



PARTNERSHIP TO PROTECT WORKPLACE OPPORTUNITY

December 7, 2015

Dear Member of Congress:

On behalf of the Partnership to Protect Workplace Opportunity (the Partnership) and the undersigned 164 state, local, and national organizations, we write to ask that you contact the Department of Labor (the Department or DOL), the Office of Management and Budget's Office of Information and Regulatory Affairs, and others within the Administration and urge them to reconsider the Department's June 30, 2015, proposed changes to the exemptions for executive, administrative, and professional employees (the "white collar exemptions") to the Fair Labor Standard Act's overtime pay requirements. The Department is expected to finalize the rule in mid-to-late 2016. If the Department goes forward with the changes it proposed, the impact will be unduly burdensome on employers and ultimately result in significant, unintended consequences on employees.

The Partnership consists of a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry. (See <http://protectingopportunity.org>). The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

The Department proposes more than *doubling* the salary level required to qualify for the white collar exemptions from \$455 per week/\$23,660 per year to \$970 per week/\$50,440 per year. DOL also proposes automatically increasing this minimum salary going forward on an annual basis and publishing the increased minimum salary *only* 60 days before it becomes effective, with no opportunity for comment or input from employers who will have to comply. Implementing automatic increases will guarantee that the salary threshold will quickly become so high that very few employers will be able to avail themselves of the statutorily provided exemptions. Furthermore, it will also mean that increases will go into effect during future economic downturns—exactly the worst time to be increasing such a salary threshold.

Furthermore, while DOL did not offer a specific proposal to modify the "duties tests" for determining which employees are executive, administrative, and professional, the Department suggested it is considering making extreme changes that would impose a "quantification" test so that employers would have to track exactly how much time an employee spends performing specific duties to qualify as exempt. Such a test would render these exemptions all but irrelevant.

The magnitude of DOL's proposal, coupled with the annualized automatic increases with no feedback from employers, and the changes to the duties test that DOL is considering, threaten businesses, employees, non-profits, state and local governments, and the economy as a whole. According to the Department's own estimate, as a result of the minimum salary increase more than

four million employees will need to be reclassified from exempt/salaried to non-exempt/hourly and the rule will affect over ten million workers; that is more than the populations of Maine, New Hampshire, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, Vermont, Washington, and Wyoming combined.

The millions of employees converted from exempt to nonexempt status would lose the flexibility that they currently enjoy and have fewer opportunities for career advancement. Employers must closely track work hours for nonexempt employees to ensure compliance with overtime pay and other requirements, which means workers have less autonomy and fewer opportunities for employer-sponsored career training and enhancement. In addition, those reclassified to nonexempt status as a result of the new rule are unlikely to receive a pay increase and in some cases, may see a decrease in pay. Just because an employee is eligible for overtime pay does not necessarily mean the employee will *earn* overtime pay. Hourly employees are not guaranteed any fixed weekly pay—like salaried employees—or guaranteed any specific hours. Employers must carefully manage labor costs to remain in business and frequently limit employees' hours to prevent paying overtime. There is no reason to believe employers will stop doing so after DOL implements this rule.

Even with controlling for possible increased overtime, the cost associated with mass reclassification of employees is staggering. According to the National Retail Federation (NRF), which conducted an economic analysis of the proposal on *just* retail and restaurant industries, those businesses will see an increase of over \$8.4 billion per year in costs with the proposed salary level. The Office of Advocacy within the Small Business Administration (SBA) expressed concerns that DOL did not consider the impact of the proposal on “key small entities” like a non-profit organization “operating Head Start programs in southeast Louisiana” which will have to cut many critical services as a result of the \$74,000 in first-year costs this proposal will cause.

Particularly troubling is the impact of these increases on regions of the country with a lower cost of living. What works in Washington, D.C., New York City, and San Francisco will not work in Indianapolis, Louisville, Birmingham or Boise, let alone other rural areas. Yet, DOL set the proposed minimum salary threshold nearly \$10,000 *higher* than that of California and nearly \$15,000 *higher* than New York – two of the country's most expensive states to live. This will disproportionately impact workers and companies in cities and states with a lower cost of living, including college graduates in those areas who will start their professional careers with less flexibility and fewer opportunities for advancement. As the SBA noted in its comments, DOL failed to “consider the difference in purchasing power of its proposed threshold in higher- and lower- wage states and regions.” In fact, the SBA found DOL's economic analysis so faulty that it recommended DOL publish a supplemental “analysis on the economic impact of this rule on small entities and consider small business alternatives.”

The Department's proposal also fails to account for the devastating impact such an increase is likely to have on certain sectors of the economy, such as retail, restaurant, not-for-profits, educational institutions, and on state and local government. An Oxford Economics report commissioned by the NRF estimates that 2,189,600 retail and restaurant workers, or 64 percent of exempt workers in the industry, would be affected by the increase in the salary level.

Similarly, the Department's proposal glosses over the fact that this proposed increase in the salary level makes it difficult to maintain part-time exempt positions. Under the current salary requirement, a part-time, pro-rated salary is sufficient to establish the exemption (provided that the pro-rated amount exceeds \$455 per week). The new amount makes such an arrangement far more difficult, effectively eliminating some flexible workplace arrangements. If an employee's pro-rated salary is not in excess of the new salary amount, that employee now needs to meticulously record his

or her working hours, even if he or she never approaches 40 hours, because the FLSA's "hours worked" recordkeeping obligations apply to all non-exempt employees.

On September 4, the Partnership submitted detailed [comments](http://protectingopportunity.org/wp-content/uploads/2015/09/PPWO-Comments.pdf) (See <http://protectingopportunity.org/wp-content/uploads/2015/09/PPWO-Comments.pdf>) on behalf of 133 organizations highlighting the aforementioned concerns with the proposed overtime regulation. In total, the Department received over 290,000 comments, considerably higher than the 75,280 comments received in 2004 when the Department last updated the overtime regulation.

DOL's proposal has been the subject of Congressional hearings before the House Committees on Small Business and Education and the Workforce at which a diverse group of employer stakeholders detailed the many unintended costs and negative consequences of the proposed rule. Congress has heard that the cost of the Department's proposal will make it increasingly difficult for a Pennsylvania nonprofit, serving at-risk youth, to keep its doors' open and that the mass reclassification of workers and ensuing loss of career advancement opportunities will threaten the ability of hard-working and talented employees to advance from an entry-level role as a crew member at a quick-service restaurant to Chief Operating Officer.

In light of these concerns, we ask that you please contact the Department, the Office of Management and Budget's Office of Information and Regulatory Affairs, and other officials within the Administration and urge them to reconsider this rule.

Sincerely,

The Partnership to Protect Workplace Opportunity and the following organizations:

National Organizations

American Association of Advertising Agencies (4A's)
American Bakers Association
American Bankers Association
American Council of Engineering Companies
American Frozen Food Institute
American Hotel & Lodging Association
American Institute of CPAs
American Insurance Association
American Rental Association
American Society of Association Executives (ASAE)
American Society of Travel Agents
American Staffing Association
American Supply Association
AmericanHort
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated General Contractors
Auto Care Association
Building Service Contractors Association International (BSCAI)
Coalition of Franchisee Associations
College and University Professional Association for Human Resources

Consumer Technology Association
Electronic Transactions Association
Financial Services Institute
Food Marketing Institute
Franchise Business Services
HR Policy Association
Independent Electrical Contractors
Independent Insurance Agents & Brokers of America
International Association of Amusement Parks and Attractions
International Bottled Water Association
International Foodservice Distributors Association
International Franchise Association
International Public Management Association for Human Resources
International Warehouse Logistics Association
IPC – Association Connecting Electronics Industries
ISSA, The Worldwide Cleaning Industry Association
IT Alliance for Public Sector
Manufactured Housing Institute
National Apartment Association
National Association of Electrical Distributors
National Association of Home Builders
National Association of Landscape Professionals
National Association of Manufacturers
National Association of Professional Insurance Agents
National Association of Wholesaler-Distributors
National Association of Women Business Owners
National Automobile Dealers Association
National Christmas Tree Association
National Club Association
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Lumber and Building Material Dealers Association
National Multifamily Housing Council
National Pest Management Association
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National RV Dealers Association
National School Transportation Association
National Tooling and Machining Association
Newspaper Association of America
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Promotional Products Association International
Retail Industry Leaders Association
Service Station Dealers of America and Allied Trades

Small Business & Entrepreneurship Council
Snack Food Association
Society for Human Resource Management
Society of American Florists
Society of Independent Gasoline Marketers of America
Tire Industry Association
U.S. Chamber of Commerce
WorldatWork

State and Local Organizations

Alabama Society of CPAs
Alliance of Automotive Service Providers of Pennsylvania
Arizona Restaurant Association
Automotive Aftermarket Association of the Carolinas and Tennessee, Inc
Automotive Aftermarket Association Southeast
Automotive Parts & Services Association-Texas
California Restaurant Association
California, Nevada, Arizona Automotive Wholesalers Association
Chesapeake Automotive Business Association
Georgia Restaurant Association
Idaho Society of CPAs
Illinois CPA Society
Illinois Restaurant Association
Indiana CPA Society
Indiana Restaurant & Lodging Association
Iowa Restaurant Association
Iowa Society of CPAs
Kansas Restaurant and Hospitality Association
Kansas Society of CPAs
Kentucky Restaurant Association
Kentucky Society of CPAs
Louisiana Restaurant Association
Louisiana Retailers Association
Lumbermen's Association of Texas & Louisiana
Maine Restaurant Association
Maine Society of CPAs
Maryland Association of CPAs
Maryland Retailers Association
Massachusetts Restaurant Association
Michigan Association of Certified Public Accountants
Michigan Restaurant Association
Michigan Retailers Association
Mid-America Lumbermens Association
Midwest Automotive Parts & Service Association
Minnesota Retailers Association
Mississippi Hospitality & Restaurant Association
Missouri Restaurant Association
Montana Equipment Dealers Association
Montana Retail Association
Montana Tire Dealers Association
Nebraska Restaurant Association

Nevada Society of Certified Public Accountants
New England Tire & Service Association
New Hampshire Restaurant & Lodging Association
New Hampshire Society of CPAs
New Jersey Gasoline, C-Store, Automotive Association
New York State Association of Service Stations and Repair Shops, Inc.
New York State Restaurant Association
North Carolina Hotel & Lodging Association
North Dakota Hospitality Association
Northeastern Retail Lumber Association
Ohio Restaurant Association
Ohio Society of CPAs
Oklahoma Lumbermen's Association
Oklahoma Restaurant & Lodging Association
Oklahoma Restaurant Association
Oregon Home Builders Association
Oregon Restaurant & Lodging Association
Pennsylvania Association of Automotive Trades
Pennsylvania Food Merchants Association
Pennsylvania Institute of CPAs
Pennsylvania Restaurant & Lodging Association
Puerto Rico Society of CPAs
Restaurant Association of Maryland
Retail Association of Maine
Rhode Island Hospitality & Tourism Association
Society of Louisiana CPAs
South Carolina Association of CPAs
South Carolina Restaurant & Lodging Association
South Dakota CPA Society
South Dakota Retailers Association
Southwest Car Wash Association
Tennessee Hospitality & Tourism Association
Texas Independent Automotive Association
Texas Restaurant Association
Texas Society of CPAs
Texas Tire Dealers Association
Utah Association of CPAs
Utah Food Industry Association
Utah Retail Merchants Association
Virginia Restaurant, Lodging & Travel Association
Virginia Retail Merchants Association
Washington Maryland Delaware Service Station and Automotive Repair Association
Wisconsin Restaurant Association

cc: U.S. House of Representatives
U.S. Senate