at Section 7(i) or Section 13(b)(10) is wholly irrelevant to the inquiry.[53]

Moreover, even taking the data as relevant, the Department only addresses why the current threshold ($107,432) is outdated—not why the percentile should jump from 80 to 85. The fact that the Department sees this difference as "high enough to exclude employees who are not 'at the very top of [the] economic ladder'" does not address whatsoever why the 80th percentile— currently $125,268—would be insufficient to accomplish this.[54]

D. The Proposal To Automatically Increase The Salary Level Every Three Years Is Unlawful and Improper

The Department should not automatically update the minimum salary level going forward. Doing so would disservice some of the very interests the Department has historically sought to promote. In addition, other rationales that have been articulated and reiterated in favor of this concept remain unwarranted or unsupported; outweighed by other considerations; and fraught with both entirely-foreseeable adverse results as well as the very-real potential for unforeseen and perhaps unintended consequences.

Fundamentally though, indexing the minimum salary level with required automatic increases is unlawful under both the FLSA and APA. Congress tasked the Department with revisiting these exemptions "from time to time by regulations of the Secretary subject to the provisions of [the Administrative Procedure Act]"[55] Congress has never stated that it

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[52] In addition to having to meet the HCE salary threshold, to be exempt a HCE must also "customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard tests for exemption." *See,* Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), Wage and Hour Division, U.S. DOL, https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime.

[53] Neither of these exemptions has a similar pay requirement. Section 13(b)(10) has no pay requirement beyond minimum wage. Section 7(i) has a somewhat higher pay requirement (1.5 times the minimum wage) but, depending on the pay structure and amounts, a salary could have *negative* implications in that analysis.

[54] 2023 NPRM at 62159, quoting, 69 FR 22169 & Table 3.

[55] 29 U.S.C. § 213(a).

intended for the minimum salary level to be indexed. In fact, Congress has previously considered, but not enacted, a proposal to index the salary level.[56] This is an express recognition that (1) any indexing of the minimum salary level requires congressional action; and (2) that Congress has decided it does not have any interest in doing so (or at least that it did not have any such interest in 2012). Furthermore, there is nothing in the regulatory history of Part 541 that offers precedential support for the type of indexing proposed by the Department. In fact, in 2004, the Department rejected indexing as contrary to Congress's intent and creating negative, adverse consequences, stating "the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act[.]...The Department believes that adopting such measures in this rulemaking is both contrary to congressional intent and inappropriate."[57]

Automatically increasing the minimum salary thresholds every three years would also violate the notice-and-comment rulemaking requirements of the APA. The "notice-and-comment provisions of the APA enable the agency promulgating a rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1299 n.9 (5th Cir. 1983). The proposed rule's indexing provision fails to comply with the FLSA because it does not follow the requirements of the APA expressly incorporated by reference into 29 U.S.C. § 213(a)(1). Under that provision, the only power granted by Congress is the authority to define and delimit the exemption "by regulations" promulgated "subject to" the requirements of the APA.

In addition to it being unlawful, the automatic increase proposed by the Department is contrary to its longstanding view that "the line of demarcation" provided by the salary threshold "cannot be reduced to a standard formula."[58] Yet that is precisely what the "update" mechanism involves: indexing the salary every three years, in perpetuity, using nothing more than "a standard formula."

As in the past, the Department has referred to the historically uneven and sometimes lengthy intervals between adjustments in the salary levels. But this merely had to do with how the Department has allowed this aspect of its Section 13(a)(1) responsibilities to languish. To put it charitably, the Department's record of inaction for decades is no adequate justification for such a historically unprecedented change. Indeed, the Department does not give itself sufficient credit for more frequent evaluations in the last two decades. The approach expressed in the 2019 Final Rule is the right one: more frequent assessments of whether it is, in fact, time to undertake an evaluation.

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[56] *See* The Rebuild America Act, S. 2252, 112th Cong. (2012) (proposing to match the salary level to "the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers").

[57] 2004 Final Rule at 22171-172.

[58] 80 Fed. Reg. 38527.

Furthermore, an automatic update assumes that whatever method is used to devise a minimum salary that effectively "identifies exempt employees" now will remain an accurate indicator of exempt status for the rest of time. But over the last 75 years, the methodology has evolved. Given this history, it would be a considerable act of hubris to assume that the Department has found the perfect method for calculating the minimum salary level this time, and that no further revision will be necessary, particularly given how closely the Proposed Rule follows the 2016 Final Rule that was enjoined.

In fact, any percentile method of the sort used now will itself skew the data upon which it relies to "identify exempt employees" when it establishes a new minimum salary level. For example, assume that the Department sets the minimum salary level as the 35th percentile of "salaried workers" as proposed. Employers are likely to respond by overwhelmingly (1) converting employees who have been paid on a salary basis at less than the minimum threshold to nonexempt, hourly-paid ones; and/or (2) increasing the salaries of employees who will remain exempt to at least the minimum threshold, along with raising the salaries of more-highly-paid employees to prevent or mitigate compensation-compression.

The first option will necessarily reduce the proportion of exempt employees paid on a "salary basis" in the pool the Department uses to "identify exempt employees."[59] The second will substantially increase the amount which that remaining pool is paid. The Department's approach will thus result in a smaller group of "salaried workers" (even if restricted to an appropriate pool) who are in turn paid at higher salary levels, thereby artificially and unduly influencing the minimum salary levels used to compute the new minimum salary for exempt status. Indeed, many employers will conceivably begin making these moves based on estimates in anticipation of these changes each time, which will also serve to taint the calculation. The result will be that tomorrow's 35th percentile and its corresponding salary will be an even poorer proxy for the actual work performed by exempt employees because the measure itself will drive the outcome from the start and then increase dramatically over the course of time.

Perpetuating the indexing approach would also mean that the Department has abandoned its responsibility for making substantive judgments about the inflationary effects of threshold increases, including as to lower-wage areas and economic sectors.[60] The impact would be especially pronounced in a period of high inflation and will undeniably contribute to inflation, perhaps sending the economy into a further inflationary spiral. Nor would this effect be limited to the amount of the jump in the minimum salary itself; that move would also spark increases for others (so as to avoid compression) and other compensation and benefit components keyed to salary figures.

The Department's proposal takes what it has made as a highly-important aspect of the exemptions' application and puts it on autopilot for an indefinite period of time. If footnote 3

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[59] As we have discussed, the pool used for this data is substantially mismatched with the question at hand. It is easy for the Department to obtain, but it will serve as a poor proxy at any time.

[60] *See, e.g.*, 69 Fed. Reg. 22168 (April 23, 2004); 40 Fed. Reg. 7091 (February 19, 1975).

of the Proposed Rule provides accurate representations of the increases to salary that can be expected from 2022 data to 2024 data, the minimum salary level will increase over $4,000 in only two years. If the minimum salary level increases by $6,000 every three years, the minimum salary will be set at roughly $66,000 after the first automatic increase, and nearly $80,000 within less than 10 years.[61] This would have the Department's minimum salary level higher than any state's current minimum salary level, and undeniably eliminate the relevance of any duties test in the regulations.

The simple fact is, to be consistent with the FLSA and the APA, the Department must analyze the purpose of the minimum salary level and issue a proposed rule to increase that level, which is subject to publication as a proposed rule, a comment period, followed by agency review (oftentimes further revision), and finally, a final rule any time the Department believes an increase in the salary level is in order. The Department has no authority to evade this process to implement an automatic increase. This proposal should be abandoned.

E. Practical Implications The Department Must Consider

The Department has not given appropriate weight to the analysis of the negative practical implications that result from the Proposed Rule, nor has it considered the impact that the current timelines of implementation will have on businesses that have structured their operations in reliance on the current overtime rule. Whenever the Department changes course, as it proposes to do here, the Department must acknowledge the change, provide a reasoned explanation for changing course, and consider significant reliance interests in the agency's prior approach.[62]

1. The Proposed Rule Will Negatively Impact The Economy and Employers

The Department has not given appropriate consideration to the profound adverse impact that this Proposed Rule will have on the American economy. If the Proposed Rule is enacted as written, these negative repercussions will undoubtedly lead to broad national and global concerns, including the rising prices of goods and services, fluctuating employment rates, and rampant inflation.

The effectiveness of the Proposed Rule presumes that most U.S. businesses enjoy substantial profit margins and can easily afford to increase payroll costs while still balancing the books. However, studies suggest that the opposite is true—99.9% of U.S. businesses are small businesses, over 33.2 million of them—and the average salary of a small business owner is just 3% over the annual mean wage in the U.S. at $58,260.[63] The Proposed Rule will leave many of these employers in an untenable dilemma. The small business that seeks to keep its current staff of employees in the same roles, duties, and work schedules will be forced to

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[61] *See* 88 FR 62152, n.3.

[62] Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[63] Kelly Main, Small Business Statistics of 2023, Forbes.com (Dec. 7, 2022), https://www.forbes.com/advisor/business/small-business-statistics.

raise the wages of its exempt employees to meet the modified minimum salary threshold. However, this increase to employer payroll costs, an increase that is both considerable and abrupt, contains no magic bullet for the small employer to recover commensurate income and have the margin to afford these hikes. As a result, these businesses will be forced to raise the costs of their goods and/or services if they stand any hope of retaining staff and remaining in business.

The pressures on charitable nonprofits would be even more severe. By necessity, these charities need key employees to be exempt as they often work irregular and long hours devoted to their missions. These are employers who rely on donations to maintain their operations and are unable to increase revenues to cover increased costs. During the comment process for the 2016 rule many nonprofits described how the increased salary threshold would force them to provide fewer services to those in need. Groups such as Operation Smile and Habitat for Humanity submitted comments detailing how they would not be able to help as many people.[64] The same is true for cities and municipalities who rely on taxes and will be unable to budget for higher labor costs.

Finally, even large employers will face disruptions and challenges from the increased salary threshold. Members of the Chamber have described how entry level positions, but clearly exempt, employees in lower income areas of the country will be jeopardized. These companies compete in a global economy and may choose to higher fewer of these employees or send these jobs overseas. These jobs are often driven by customer contracts that cannot be adjusted midway to accommodate higher labor costs.

2. The Proposed Rule Will Eliminate Worker Flexibility And Negatively Impact the Workforce

The economic impact described above focuses on the rising prices and rising inflation rates that would result from a business's reasonable choice to increase an employee's salary in order to maintain that employee's exempt status. But alternatively reclassifying an employee to non-exempt status has equally negative practice impacts, eliminating the flexibility enjoyed by the formerly exempt employee.

On a practical level, transitioning an employee from exempt to non-exempt status on a mass scale will involve a range of steps that will have ripple effects fracturing the work environment. Employees who are shifting from a salary to an hourly wage[65] lose considerable flexibility to achieve their desired work-life balance. Salaried employees generally can work on their own schedule: in other words, there is no employer discipline for working irregular hours and completing tasks while juggling family responsibilities, so long as the job gets done. On the other hand, hourly wage earners are not oriented toward the completion of tasks but rather the completion of shifts, clocking in and clocking out, while employers are likely to scrutinize their time to ensure that the company is not exposed to overtime payments. It is

[64] See, "DOL's Overtime Rule Hurts Charities & Non-Profits," American Action Forum Insight, May 23, 2016, https://www.americanactionforum.org/insight/impact-dols-overtime-rule-non-profit-services/.
[65] We can assume, arguendo, that the shift is from salary to hourly; even if the employer elects to maintain a non-exempt salary position, the employer will still have to account for employees' hours.

neither unlawful nor uncommon for non-exempt employees to face discipline when they work more than 40 hours per workweek and the employer has mandated that such work be avoided or approved by managers in advance (though paid, regardless). Under the Proposed Rule, employers will increasingly adopt such policies to control hours and maintain costs of newly non-exempt employees.

Moreover, even as remote work diminishes from pandemic-level heights, the possibility of remote work is now permanently normalized and highly desired, at least as an option for some percentage of an employee's workdays. Yet, one of the key lessons of the pandemic was that returning hourly employees to the workplace at higher rates meant they enjoyed less flexibility than their exempt colleagues.

Studies have revealed higher levels of workplace satisfaction and overall job happiness for salaried workers. A Gallup poll found that salaried workers are "substantially more satisfied than hourly workers" in eight of thirteen job areas tested.[66] And, in a *Forbes* article comparing the advantages and disadvantages of hiring employees in salaried or hourly roles, an identified advantage of salaried employees is the ability to "attract employees with a flexible schedule" and a disadvantage of hourly is the inability to maintain employees seeking "autonomy" and "stability."[67]

This underscores a point that is wholly intuitive: workplace cultures are better when employees have more freedom and feel a deeper connection to the company, but hourly employees experience less freedom while their connection to the company is more tenuous.[68] Under the Proposed Rule, employers would be undermining their own work culture and employees would receive diminished benefits only to be paid *the same amount of compensation*, if not less. Thus, the Department must consider that the Proposed Rule will effectively undermine employer discretion, work culture, employee job satisfaction, and broader economic health.

3. The Department Has Provided Insufficient Time For Employers To Implement Any Change To the Minimum Salary Level

A sufficient implementation period is a matter of importance to any FLSA-related change. As the experiences of 2016 Rule revealed, employers that have structured their operations in reliance on the current rule need an appreciable amount of time to determine which employees are actually or potentially affected; to analyze those varying circumstances; to formulate alternative approaches and their ramifications, and to devise measures to ameliorate the impact of actions taken. In many instances, all of this will have to occur *before*

[66] Megan Brenan, Hourly Workers Unhappier Than Salaried on Many Job Aspects, Gallup (Aug. 23, 2017), https://news.gallup.com/poll/216746/hourly-workers-unhappier-salaried-job-aspects.
[67] Dana Miranda & Cassie Bottoroff, Hourly Wage vs. Salary: Differences, Pros and Cons, Forbes.com (Jul. 21, 2023), https://www.forbes.com/advisor/business/hourly-wage-vs-salary/
[68] Paying a non-exempt employee on a salary or other non-hourly basis (or even relying on an overtime-only exemption) does not solve this problem. The reality is that accurate timekeeping can be difficult, and ironically is becoming more difficult because technology has made employees more accessible.

operating budgets can be set for *that* employer's *next* fiscal year. The Chamber submits that at least a twelve-month notice is necessary.[69]

a. Why Additional Time Is Needed

The Department has ignored the time and effort necessary to implement changes in a reasonable manner. Experience has shown, particularly with the hefty increase contemplated in 2016, that employers have a variety of hurdles to overcome in a very short period of time. As a preliminary matter, employers must evaluate how the changes might affect their workforces in the near and intermediate terms, including determining who can continue to be treated as exempt and what the resulting cost will be of salary increases.[70] Employers must engage in the below practices to effectively plan and respond to any proposed increase in the minimum salary level.

Planning Component

For those employees remaining exempt, consider whether an increase would be necessary given the employee's specific pay components, particularly:

- Traditional salary;
- Total-compensation-based guarantee;[71]
- Time-based guarantee;[72] and/or

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[69] This time is needed for each increase, even if the Department erroneously and unlawfully automates the process. While knowing how to approach the changes might become easier for employers with a scheduled update, evaluating the current circumstances, options, costs, etc. at that particular time will not. Moreover, the time it takes to implement the changes, including giving proper notice to comply with many state laws, is substantial regardless. Even a relatively straight-forward change from exempt to non-exempt might take six months to fully implement.

[70] This alone is no small feat even without a regulatory change. Experience shows that an exemption assessment can take a few days, a few months, or even longer. The length of the Department's own investigations bears that out.

[71] The Department continues to portray the "salary basis" as requiring a traditional salary when, in fact, "guarantee" is the operative word. As the Chamber and others have submitted repeatedly since the poorly structured 10% credit was proposed in 2015, an employer can meet the salary basis test based 100% on other forms of payment as long as the guarantee is a predetermined amount set high enough to meet or exceed the minimum "salary" level.

[72] Employees subject to the reasonable relationship test (*i.e.*, those appearing to be paid based on day, shift, hour) will need to be evaluated based on the new minimum "salary" level. The Chamber opposes the proposed figures in 541.604(b) as printed at 2023 NPRM 62240. The figures $330 and $1,100 would make a better example of the 1.5 to 1 ratio permitted and consistent with prior rulemakings. If the Department intends that the more restrictive ratio in the proposed example reflect a change, we object to its attempting to do so in this fashion. A more restrictive ratio, which first appeared in the 2019 Final Rule without notice and appears now in the NPRM without any reference to it whatsoever, has never been subject to notice and comment and is not sufficiently highlighted here to consider it as subject to notice and comment. Though the ratio is not a rigid test, the Department creates confusion by making unnecessary revisions in 2019 or now. *See*, WHD Opinion Letter, FLSA 2018-25 (Nov. 8, 2018) (rejecting a ratio of 1.8-to-1).

- Any combination of these and other components available.

For those employees reclassified as non-exempt:

- Evaluate the application of overtime-only FLSA exemptions that permit extra hours, generally, without any particular pay requirement beyond minimum wage;
- Adopt fluctuating-workweek pay plans, day-rate pay plans, or "9/80" pay plans to minimize the cost of overtime;
- Redesign or eliminate incentive pay components that could require complex overtime calculations;
- Evaluate the ramifications under various policies and benefits plans;
- Invest in timekeeping systems;
- Develop policies to apply to employees accustomed to a more fluid and flexible workday (prohibiting off-the-clock work, requesting overtime in advance, recording all hours worked, waiting time, training time, travel time, meal periods, etc.); and
- Train management on a variety of wage-hour topics that might be new to their units.

Additional considerations *beyond* just impacted employees:

- Determine the extent to reduce or eliminate benefits and other emoluments of employment (such as paid-leave allotments, tuition reimbursement, on-premises meals, transportation supplements, employer provided phones, or child-care paid for or provided, as just a few illustrations) to offset composite increases in labor costs;[73]
- Determine what changes in pricing may be needed to offset labor costs;
- Determine what immediate workforce reductions may be required;
- Determine what hiring freezes or delayed or canceled promotions are necessary;
- Determine whether or to what extent to close establishments or facilities or to postpone or cancel expansion plans;
- Determine whether and to what extent to move work offshore or across borders;
- Determine whether to reduce compensation of nonexempt employees to offset exempt-employee increases;
- Determine whether to combine or eliminate positions and place greater levels of responsibility and work upon the remaining, more-highly-paid positions falling within the exemptions; and

[73] Oftentimes employers must decide whether to reduce or eliminate benefits for the impacted employees (whether experiencing an increase in salary or a move to non-exempt status), an entire class of employees, or company wide as it juggles its workforce's competing concerns and weighs the available options, each likely to be perceived as unfair in its own way.

- Reassess the job duties of other exempt-classified employees to ensure that changes made have not undercut their exempt status.

Execution and Aftermath

- Develop communication plans to explain to employees (especially adversely-affected ones) that these changes were the result of the Department's revisions;
- Deal with substantial, pervasive, adverse morale effects with regard to employees who are no longer treated as exempt and/or those who remained exempt but experienced wage-compression as the result of increased salaries among lower-paid exempt workers;
- Adjust payroll schedules for reclassified employees, including evaluating the timing of payments and related notice; and
- Bear the substantial quantitative and qualitative costs that working-through all of these considerations entails.

The Department must understand that, other policy considerations aside, most employers cannot feasibly implement the kinds of changes that any Final Rule will necessitate (both directly and indirectly), without taking steps that are ultimately detrimental to employee interests. Any suggestions to the contrary simply do not adequately account for the realities facing almost all affected employers. In the end, no harm will come from the Department providing a longer implementation period.

Accordingly, with respect to any increase to the minimum salary threshold and/or total annual compensation figure, whether the result of an individual rulemaking or an automated process, the Chamber advocates a period of at least one year from publication of the exact dollar figure to it taking effect.

b. The Department Should Phase-In Any Substantial Salary Increase

For this initial implementation, if the proposed minimum salary level is finalized, the Department should phase in the salary increase over three years in even, or incrementally larger, steps. This would be similar to the last set of minimum wage increases implemented—notable and with widespread effect but not nearly as intensive of a planning process as changes to the minimum salary level. The phase in, combined with a twelve-month notice at the outset, should permit employers to better prepare their budgets and perhaps even prioritize which positions or departments to undertake first.

F. The Department's Attempts To Include Severability In the Regulation Are Specious

The Department took the unusual step of explicitly including in the regulations that they are to be viewed as severable. Specifically, in Section 541.5 of the Proposed Rule, the Department states:

> If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision must be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding be one of utter invalidity or unenforceability, in which event the provision will be severable from part 541 and will not affect the remainder thereof.[74]

Notwithstanding that this provision implies that the Department anticipates that some or all of the Proposed Rule will be challenged and enjoined in Court, the reality is that the provision is unenforceable and does not provide any meaningful advantage for the Department in a court of law. When courts look at severability questions with respect to legislative action, they ask two questions: (1) is it Congress's intent to have the remainder of the law enacted without any unlawful provision, and (2) whether the remainder of the law is "fully operative as a law."[75] This same test is relied upon in assessing severability in the regulatory context.[76] Courts have applied the same test to determine the effect of severability clauses in both statutes and regulations – the inclusion of a severability clause in a regulation does not create a rule of law, but instead, is merely an aid to a reviewing court because "whatever relevance such an explicit clause might have in creating a presumption of severability... the ultimate determination of severability will rarely turn on the presence or absence of such a clause."[77] In fact, it is quite common for lower courts to simply ignore severability clauses contained in legislation.[78]

Furthermore, as Judge Mazzant previously noted in issuing a nationwide injunction related to the Department's attempts to increase the minimum salary level in 2016, the minimum salary level and the automatic increase proposals are intertwined and the automatic increase provision in the Proposed Rule cannot survive if the increase to the minimum salary level is struck down.[79]

Because the courts essentially apply a *de novo* review in analyzing the enforceability of a severability clause, the Department's use of such a clause here does not further the interests of the Department and it should be withdrawn.

CONCLUSION

As explained in detail above, the Proposed Rule suffers from the same defects that led to an injunction of the 2016 Final Rule and fails to take into account the very real and significant negative impacts that the Proposed Rule will have on employees and businesses alike. The Chamber believes the Department should abandon the Proposed Rule in its entirety to avoid substantial disruption to the workforce in this country.

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[74] 88 Fed. Reg. 62238.
[75] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684.
[76] See K-Mart Corp .v Cartier, 486 U.S. 281, 286-93 (2012).
[77] United States v. Jackson, 390 U.S. 570, 585, n.27 (1968).
[78] Ragsdale v. Turnock, 841 F.2d 1358, 1377 (7th Cir. 1988).
[79] Nevada v. United States Department of Labor, 218 F.Supp.3d 520, 531-32.

If any change to the minimum salary level is contemplated, it cannot and should not deviate from the precedential levels relied upon by the Department, and the Department should make reasonable efforts to identify meaningfully better sources of data before attempting to move forward with any changes. Furthermore, the automatic increases in the Proposed Rule are unlawful and improper and should be abandoned once and for all.

Sincerely,

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