



# 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