

November 7, 2023

Amy DeBisschop  
Director  
Division of Regulations, Legislation, and Interpretation  
U.S. Department of Labor  
200 Constitution Ave. NW  
Room S-3502  
Washington, DC 20210

**RE: Notice of Proposed Rulemaking, Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees RIN 1235-AA39**

Dear Ms. DeBisschop:

HR Policy Association (“HR Policy” or “Association”) welcomes the opportunity to submit the following comments for consideration by the Wage and Hour Division of the U.S. Department of Labor (“DOL”) in response to the published Notice of Proposed Rulemaking (“NPRM,” “Proposed Rule,” or “Rule”) and Request for Comments regarding defining and delimiting the exemption for executive, administrative, professional, outside sales, and computer employees from overtime requirements under the Fair Labor Standards Act (“FLSA” or “Act”).<sup>1</sup>

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in nearly 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association’s member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy, and submits the following comments for review by the Department.

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<sup>1</sup> 88 Fed. Reg. 62152.

The Association is a leading member of the Partnership to Protect Workplace Opportunity (“PPWO”), a coalition of a diverse group of associations and other stakeholders representing employers from the private, nonprofit, and public sector which collectively employ millions of employees in nearly every industry in the country. As a member of that coalition, the Association is a signatory to the PPWO’s submitted comments and endorses the positions articulated in such comments. The Association submits the following additional comments in this letter to reaffirm its own opposition to the Proposed Rule and to highlight some specific policy concerns with the Rule.

Association members include some of the leading employers in the country and globally, all of whom are fully committed to providing competitive compensation and benefits to all employees. Association members are also committed to providing all possible resources and flexibility to employees to support career advancement. Finally, Association members are committed to full compliance with all labor and employment laws, including the Fair Labor Standards Act.

Unfortunately, the Department’s Proposed Rule creates a rigid, one-size-fits-all and untenable framework for overtime pay (and exemption from same) under the FLSA that directly inhibits employers from achieving all of the above. Accordingly, the Association opposes the Rule and strongly urges the Department to consider significant revisions for any final rule, or to withdraw the Proposed Rule entirely.

- **The Proposed Rule inhibits flexibility for employees.**

Flexible work arrangements have become increasingly important to workers in the wake of the COVID-19 pandemic. Several recent studies calculated the percentage of remote workers

to be as high as 50%, with remote work rates likely to increase in coming years.<sup>2</sup> The proposed salary threshold in the Rule would, overnight, force thousands of remote workers from exempt to nonexempt status. This transition would place an enormous burden on both employers and employees to begin meticulous recordkeeping of work and non-work time, which, for remote employees, is often interspersed over short segments throughout the week. Many remote and hybrid employees regularly engage in non-work activities during traditional “9 to 5” hours, including for childcare and medical purposes. To avoid potential timekeeping and other compliance issues, the Proposed Rule may force employers to require hybrid or remote workers to strictly follow traditional work hour schedules (such as 9 to 5), or even to do away with remote or hybrid work arrangements altogether, which will be less accommodating to personal needs or preferences. The flexibility afforded by hybrid and remote work arrangements – particularly sought after by female employees and working mothers – will accordingly be significantly reduced as a result of the Proposed Rule.

- **The Proposed Rule will result in widespread “demotions” and a decrease in good, entry-level American jobs.**

The inappropriately high salary thresholds contemplated by the Proposed Rule will force employers to transition millions of employees from exempt to nonexempt status. For many employees, in addition to the loss of flexibility, this will be considered a demotion – being an hourly employee required to track your own hours carries a certain stigma for many employees, particularly those who are just entering the workforce. Moving from exempt, salaried status to being paid by the hour will accordingly be met negatively by many employees, as it may feel like a loss of financial stability that they previously had as an exempt employee. This will be

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<sup>2</sup> Dylan Walsh, *How Many Americans are Really Working Remotely?* MIT SLOAN SCHOOL OF MANAGEMENT (June 29, 2023), <https://mitsloan.mit.edu/ideas-made-to-matter/how-many-americans-are-really-working-remotely>.

particularly true in companies where the additional overtime costs force strict limits on hours worked. Many employees will view this as imposing an artificial limit on their productivity, inhibiting their growth potential within the company.

Similarly, many individuals newly entering the workforce and seeking a competitive job at top companies may eschew jobs that are paid by the hour and require tracking their hours. Association members offer good entry-level jobs at competitive salaries based on the cost of living in specific regions of the country. The Proposed Rule's new threshold will cause thousands of these jobs to become reclassified as nonexempt, and, accordingly, become less attractive and/or competitive in the eyes of new graduates.

Such a result is particularly alarming for employers in a labor market that continues to experience significant talent shortages – most notably in STEM fields. President Biden has vigorously advocated for creation of good American jobs, and concurrently for increased American leadership in STEM fields. The Proposed Rule will force employers to look abroad for individuals to fill such jobs, either because they do not want to or cannot radically change compensation structures as required by the Rule, or because American graduates will opt for salaried positions over hourly ones. Accordingly, the Proposed Rule will reduce the number of good American jobs and American companies' global competitiveness in STEM fields and others, in direct opposition to the priorities of the Biden Administration.

- **The Proposed Rule does not allow enough time for compliance.**

Under the Proposed Rule, employers would have 60 days to come into compliance with any final rule. The Department itself “recognizes that the 60-day proposed effective date is shorter

than the effective dates” for previous overtime exemption rules, and yet with almost no corresponding justification maintains that “a 60-day effective date is appropriate.”<sup>3</sup>

Given the enormous compliance burden placed on employers by having to potentially reclassify thousands of employees from exempt to nonexempt status, a 60-day compliance window is inappropriately short. This is particularly true given that the actual salary threshold remains to be calculated; employers therefore will be in the dark until the final rule is published, and then be forced to make adjustments within 60 days. The Association strongly urges the Department to revise the effective date to at least 90 days from publication of any final rule, and encourages such a window to be extended to 180 days.

- **The Proposed Rule inappropriately increases minimum salary threshold for the highly compensated employee exemption.**

For the same reasons articulated above and in the PPWO coalition comments, any final rule should not include any increases to the highly compensated employee exemption salary threshold (“HCE”). The Proposed Rule would increase the HCE threshold by nearly 35 percent, or roughly five times as large as the last adjustment. Such a large jump will present significant compliance issues for employers that will overburden human resource functions, particularly given that many affected employees may have been exempt under the HCE for longer periods of time. The Association accordingly urges the Department to abandon its proposed increase to the HCE.

- **The Proposed Rule’s automatic indexing is both unlawful and impractical.**

The Association also strongly urges the Department to abandon its proposal to automatically increase the lower salary exemption threshold every three years. The DOL previously attempted to include automatic indexing in 2016; as in 2016, and for the reasons articulated in the PPWO

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<sup>3</sup> 88 Fed. Reg. 62152, 62180.

coalition comments, the Department's proposal here is beyond the scope of the FLSA and in violation of the Administrative Procedure Act. Because the Department lacks the legal basis to adopt automatic indexing, it should not include any such provision in any final rule.

Further, automatic indexing as contemplated by the Proposed Rule presents significant practical issues for employers. Employers will be required to constantly reevaluate employee exemption classifications and continuously tinker with compensation structures to ensure compliance, at considerable financial and human resource cost. Such compliance issues are compounded by the fact that the Department's formula for indexing provides little predictability for employers as to where exactly the threshold will land every three years. Thus, in addition to lacking a legal basis for doing so, the Department should not include automatic indexing in any final rule given the immense practical costs it will create for employers.

Sincerely,

/s/ Gregory Hoff

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