IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al.*,
Plaintiffs, **No. 4:16-CV-731-ALM**

v.
UNITED STATES DEPARTMENT OF LABOR,
et al.,
Defendants.

Texas AFL-CIO's Motion to Intervene and Brief in Support

The Texas AFL-CIO, a federation of labor unions in Texas whose affiliated unions represent 235,000 working men and women throughout the state of Texas in virtually all sectors of the economy, hereby moves to intervene as a defendant in this action pursuant to Federal Rules of Civil Procedure 24. The Texas AFL-CIO seeks to intervene as of right pursuant to Rule 24 (a) (2) or, in the alternative, to intervene with permission under Rule 24 (b). Plaintiffs have indicated they oppose the Texas AFL-CIO's intervention and Defendants are still considering their position on this motion, so it is filed as an opposed motion.

INTRODUCTION

These consolidated lawsuits both seek to challenge the final rule promulgated by the United States Department of Labor ("DOL" or "Department") on May 18, 2016 entitled, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," (hereafter "the Final Rule") 81 Fed. Reg. 32,391 (May 23, 2016) on a number of grounds. The Plano Chamber of Commerce and the other "Business Plaintiffs" challenge the Final Rule as exceeding the authority of the DOL and other defendants,

and as being arbitrary, capricious, and contrary to procedures required by law. They also object to the escalator provision governing the minimum salary threshold set in the Final Rule. Nevada and the other "State Plaintiffs" challenge the Final Rule as violating the Constitution, (arguing that *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) precludes or should be overturned), that DOL went beyond its authority under 29 U.S.C. Section 213 (a)(1) and that DOL violated the Administrative Procedure Act (APA) by implementing the Final Rule and by the inclusion of the escalator provision.

The DOL has defended the Final Rule, and has pursued an appeal to the U.S. Court of Appeals for the Fifth Circuit of the Preliminary Injunction issued by this Court in the suit brought by the State Plaintiffs. The interests of the DOL in defending the Final Rule parallel the interests of the Texas AFL-CIO in many respects. However, the Texas AFL-CIO has additional concerns, exacerbated in last several days, as to which the Texas AFL-CIO believes it may not be adequately represented by the DOL. With the recent presidential election, and particularly as more information becomes available regarding the incoming Administration's plans, policy and appointments, the Texas AFL-CIO has grave concerns as to whether its interests in the Final Rule will be represented by the DOL.

FACTUAL BACKGROUND

The Texas AFL-CIO is a federation of labor unions consisting of approximately six hundred fifty (650) local unions who represent two hundred thirty five thousand (235,000) dues paying members. The mission of the Texas AFL-CIO is to promote the interests of Texas wage earners, in legislative, judicial, and other public forums and activities. Texas AFL-CIO affiliates represent workers in every geographical area of the state, and in virtually all key sectors of the

economy. The Texas AFL-CIO's parent organization is the American Federation of Labor and Congress of Industrial Organizations (the AFL-CIO) in Washington, D.C..

On behalf of its affiliated and subordinate bodies, including the Texas AFL-CIO, the AFL-CIO actively participated in the regulatory process leading up to the Final Rule and filed comments supporting the DOL's proposed regulation but urging that the salary threshold should be raised above the level set forth in the proposed regulation. (Exhibit 1 is a copy of the comments filed by the AFL-CIO).

The Texas AFL-CIO's affiliates represent workers who are directly impacted by the Final Rule, which increases the salary threshold for automatic overtime eligibility to above the $23, 660 rate (the rate previously set by DOL in 2004). Many of these employees would be entitled to overtime under the higher salary threshold.

Moreover, as noted in the AFL-CIO's comments (Exhibit 1 at pp. 5-6), workers will benefit from the Final Rule in a number of ways, such as the reduction of salaried workers to 40 hours per week, with the reassignment of those hours to part-time or newly-hired workers. This aspect of the Final Rule will directly benefit workers throughout the state of Texas who are represented by many of the Texas AFL-CIO's affiliated local unions.

In addition, the Texas AFL-CIO has an interest in robust enforcement of the FLSA, including its overtime provision, because the overtime guarantee in the FLSA sets a floor for all workers covered by the Act, whether or not they are protected by a collective bargaining agreement. Often unions negotiate more favorable provisions in collective bargaining agreements, and any change in overtime protection under the FLSA affects collective bargaining rates for union workers and the rates and conditions which the unions can achieve above the floor provided by the FLSA. The long delay between the increase in the salary level in 2004 and

the effective date of the Final Rule has meant that fewer and fewer non-exempt workers who should be entitled to overtime have had the benefit of the "bright line" provided by the salary threshold to protect against misclassification of workers who should be non-exempt but improperly are being treated by their employers as exempt from overtime protections.

The Texas AFL-CIO also has a strong interest in the Final Rule because it represents a long overdue updating of the salary threshold, which, in the 12 years since the last increase in 2004, has substantially lagged behind salary levels in numerous non-exempt job classifications, creating increased incidents of misclassification by employers who unfairly seek to depress salaries and benefits, and creating competitive disadvantages for those employers who are willing to negotiate fair and higher level salaries and benefits in collective bargaining agreements. This creates a downward pressure on all compensation and working conditions for workers in Texas, an issue of utmost concern for the Texas AFL-CIO.

Events that have occurred in the last month since the presidential election on November 8 have led the Texas AFL-CIO to have increasing concerns about the incoming administration's willingness to continue to support and aggressively defend the Final Rule. Most recently, President-Elect Donald Trump announced his choice of Andrew Puzder to be Secretary of Labor in the incoming administration. Puzder has strongly and publicly opposed the Final Rule.[1] In addition, given the strength of record and rationale supporting the Final Rule, the Texas AFL-CIO did not anticipate the Court's November 22, 2016 ruling granting the Preliminary Injunction. For these reasons, the Texas AFL-CIO now seeks to intervene in the district court case, to protect and defend its interests in the Final Rule.

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[1] http://www.forbes.com/sites/realspin/2016/05/18/the-harsh-reality-of-regulating-overtime-pay/#7551aa962321 (most recently viewed on December 9, 2016).

ARGUMENT

I. The Texas AFL-CIO Should Be Granted Intervention as of Right

Under Federal Rules of Civil Procedure 24 (a) (2), an applicant is entitled to intervene as of right if (1) the motion to intervene is "timely," (2) the movant "claims an interest relating to the property or transaction that is the subject of the action," (3) the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) the existing parties do not already "adequately represent that interest." Fed. R.Civ. P. 24(a)(2). The Texas AFL-CIO satisfies all four of these requirements.

A. The Texas AFL-CIO's Motion is Timely

This motion to intervene is timely. While it was not filed at the initial outset of litigation, it has been filed promptly in light of the recent events outlined above. The substantive issues in the case are still pending before the Court, which has not yet ruled on the pending motion for summary judgment. Intervention by the Texas AFL-CIO will not unduly delay the matter. The Texas AFL-CIO is filing herewith a comprehensive proposed answer which will respond to the allegations in both complaints. The Federal Defendants have not yet filed answers, but presumably will be doing so in the near term. In addition, the Texas AFL-CIO hereby adopts and joins Defendants' Response in Opposition to Plaintiffs' Expedited Motion for Summary Judgment (Document # 56) and Defendants response and sur-reply in the preliminary injunction matter, (Documents # 37 and #51) as its own, and thus will not delay the proceedings.[2]

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[2] The Texas AFL-CIO does hereby request leave to promptly file a short supplemental response in opposition to the Motion for Summary Judgment to highlight some issues from its unique perspective, but could do so very quickly, with the Court's leave.

B. The Texas AFL-CIO Has an Interest Relating to the Transaction that is the Subject of this Action

The Texas AFL-CIO clearly has sufficient interest to justify intervention. The Texas AFL-CIO (as one of the national AFL-CIO's subordinate bodies) actively participated in the regulatory proceedings leading up to the issuance of the Final Rule and has demonstrated in the earlier Factual Background section of this motion the multiple ways in which the full and robust implementation and enforcement of the Final Rule benefits workers in Texas represented by the Texas AFL-CIO's affiliated local unions, as well as the overall interests and purposes of the Texas AFL-CIO in improving the wages and working conditions of workers throughout Texas.

C. The Texas AFL-CIO's Interests Would Be Impaired if Plaintiffs Prevailed

Were the plaintiffs to prevail, the Texas AFL-CIO, its affiliated local unions and the workers those unions represent will suffer substantial harm because they will lose all the benefits which have been described in the Factual Background section, namely the benefit of a "bright line" for workers who properly are non-exempt but are misclassified, the increased floor for salaries and working conditions above which Texas unions can negotiate improved benefits, salaries and working conditions, and the anticipated increased hours for part-time employees and potential new jobs which would be created where an employer sought to limit employees to 40 hours per week to limit overtime. In addition, should the plaintiffs prevail, the Texas AFL-CIO will be compelled to deal with the downward pressure on salaries and benefits created by continued unrealistically low (2004 level) salary thresholds. For all these reasons, the interests of the Texas AFL-CIO will suffer substantial harm, if plaintiffs prevail.

D. The Texas AFL-CIO's Interests May Not Be Adequately Represented by the Federal Defendants

To justify intervention as of right, the Texas AFL-CIO must show that its interests *may* not be adequately represented by the federal defendants, not that the representation actually is inadequate. *Supreme Beef Processor, Inc., v. U.S. Department of Agriculture,* 275 F.3d 432, 437-8 (5th Cir. 2001). To date the federal defendants have robustly defended the rule. However, as described more fully in the Factual Background section, the Texas AFL-CIO is very concerned that the incoming administration will change course. The Texas AFL-CIO therefore believes that its interests may not be adequately represented by the federal defendants with the change of administration as of January 20, 2017. *Legal Aid Society of Alameda Co. et al. v. Dunlop,* 618 F.2d 48 (9th Cir. 1980) (Chamber of Commerce's motion to intervene should have been granted when it appeared government's position in litigation was changing). The Texas AFL-CIO is concerned that the incoming Administration, notwithstanding the voluminous record supporting the need for and appropriateness of the Final Rule, might amend or repeal the Final Rule in a manner that does not conform with the Administrative Procedure Act.

II. In the Alternative, the Texas AFL-CIO should be granted permissive intervention.

Because the Texas AFL-CIO satisfies all the requirements of Rule 24 (a)(2), it should be granted intervention as of right. At a minimum, however, it should be granted permissive intervention under Rule 24 (b), which provides that "[o]n timely motion, the court may permit anyone to intervene who ….has a claim or defense that shares with the main action a common question of law or fact." The Texas AFL-CIO plainly satisfies both of the prerequisites for permissive intervention. As explained above, its motion is timely. *See supra* Part I.A. The

accompanying proposed answer and our adoption of the Defendants' response and reply in opposition to the motion for summary judgment demonstrate that the Texas AFL-CIO seeks to assert defenses which respond to the allegations in the plaintiffs' complaints and are consistent with the defenses already asserted by the federal defendants.

Once these two threshold requirements are met, the Court has discretion to allow permissive intervention. In exercising its discretion, a court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R.Civ. P. 24 (b). There is no risk of such delay in this case. The Texas AFL-CIO is submitting a proposed answer with this motion and has adopted herein the federal defendants' responsive pleadings related to the summary judgment issues. The federal defendants have not yet filed an answer and movant herein is seeking only a brief time period to file a supplemental response to the issues raised by the pending motion for summary judgment.

In this Circuit, intervention should be granted absent harm, so greater justice can be done. *EEOC v. Commercial Coating Service, Inc.* 220 F.R.D. 300; 2004 U.S. Dist. LEXIS 7818, quoting *John Doe No. I v. Glickman,* 256 F.3d 371, 375 (5th Cir. 2001)(internal cite omitted).

Wherefore, the Texas AFL-CIO respectfully requests that its motion be granted and that it be permitted to intervene as of right, or in the alternative, be granted permissive intervention. In addition, the Texas AFL-CIO respectfully requests leave to file a supplemental response in opposition to Plaintiffs' Motion for Expedited Summary Judgment and Brief in Support.

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

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CERTIFICATE OF SERVICE

I certify that on December 9, 2016, the foregoing Motion to Intervene and Brief in Support Thereof, together with the accompanying exhibit and Proposed Answer, were filed electronically by submission to the Court's civil ECF email address and served on all counsel of record by electronic mail.

Dated: December 9, 2016

Respectfully submitted,
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____

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CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirement in LOCAL RULE CV-7(h). I met and conferred with counsel for Business Plaintiffs, counsel for State Plaintiffs and counsel for Defendants via email and telephone regarding Texas AFL-CIO's Motion to Intervene. The responses were as follows:

The State Plaintiffs oppose this motion for intervention

The Business Plaintiffs oppose this motion for intervention

Defendants: Counsel for Defendants stated that "Defendants were contracted by Counsel for the Texas AFL-CIO today and are still considering their position on this motion".

The discussions conclusively ended in an impasse, leaving an open issue for the court to resolve. LR CV-7(i).

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

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September 4, 2015

Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
Rm. S-3502
Department of Labor
200 Constitution Avenue, NW,
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Submitted via: http://www.regulations.gov

Re: RIN 1235-AA11
COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

Dear Ms. Ziegler:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully submits the following comments in response to the Wage and Hour Division of the Department of Labor's proposed rule RIN 1235-AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, on behalf of itself and its affiliates:

INTRODUCTION

The AFL-CIO and its 56 national and international union affiliates collectively represent 12.2 million working men and women who have a deep and abiding interest in maintaining and strengthening the overtime protections afforded by the Fair Labor Standards Act (FLSA) and its implementing regulations.

The FLSA's overtime guarantee sets a floor for all workers covered by the Act, whether or not they are protected by a collective bargaining agreement. Any changes in

overtime protection under the FLSA affect collective bargaining rates for union workers. FLSA overtime protections also affect union employees whose wages and working conditions are covered by other statutes, such as federal sector employees and private employees hired to perform work for the federal government.

More generally, the labor movement attaches singular importance to the overtime protections of the FLSA. Over a period of decades, millions of working people marched, protested, went on strike, and made enormous sacrifices to combat the evil of overwork and guarantee working people the opportunity to realize our full potential as human beings and participate meaningfully in the process of self-government, separate and apart from the relentless demands of the workplace. Countless union and non-union working people have been fired, beaten, imprisoned, and killed in the struggle for our right to "eight hours of work, eight hours of rest, and eight hours for what we will." The AFL-CIO places the highest priority on the restoration and preservation of these hard-won rights.

The overtime provisions of the FLSA are the most family-friendly legislation ever enacted in the United States. Along with collective bargaining, statutory overtime protections such as the FLSA have made the two-day weekend a societal norm in the United States. The FLSA's overtime guarantee has been a phenomenal success, and workers who enjoy overtime protection work far fewer hours on average than those who do not.[1] Overtime premium pay has become a cherished feature of the American social contract, and preserving and enforcing the FLSA's overtime guarantee is accordingly one of the Labor Department's weightiest responsibilities.

The AFL-CIO broadly supports the Department's long-overdue update of regulations implementing the overtime provisions of the FLSA. Overtime protections have been seriously eroded since 1975, and restoring those protections is an urgent necessity. We heartily applaud Secretary Perez and President Obama for taking the single most significant step within their authority to raise wages and improve working conditions for working people in America. However, we believe this update should protect more workers, with a higher standard salary threshold and a more protective "duties test" for workers above the threshold. For reasons explained in more detail below, in our view, the proposed salary threshold, while a welcomed improvement, does not go far enough to actually restore overtime benefits to all who were previously covered but whose coverage has been eroded over time.

Congress Intended Overtime Protection to Be Broadly Applicable

Congress and President Roosevelt intended the FLSA's overtime guarantee to be the rule rather than the exception. As Jared Bernstein and Ross Eisenbrey pointed out in a paper that inspired the present rulemaking: "President Franklin D. Roosevelt and key members of Congress began with an assumption that every worker falling within Congress's power to regulate interstate commerce should eventually have a workweek of 40 hours, with the exception of agricultural workers."[2]

The Supreme Court has recognized that broad coverage of the FLSA's overtime protections is essential to carry out the purposes of the Act.[3] The Notice of Proposed Rulemaking (NPRM) lays out those purposes:

> It is widely recognized that the general requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives. The first is to spread employment by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours, thereby reducing involuntary unemployment. The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers.[4]

Both these policy objectives would be frustrated if too many workers were denied overtime protection. The FLSA's overtime guarantee cannot spread work and reduce unemployment throughout the economy if it applies to only a fraction of workers and workplaces. Nor can the FLSA protect against "the evil of overwork"[5] and improve the health and well-being of the American workforce if too many employees are left unprotected.

Exceptions to Overtime Protection Must Be Narrowly Drawn

The FLSA carves out exceptions to the rule of broad overtime coverage in the specific cases of "bona fide" executive, administrative, and professional ("EAP") employees. Yet because the purposes of the FLSA would be frustrated if too many workers were denied overtime protection, these exceptions must be narrowly drawn. The exceptions cannot be allowed to swallow the rule.

As the Supreme Court has said, "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality…Where exceptions were made, they were narrow and specific."[6] For these reasons, it is well settled that the exemptions from overtime protection must be narrowly construed.[7]

The "EAP" exemptions should be applied only when they fit within the terms and spirit of the FLSA. The rationale for two kinds of exemption are most obviously consistent with the purposes of the Act: (1) employees who have sufficient bargaining power that they do not need the Act's protections against the "evil of overwork"; and (2) employees who perform work that cannot be shared.

As the Department points out, "the type of work exempt employees performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week…generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium."[8] The Government Accountability Office explains that "The nature of their jobs – managerial and professional – precluded the potential for the job expansion desired in other types of employment (that is, hiring more workers to perform the additional hours of work)."[9]

Likewise, the policy objective of reducing overwork may not be controlling in situations where employees have sufficient bargaining power to protect themselves. As Jared Bernstein and Ross Eisenbrey note, "From the first draft of the bill that became the FLSA, the legislation exempted executives as a class that did not need protection, followed in subsequent drafts by administrative employees. They were, after all, the bosses, managers, and administrators who set the rules and policies that governed the workplace."[10]

Overtime Regulations Are Designed to Prevent the Misclassification of Overtime-Eligible Employees

To keep the exceptions from swallowing the rules, it is also necessary to ensure that workers who should have overtime protection are not denied overtime protection by their employers. The regulations implementing the overtime provisions of the FLSA include several features designed to prevent such misclassification of eligible workers.

Although the FLSA exempts "bona fide" executive, administrative, and professional employees from overtime protection, it does not define these terms. Instead, it delegates to the Secretary of Labor the responsibility to "define and delimit" these terms "from time to time."[11]

Congress inserted the qualification "bona fide" into this statutory language because it knew from experience with the National Industrial Recovery Act (NIRA) that employers would misclassify ordinary workers as managers in order to avoid their overtime obligations.[12] By the time Congress debated the FLSA:

> The opinion among those protective of labor interests then was that fraud and evasion could not be avoided without two elements that eventually became central to the FLSA approach to upper-level exemptions: "a duties test, that is, a commitment on the part of the government to scrutinize the actual duties performed by someone whose job is labeled exempt, and a minimum salary test" used to make sure that the employer's representations that a job is highly valued is matched by its compensation.[13]

The Labor Department incorporated both the "salary test" and the "duties test" into implementing regulations. Salaried workers can only be exempted from overtime protection as "EAP" employees if they earn more than a certain threshold salary amount ("the salary test").[14] They must also have the job duties of a "bona fide" EAP employee ("the duties test").

The "salary test" and the "duties test" work in tandem to reduce the risk that overtime-eligible workers will be misclassified. Of the two tests, the "duties test" is the more subjective and difficult to enforce, so applying only the "duties test" would expose too many eligible workers to the risk of misclassification. Yet applying only the more objective "salary test" would deny overtime protection to workers above the threshold who do not have the job duties of "bona fide" EAP employees.[15] Applying the two tests

in tandem can minimize the risk of misclassifying workers who should have overtime protection, but only if the threshold is set at a high enough level that large numbers of eligible workers are not stranded above the threshold and exposed to the risk of misclassification.

The Proposed Update Would Extend Overtime Protection to Millions of Workers and Discourage the Misclassification of Millions More

The Department proposes to set the standard salary threshold at the 40th percentile of earnings of full-time salaried workers, which would amount to $970 per week (or $50,440 per year) in 2016. The Department also proposes to set the salary threshold for the streamlined duties test applicable to "highly compensated employees" at the 90th percentile of earnings for full-time salaried workers, which would amount to $122,148 per year in 2016. The Department proposes to automatically update these salary thresholds on an annual basis.

The Department estimates that this overtime update would extend overtime protection to 4.7 million workers in 2013,[16] while the Institute for Women's Research and Policy (IWPR) estimates 5.9 million salaried workers would be newly eligible in 2014.[17]

However, the Economic Policy Institute (EPI) points out that the Department is relying for its estimates on obsolete data from 1998.[18] Yet we know that overtime protections have been significantly weakened since 1998--by court decisions and by the Bush administration's overtime regulation of 2004. Therefore the Department must be overestimating the number of salaried workers who are currently eligible and underestimating the number of salaried workers who would gain eligibility under the new threshold. Unfortunately, "no data are available documenting who is currently eligible for or receiving overtime,"[19] making it impossible to estimate precisely the number of workers who would gain eligibility under the rule.

In addition to extending overtime eligibility to more than 4.7 million workers, the proposed update would make it harder for employers to misclassify another 10 million salaried workers who are already eligible for overtime. The Department estimates that 10 million overtime-eligible workers have salaries above the current threshold and below the proposed threshold.[20] These are workers who are currently eligible for overtime because of their job duties alone, but after the proposed threshold increase they will be eligible by reason of their salaries alone, without regard to their job duties. The more subjective "duties test" currently exposes these overtime-eligible workers to the risk of misclassification, but the more objective salary test will make it harder for employers to misclassify them as ineligible.[21]

The overtime update would benefit workers in a variety of ways. Some salaried workers would be reclassified as hourly and be paid time-and-a-half for their overtime work. Other salaried workers, who are currently paid nothing for their overtime hours, would remain salaried but see their work hours reduced.[22] As employers reassign

workloads to minimize overtime costs, some part-time workers would be assigned additional hours and some unemployed workers would be hired. Putting more money in the pockets of workers, who are most likely to spend their paychecks in their local communities, would generate more business activity and improve economic performance.

Workers and society as a whole would benefit in other ways, as well. As the Department points out, extending overtime eligibility would reduce work hours for the kinds of workers most likely to prefer fewer work hours.[23] By reducing the work hours of many workers, the update would reduce their risk of injury and health problems.[24] The update would thereby improve the welfare of their families, minimize the amount of resources spent on health care, and increase productivity.[25] The update would further increase productivity by reducing turnover, incentivizing workers to work harder, and increasing marginal productivity as fewer hours are worked.[26]

THE OVERTIME SALARY THRESHOLD SHOULD BE HIGHER THAN THE DEPARTMENT'S PROPOSAL

The denial of overtime protection to large numbers of workers would frustrate the purposes of the FLSA, which depend on breadth of coverage. The Department's proposed increase in the salary threshold is substantial and welcome, but too low by a wide variety of relevant measures and not high enough to minimize the risk that eligible workers above the threshold will be denied protection.

The Existing Standard Salary Threshold Is Far Too Low and Must Be Increased Significantly

The current salary threshold of $455 per week (or $23,660 per year) is so low that it risks becoming irrelevant. As the Department points out, "If left at the same amount, the effectiveness of the salary level test as a means of helping determine exempt status diminishes as the wages of employees entitled to overtime pay increase and the real value of the salary threshold falls."[27]

The need to increase the current threshold is not seriously disputed. Even the Bush administration committed in 2004 "in the future to update the salary levels on a more regular basis."[28]

Conclusive evidence of the need for an update is the fact that the annual value of the standard salary threshold is now lower than the poverty threshold for a family of four.[29] There is no justification for allowing employers to deny overtime protection to workers earning as little as $455 per week – which amounts to less than minimum wage for employees working long hours. Even for employees working 40 hours per week, $455 per week amounts to $11.38 per hour, barely above the minimum wage in several states. According to a Labor Department investigatory commission chaired by Harold Stein in 1940 ("the Stein Report"),[30] it was "widely conceded" that workers whose pay was close to the minimum wage were not the kind of employees Congress intended to

deny overtime protection,[31] and failure to increase the salary threshold to "substantially more than the minimum wage" would invite evasion of the wage and hour provisions of the FLSA.[32]

No Single Methodology Is Required for Setting the Salary Threshold

Because Congress did not define the terms "bona fide executive, administrative, or professional capacity" and the Labor Department established the current regulatory structure after enactment of the FLSA, the legislative history does not offer precise guidance for setting the salary threshold. The Department has used a variety of reasonable methodologies over the years, including those recommended by the Stein Report in 1940,[33] the Weiss Report in 1949,[34] and the Kantor Report in 1958.[35] None of these methodologies has ever been successfully challenged in court.

The Department's Proposed Standard Salary Threshold Is Low Compared to the Labor Department's Most Commonly Used Methodology

The methodology that the Labor Department has most frequently used is that of the Kantor Report of 1958. The Department concedes that the salary threshold it is now proposing "is lower than the average historical short test salary ratio under the Kantor method."[36]

Applying the Kantor methodology in 2013 would result in a salary threshold of $657 per week, corresponding to the 20th percentile of weekly earnings of full-time salaried workers.[37] However, the Labor Department used the Kantor methodology to set the threshold for the more rigorous "long duties test," which the Bush administration eliminated in 2004. The Labor Department historically set the threshold for the less rigorous "short duties test," which was comparable to the current "standard duties test," at 150 percent (on average) of the threshold for the "long duties test."[38] Making this adjustment to the Kantor methodology would amount to a weekly salary threshold of $979 in 2013, or $50,908 per year, significantly higher than the Department's proposed threshold of $921 in 2013.[39]

The Department concedes that "the proposed salary amount is only about 140 percent of the long duties test salary level under the Kantor method, and thus may be viewed as slightly out of line with the historic average of approximately 150 percent of the long test at which the short test salary has been set."[40]

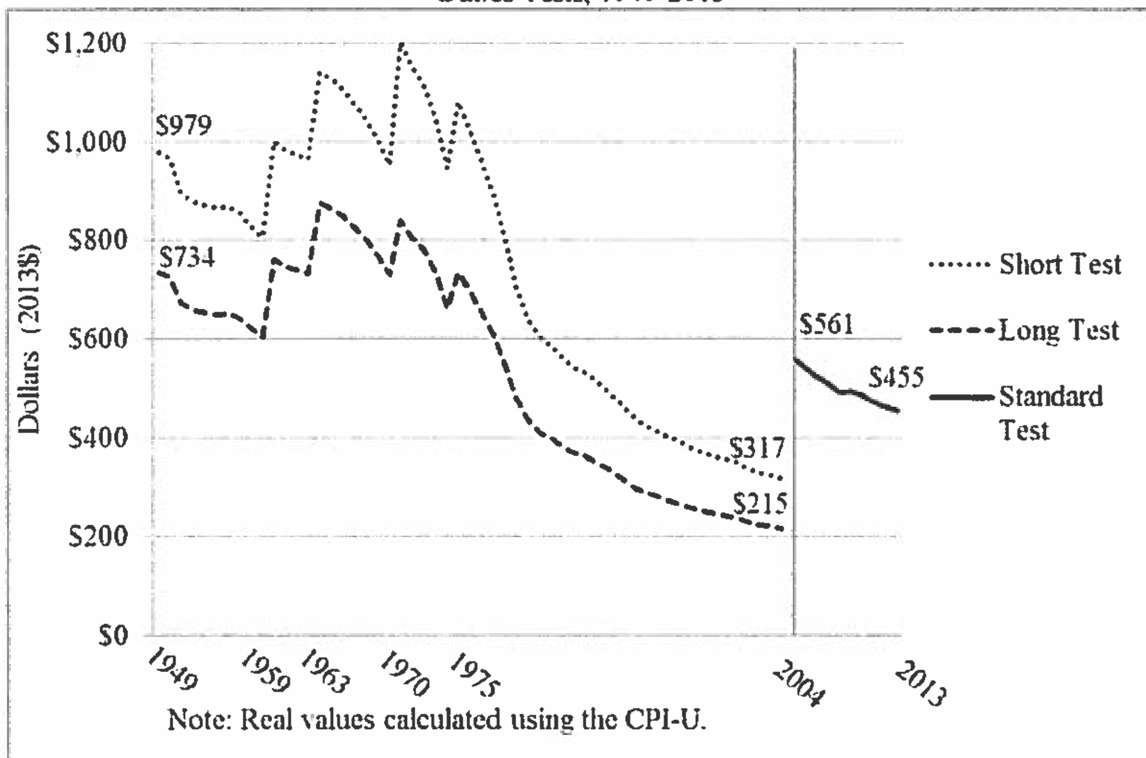
The Proposed Standard Salary Threshold Is Low Compared to Previous Threshold Levels (Adjusted for Inflation)

Although the Department has expressed its concerns about using the CPI-U to adjust previous salary thresholds for inflation, it did use CPI-U to set the salary threshold in 1975. The proposed threshold is lower than the inflation-adjusted levels of previous thresholds, as the Department itself acknowledges.

At the very least, CPI-U serves as a reliable benchmark by which to gauge the reasonableness of proposed salary levels. "The Department has recognized that measures of inflation and losses in purchasing power provide helpful background for setting the salary level because they indicate how far the levels erode between updates and underscore the need for an update."[41]

The Department concedes that "the proposed standard salary threshold is lower than the historical average salary for the short duties test."[42] The proposed threshold is significantly lower than the 1975 threshold adjusted for inflation, which would be $1,083 per week (or $56,316 per year) in 2013.[43] Figure 1 from the NPRM shows the inflation-adjusted values of all the salary threshold increases since 1949.

Figure 1: Real Values of the Salary Level Tests using the Long, Short, and Standard Duties Tests, 1949-2013



The Proposed Standard Salary Threshold Would Cover a Smaller Share of Salaried Workers than the 1975 Threshold

One measure of the appropriateness of any salary threshold is the share of salaried workers whose earnings fall below the threshold. The fewer salaried workers fall below the threshold, the more salaried workers – and specifically the more salaried workers who should have overtime protection -- will be stranded above the threshold and exposed to the risk of misclassification.

By this measure, the proposed salary threshold is significantly lower than the 1975 threshold. In 1975, 62 percent of salaried workers earned less than the threshold, whereas the Department proposes to set the standard threshold at the 40th percentile of full-time salaried workers. To protect the same percentage of salaried workers as in 1975, the threshold would have to be $69,000 per year in 2013 dollars,[44] or $58,344 after accounting for the shift towards higher-level jobs that has occurred since 1975.[45]

The Proposed Standard Salary Threshold Does Not Fully Protect Occupations That Have Been Protected By Previous Thresholds

The Stein Report of 1940 established the following test for setting the salary threshold for administrative employees: "Is the salary level high enough to deny exemption to bookkeepers (who ought to be entitled to overtime pay) but low enough so as not to deny exemption to too many accountants (most of whom ought to be exempt)?"

Applying this test in 1940, the Department set the threshold at a level designed to deny the exemption to all but 8 percent of bookkeepers while permitting the exemption of less than 50 percent of accountants, those "whose work, while related to that of bookkeepers, requires in general far more training, discretion, and independent judgment."

To achieve this same result for bookkeepers in 2014, the Department would have to set the threshold at more than $56,470, which is the 90th percentile salary for bookkeepers.[46] To reach the same result for accountants, the Department would have to set the threshold at roughly $65,940, which is the median annual wage for accountants and auditors.[47] The Department's proposed threshold is significantly below these levels.

The Proposed Standard Salary Threshold Is Lower Than Previous Thresholds Relative to Wages of Non-Supervisory Workers

One approach the Department has used in the past is to set the salary threshold significantly higher than wages for certain overtime-eligible workers. In general, the salary threshold should be well above the median wage for non-supervisory production workers. In 1975 the salary threshold was 1.57 times the median wage.[48] Applying this same ratio to the 2013 median wage of $16.70 would result in a threshold of $1,050 per week (or $54,536 per year). By this measure as well, the proposed salary level is significantly lower than the 1975 threshold.

The Proposed Standard Salary Threshold Is Low Relative to Entry Wages for College Graduates

According to the Weiss Report of 1949, the salary threshold must be "considerably higher than the level of newly hired college graduates just starting out on their working careers." Presiding Officer Harry Weiss explained that "these are the

persons taking sub-professional and training positions leading eventually to employment in a bona fide professional or administrative capacity." Applying this test in 1950, the Department set the salary threshold at 25 percent above the college-level entry wage. Applying the same ratio to 2013 entry-level wages of $21.89 per hour for men and $18.38 per hour for women would result in a salary threshold of about $1,000 per week (or $52,000 per year).[49]

The Proposed Standard Salary Threshold Is Low Relative to the Minimum Wage

The Department notes that the salary threshold levels established from 1949 to 1975 ranged from 3 to 6.25 times the minimum wage.[50] The proposed salary threshold is 3.35 times the minimum wage, which is on the low side of that range.

The Proposed Standard Salary Threshold Is Low Relative to the Median Wage of Supervisory Workers in Management Occupations

The proposed threshold is well below the level associated with supervisory duties in management occupations. The Bureau of Labor Statistics (BLS) breaks out four levels of supervisory responsibilities in management occupations, whose (2010) median weekly earnings range from $1,520 to $3,995. The Department's proposed threshold of $970 in 2016 is obviously well below a level associated with supervisory duties. BLS also grades occupations by leveling factors (scores given to each occupation based on its demands for skill, knowledge, and responsibilities) and an hourly wage of about $24 (the proposed salary threshold of $970 divided by 40 hours) is consistently below Level 7 (out of 15), which is also consistent with non-supervisory responsibilities.

The Proposed Standard Salary Threshold Does Not Minimize the Risk of Misclassifying Eligible Workers

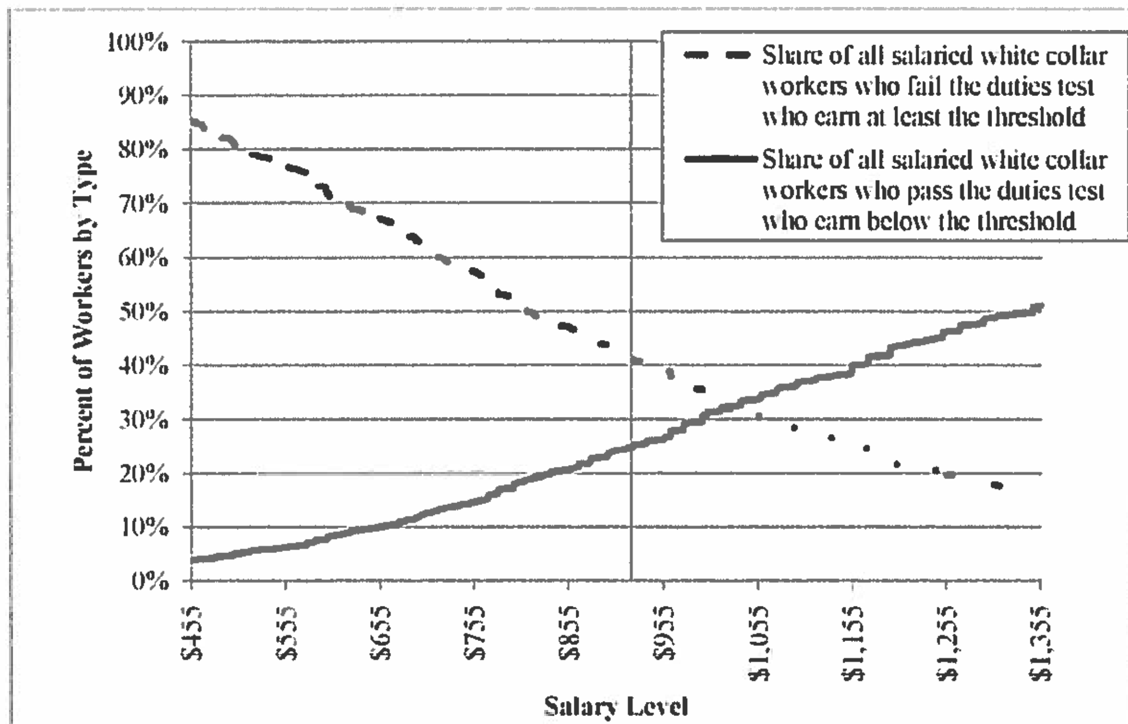
The Weiss Report of 1949 found that the salary thresholds, when too low in comparison to real salaries, lead to "increasing misclassification."[51] Presiding Officer Harry Weiss concluded that the salary threshold must be high enough to cover the "great bulk" of overtime-eligible workers "if it is to be effective."[52] Similarly, the NPRM highlights "the inefficiencies of applying the duties tests to large numbers of overtime eligible white collar employees and the possibility of misclassification of these employees as exempt."[53]

We agree that to minimize the risk that eligible workers will be misclassified, the salary threshold must be set at a high enough level to cover the "great bulk" of overtime-eligible workers and to ensure large numbers of overtime-eligible salaried workers are not stranded above the threshold at risk of misclassification.

The Department highlights the fact that at the proposed threshold level, the number of overtime-eligible salaried workers above the threshold would be reduced from 11.6 million to about 5.3 million.[54] This number is still too high.

The Department concedes that the percentage of overtime-eligible white collar salaried employees above the proposed threshold will still be considerably higher than the percentage of employees below the threshold who meet the duties test. In order to equalize these two percentages and minimize the risk that eligible workers will be misclassified, the Department would have to increase the standard salary threshold to the 50th percentile of full-time salaried workers, or $1,154 per week ($60,008 per year) in 2013.[55] Again by this measure, the proposed threshold level is too low.

Figure 3: Percentage of White Collar Salaried Workers by Earnings and Duties Test Status



The Salary Threshold Should Not Be Lowered to Account for Regional Variations

The Department explains that the reason why it has set the proposed threshold level below the level required by the Kantor methodology[56] and below the level necessary to minimize the percentage of overtime-eligible workers above the threshold[57] is to account for wage levels in low-wage regions and low-wage industries. On this basis, the Department argues that its proposed threshold already "accounts for the fact that the salary threshold will apply to all employees nationwide, including employees who work in low-wage regions and low-wage industries."[58] However, the Department's downward adjustments are not necessary, and there is certainly no justification for further downward adjustment to the threshold.

There should be far less concern today about the impact of regional wage disparities because these disparities have been sharply reduced over the last four decades as lower wage states have moved much closer to national norms.[59] This

convergence should allay concerns that a higher national salary threshold would not fit the employment conditions in lower-wage states.

Moreover, the Department has already taken into account such wage disparities when setting earlier thresholds. There is therefore no need to make further downward adjustments to the inflation-adjusted levels of these earlier thresholds. The Kantor methodology was explicitly designed to take wage disparities into account, so there is likewise no need to make a downward adjustment to the salary figure produced by the Kantor methodology.

THE STANDARD SALARY THRESHOLD MUST BE UPDATED AUTOMATICALLY

The standard salary threshold must be updated on an annual basis if it is to maintain its effectiveness in minimizing the risk that employers will deny overtime protection to workers who should be protected.

Failure to Update the Salary Threshold on an Annual Basis Exposes Overtime-Eligible Workers to the Risk of Misclassification

As stated by the Weiss Report of 1949, for the salary thresholds to be effective in preventing the misclassification of overtime-eligible workers, they must be high enough to cover the "great bulk" [60] of eligible workers and they must keep up with rising salaries and prices.[61]

Over the past 40 years, neither of these two conditions has been met. The thresholds have only been updated twice since 1975. As the thresholds have failed to keep up with rising salaries, they have covered fewer and fewer eligible workers with each passing year and become much less effective in preventing misclassification of eligible workers.

There is no reason to expect threshold adjustments to occur any more frequently in the future—in the absence of an established process for annual updates. The Department made a commitment in 2004 to update the thresholds "on a more regular basis," but has not fulfilled that commitment. Competing priorities, agency workload, and the time-consuming nature of a regulatory update have predictably stood in the way of an update since 2004 – as they have over the entire 77-year history of the FLSA — and will likely stand in the way of future ad hoc updates as well.

To fulfill the purposes of the FLSA, the salary thresholds must be updated on an annual basis to avoid this progressive erosion of overtime protections and the exposure of an ever-growing number of eligible workers to the risk of misclassification.

Annual updates would have other benefits, as well. A transparent updating process would provide greater certainty and predictability for employers and workers alike. And an adjustment at regular intervals would avoid large catch-up increases in threshold levels.

The Secretary Has Authority to Provide for Annual Updates

There is nothing in the legislative history of the FLSA that suggests Congress disfavors annual updates to the salary thresholds. Of course, the Department created the thresholds by regulation after passage of the Act. Yet despite numerous amendments to the FLSA over the past 77 years, Congress has never limited the Department's ability to set salary thresholds for "EAP" employees (other than computer professionals), nor has it limited the Department's ability to provide for automatic updates to those thresholds. Just as the Department has authority to establish and increase salary thresholds for the Section 13(a)(1) exemptions, it also has authority to provide for automatic updates to ensure that the purposes of the FLSA are not frustrated by the gradual erosion of overtime protections.

No Single Methodology Is Required for Annual Updates

The Department is considering two methodologies for annually updating the salary thresholds: a wage percentile approach and the CPI-U. We believe the actual earnings of workers provide the best evidence of prevailing salary levels, but no single methodology for annual updates is required and neither of the proposed methodologies is unreasonable.

However, we urge the Department to consider a methodology for measuring the growth of actual earnings that goes unmentioned in the NPRM: the Employment Cost Index (ECI) for wages and salaries of management, professional, and related workers.[62] We believe this quarterly series published by the Bureau of Labor Statistics would provide the most accurate measure of prevailing salary levels for management and professional employees.

The wage percentile approach is consistent with the methodology the Department has used in the past when setting salary thresholds.[63] The Department likewise used the CPI-U to set salary thresholds in 1975, but we have some concern that the CPI-U may not keep up with salary increases in the future.

EMPLOYERS SHOULD NOT BE ALLOWED TO DENY OVERTIME PROTECTION TO WORKERS WHO SPEND MOST OF THEIR TIME PERFORMING THE SAME WORK AS THEIR OVERTIME-PROTECTED CO-WORKERS

The current "duties tests" allow employers to improperly deny overtime protection to far too many workers. In particular, employers should not be allowed to deny overtime protection to employees who spend most of their time performing the same work as their overtime-eligible co-workers simply by misclassifying those employees as "executives." The pretense that these workers are the kind of "bona fide" executives Congress intended to deny overtime protection in 1938 is absurd. We agree with the Weiss Report that denying overtime protection to workers who perform "substantial" amounts of non-exempt work is "contrary to the objectives of the Fair Labor Standards Act."[64]

The fact that the proposed salary threshold must be judged too low according to various measures is yet another reason why the duties tests must be strengthened. Because too many workers who should be protected will still be stranded above the proposed salary threshold and exposed to the risk of misclassification, it is especially important to have clear bright-line rules that will make it harder for employers to deny these workers overtime protection.

Specifically, employers should not be allowed to deny overtime protection to employees who spend more than 50 percent of their time performing non-exempt work. It is not enough to require that "bona fide" EAP employees spend 50 percent of their time doing exempt work: they must spend 50 percent of their time *exclusively* on exempt work. This amounts to a 50% quantitative limit on non-exempt work. This is the current law in California, where to be exempt, an employee must be "primarily engaged in the duties which meet the exemption" and where "primarily" is defined to mean more than one-half of the employee's worktime.[65] We are not aware of any problems associated with enforcement of this 50% quantitative limit on non-exempt work. As noted previously, reliance on the more subjective "duties tests" generally increases the risk that overtime-eligible employees will suffer misclassification. A more objective test, such as the quantitative 50% limit applied in California on non-exempt work, would be much easier for employers to apply than the current "primary duty test" and would lead to a reduction in litigation and anomalous outcomes. Cases decided under the "primary duty test" have resulted in conflicting outcomes where similar positions have been found to be exempt in one case and non-exempt in another, as noted by the DOL (80 FR 38543).

NON-DISCRETIONARY BONUSES SHOULD NOT BE USED IN CALCULATING EMPLOYEE SALARIES FOR THE PURPUSES OF THE SALARY THRESHOLD TEST

The proposed rule discusses the possible inclusion of non-discretionary bonuses in salary determinations but does not propose specific regulatory changes. The AFL-CIO strongly believes that non-discretionary bonuses should not be used in calculating employees' salaries for the purposes of the salary threshold test. As noted in the proposed rule, DOL has consistently assessed compliance with the salary level test by looking only at actual salary or fee payments made to employees, and, with the exception of the highly compensated employee test, has not included bonus payments of any kind in this calculation. Including bonuses in the calculation of workers' salaries could create confusion as to whether employees meet the salary threshold test, and are overtime eligible. Since non-discretionary bonuses may be paid for a variety of special circumstances such as longevity, attendance, additional training or certification, inclusion of such bonuses in the determination of whether or not an employee meets the salary threshold could lead to anomalous results where employees working side by side, performing the same job would be exempt and non-exempt, simply because inclusion of the bonus raised one employee over the salary threshold. This would be in direct contradiction to the purpose of the proposed rule, which is to clarify, streamline and simplify the regulations. In addition, allowing employers to include bonuses in the

calculation of employees' compensation will provide a means for employers to manipulate employees' salaries to avoid paying overtime to those who would otherwise be overtime eligible. We urge the DOL to continue to calculate workers' salaries based on annual guaranteed salary alone, and to not include bonuses in this calculation.

ADDITIONAL QUESTIONS RAISED BY THE NPRM

The DOL has also solicited input on the question of whether to add to the regulations examples of additional occupations to provide guidance in administering the white collar exemptions and as to computer related occupations. On balance, we oppose the inclusion of further examples and particularly with respect to the computer related occupations. In our view, it is not clear that the use of examples is helpful and we tend to believe that the examples are dangerous because industries and jobs change over the years. In addition examples tend to focus attention to job titles rather than what an employee is actually doing. Further, it appears to us that examples have not added additional context but rather have provided opportunities for employers to "game the system" and treat workers who should be entitled to overtime as exempt. So for example we have affiliates who represent employees who could be termed information technology specialists but who are in our view clearly non-exempt and are and should be entitled to overtime compensation. Information technology specialist could include a broad spectrum of positions, many of which are no different in substance in terms of job duties and extent to which the position requires the use of discretion and independent judgment with respect to matters of significance than positions which are clearly non-exempt. A fixed delineation, contrasting help desk operator with information technology specialist, and citing the first as non-exempt and the latter as exempt, is not helpful or precise and could well result in the improper exclusion of employees holding a title of information technology specialist but who in fact are not performing any duties which would render them exempt. Because there are substantial differences in what various employees holding the same title actually do and the degree to which they use discretion and independent judgment with respect to matters of significance, and because this is a field that is rapidly changing, we believe handling these positions on a case by case basis is the most efficacious means of protecting non-exempt employees and protecting their entitlement to overtime.

THE SALARY THRESHOLD FOR HIGHLY COMPENSATED EMPLOYED MUST BE INCREASED SUBSTANTIALLY AND UPDATED ANNUALLY

We agree with the Department that the current salary threshold for highly compensated employees "could lead to inappropriate classification given the minimal duties test."[66] This threshold needs to be increased substantially to allow for the exemption "only of bona fide exempt employees"[67] who "almost invariably meet all the other requirements for exemption."[68]

When the Department first established the streamlined duties test for "highly compensated employees" in 2004, it explained that at the proposed salary level employees would "invariably" meet all the other requirements for exemption, and in the

"rare instances" when this was not the case, exempting these employees would not defeat the purposes of the FLSA.[69]

It is therefore troubling that, according to the Department's own estimates, 36,000 employees earning between $100,000 and $122,148 would meet the streamlined duties test but not the standard duties test.[70] These are clearly not "rare instances."

The fact that the streamlined duties test for highly compensated employees disqualifies from overtime protection a substantial number of workers underscores the importance of increasing the salary threshold to reflect current salary levels and of providing for annual updates.

The Department proposes to set the threshold at the 90th percentile of full-time salaried employees, which is comparable to the threshold established in 2004.[71] The Department further proposes to annually update the threshold by one of two methodologies: the wage percentile approach or CPI-U.

As we stated previously, no single methodology for annual updates is required and neither of these proposed methodologies is unreasonable. We also reiterate our recommendation that the Department consider providing for annual updates using the Employment Cost Index (ECI) for wages and salaries of management, professional, and related workers.[72]

THE SECRETARY HAS ACTED WITHIN HIS STATUTORY AUTHORITY

Congress gave the Secretary of Labor broad authority to "define and delimit" the statutory terms "bona fide executive, administrative, and professional" "from time to time by regulations."

A unanimous Supreme Court reaffirmed the broad nature of this delegation in *Auer v. Robbins*,[73] stating that "the FLSA grants the Secretary broad authority to 'define and delimit' the scope of the exemptions for executive, administrative, and professional employees."

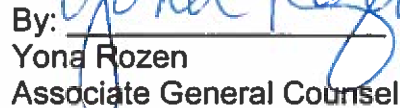
The Secretary has acted within his statutory authority to determine the operational definitions of these terms. The proposed regulation is consistent with Congress's understanding that breadth of coverage was critical to achieving the purposes of the FLSA to spread employment and protect workers who cannot protect themselves from the evil of overwork.

CONCLUSION

For all these reasons, we broadly support the proposed regulation as a necessary restoration of overtime protections that have been eroded over the past 40 years. However, we urge the Secretary to make the final rule more protective of

workers – and certainly no less protective of workers – with regard to both the standard salary threshold and the duties tests.

Respectfully submitted,



By: ____________________
Yona Rozen
Associate General Counsel

By: /s/ Kelly Ross
Kelly Ross
Deputy Director, Policy

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[1] Government Accountability Office (GAO), _White Collar Exemptions in the Modern Workplace_, GAO/HEHS-99-164 (September 1999), at 12, Figure 4. http://gao.gov/assets/230/228036.pdf
[2] Jared Bernstein and Ross Eisenbrey, "New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Institute (March 13, 2014).
[3] _Powell v. United States Cartridge Co._, 339 U.S. 497, 516 (1950).
[4] 80 Fed. Reg. 38546 (July 6, 2015)
[5] _Barrentine v. Arkansas-Best Freight System, Inc._, 450 U.S. 728, 739 (1981) ("The FLSA was designed…to ensure that each employee covered by the Act would receive a fair day's for a fair day's work and would be protected from the evil of overwork as well as underpay").
[6] _Powell v. United States Cartridge Co._, 339 U.S. 497, 516-517 (1950) ("The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality amply broad enough to include employees of private contractors working on public projects as well as on private projects. Where exceptions were made, they were narrow and specific").
[7] _Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959)._
[8] 80 Fed. Reg. 38519 (July 6, 2015), citing _Report of the Minimum Wage Study Commission_, vol. IV (June 1981), at 236, 240.
[9] Government Accountability Office, _Fair Labor Standards Act: White Collar Exemptions in the Modern Workplace_, GAO/HEHS-99-164 (1999), at 5.
[10] Jared Bernstein and Ross Eisenbrey, "New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Institute (March 13, 2014).
[11] 29 U.S.C. §213(a)(1)
[12] _See_ Mark Linder, _Time and a Half's the American Way_ (2004).
[13] Deborah Malamud, "Engineering the Middle Class: Class Line drawing in New Deal Hours Legislation," 96 Mich. L. Rev. 2212, 2266 (1998).
[14] Exempt "EAP" employees must also be paid on a salary basis.
[15] A salary-only test would also be impermissible under the FLSA, as the Department has long recognized. 69 Fed. Reg. 22173 (April 23, 2004) ("The Department has always maintained that the use of the phrase 'bona fide executive, administrative, or professional capacity' in the statute requires the performance of specific duties").
[16] 80 Fed. Reg. 385578 (July 6, 2015)
[17] _How the New Overtime Rules Will Help Women and Families_, Institute for Women's Policy and Research (August 2015). http://www.iwpr.org/publications/pubs/how-the-new-overtime-rule-will-help-women-families
[18] Ross Eisenbrey and Lawrence Mishel, "How EPI's Estimates Differ from the Department of Labor's," Economic Policy Institute (August 3, 2015), at 3. http://s2.epi.org/files/pdf/90408.pdf
[19] Ross Eisenbrey and Lawrence Mishel, "Here Is a Breakdown of Who They Are," Economic Policy Institute (August 3, 2015). http://s4.epi.org/files/pdf/90214.pdf
[20] 80 Fed. Reg. 385578 (July 6, 2015)
[21] The Department estimates that there are 807,000 salaried workers with earnings between the old threshold and the proposed threshold who are currently being misclassified as overtime-ineligible [80 Fed. Reg. 38559 (July 6, 2015)]. The Department does not explain how it arrived at this figure, which may be a significant underestimate.
[22] 80 Fed. Reg. 38569 (July 6, 2015)
[23] 80 Fed. Reg. 38579 (July 6, 2015)
[24] 80 Fed. Reg. 38580 (July 6, 2015)
[25] 80 Fed. Reg. 38580 (July 6, 2015)

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[26] 80 Fed. Reg. 38580 (July 6, 2015)
[27] 80 Fed. Reg. 38523 (July 6, 2015)
[28] 80 Fed. Reg. 38523 (July 6, 2015)
[29] 80 Fed. Reg. 38523 (July 6, 2015)
[30] "Executive, Administrative, Professional, Outside Salesman Redefined," Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of Presiding Officer Harold Stein (Oct. 10, 1940) (hereinafter the "Stein Report").
[31] Stein Report at 5.
[32] 80 Fed. Reg. 38532 (July 6, 2015)), citing the Stein Report at 19.
[33] "Executive, Administrative, Professional, Outside Salesman Redefined," Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of Presiding Officer Harold Stein (Oct. 10, 1940).
[34] "Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Presiding Officer Harry Weiss," U.S. Department of Labor (June 30, 1949) (hereinafter the "Weiss Report").
[35] "Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Presiding Officer Harry S. Kantor," U.S. Department of Labor (Mar. 3, 1958) (hereinafter the "Kantor Report").
[36] 80 Fed. Reg. 38532 (July 6, 2015)
[37] 80 Fed. Reg. 38528-38529 (July 6, 2015)
[38] 80 Fed. Reg. 385312 (July 6, 2015), at note 29.
[39] 80 Fed. Reg. 38534 (July 6, 2015)
[40] 80 Fed. Reg. 38531-38532 (July 6, 2015)
[41] 80 Fed. Reg. 38533 (July 6, 2015)
[42] 80 Fed. Reg. 38519 (July 6, 2015)
[43] 80 Fed. Reg. 38533 (July 6, 2015)
[44] Heidi Shierholz, "It's Time to Update Overtime Pay Rules," Economic Policy Institute (July 9, 2014), at 3. http://s2.epi.org/files/2014/ib381-update-overtime-pay-rules.pdf
[45] Heidi Shierholz, "It's Time to Update Overtime Pay Rules," Economic Policy Institute (July 9, 2014), at 5. http://s2.epi.org/files/2014/ib381-update-overtime-pay-rules.pdf
[46] Bureau of Labor Statistics, Wages for Bookkeeping, Accounting and Auditing Clerks (May 2014). http://www.bls.gov/oes/current/oes433031.htm
[47] Bureau of Labor Statistics, Wages for Accountants and Auditors (May 2014). http://www.bls.gov/oes/current/oes132011.htm
[48] Jared Bernstein and Ross Eisenbrey, "New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules," Economic Policy Institute (March 13, 2014), at 10.
[49] Ross Eisenbrey, Testimony before the U.S. House of Representatives Subcommittee on Workforce Protections (July 23, 2015).
[50] 80 Fed. Reg. 38532 (July 6, 2015), at Table B
[51] Weiss Report at 18.
[52] 80 Fed. Reg. 38524 (July 6, 2015), citing the Weiss Report at 18 ("the salary level adopted must exclude the great bulk of nonexempt persons if it is to be effective")
[53] 80 Fed. Reg. 38527 (July 6, 2015)
[54] 80 Fed. Reg. 38529 (July 6, 2015)
[55] 80 Fed. Reg. 38560 (July 6, 2015)
[56] 80 Fed. Reg. 38532, 38534 (July 6, 2015)
[57] 80 Fed. Reg. 38560 (July 6, 2015)
[58] 80 Fed. Reg. 38532 (July 6, 2015)
[59] See David Cooper, Lawrence Mishel, John Schmitt, "We Can Afford a $12 Minimum Wage by 2020," Economic Policy Institute (April 30, 2015). http://s4.epi.org/files/2015/we-can-afford-a-12-federal-minimum-wage.pdf.
[60] 80 Fed. Reg. 38524 (July 6, 2015), citing the Weiss Report at 18 ("the salary level adopted must exclude the great bulk of nonexempt persons if it is to be effective")
[61] Weiss Report at 18.
[62] Bureau of Labor Statistics, Employment Cost Index for wages and salaries, for civilian workers, by occupational group and industry (June 2015). http://www.bls.gov/news.release/eci.t08.htm
[63] 80 Fed. Reg. 38540 (July 6, 2015)
[64] 80 Fed. Reg. 38530 (July 6, 2015), citing the Weiss Report at 33.
[65] *See Heyen v. Safeway, Inc.*, 157 Cal. Rptr. 3d. 280, 302 (Cal. Ct. App. 2013) and Cal. Lab. Code Sec. 515(a),(e).
[66] 80 Fed. Reg. 38516 (July 6, 2015)
[67] 80 Fed. Reg. 38537 (July 6, 2015)
[68] 80 Fed. Reg. 38537 (July 6, 2015)
[69] 69 Fed. Reg. 22173 (April 23, 2004)
[70] 80 Fed. Reg. 38549 (July 6, 2015)
[71] 80 Fed. Reg. 38537 (July 6, 2015)
[72] Bureau of Labor Statistics, Employment Cost Index for wages and salaries, for civilian workers, by occupational group and industry (June 2015). http://www.bls.gov/news.release/eci.t08.htm
[73] 519 U.S. 452, 456 (1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al.*,
Plaintiffs, **No. 4:16-CV-731-ALM**

v.
UNITED STATES DEPARTMENT OF LABOR,
et al.,
Defendants.

PROPOSED INTERVENOR-DEFENDANT TEXAS AFL-CIO' ANSWER

Comes now, Texas AFL-CIO, Proposed Intervenor-Defendant and files its Proposed Answer to the Complaint filed by the Business Plaintiffs and the Complaint filed by the State Plaintiffs in the above referenced matter and in support thereof would show as follows:

The Texas AFL-CIO denies any factual allegations of the two Complaints not expressly admitted, qualified, or denied in this Proposed Answer.

I. Answer to Allegations in Complaint filed by Plaintiff Plano Chamber of Commerce et al.:

1. Introduction: Texas AFL-CIO denies paragraph 1,2,3,4, 5 of Plaintiff Plano Chamber of Commerce et. al.'s Complaint (hereinafter Business Plaintiffs' Complaint).
2. Parties: Texas AFL-CIO admits paragraphs 6-33 to the extent that those paragraphs identify and describe generally the parties but deny each paragraph to the extent that it asserts the allegation in paragraph 6 "Along with all of the Plaintiffs identified below, many of the Plano Chamber's member organizations employ executive, administrative, professional, or computer employees whose previously exempt status will be adversely

affected by the new Overtime Rule, to the detriment of Plano Chamber's members, employees and customers".

3. Texas AFL-CIO denies paragraphs 34.
4. Texas AFL-CIO admits paragraph 35 but denies the allegation in the first phrase of the first sentence to the extent that it asserts that it has exempt employees whose status is adversely affected by the new rule.
5. Texas AFL-CIO admits paragraph 36 and 37.
6. Jurisdiction and Venue: Texas AFL-CIO admits paragraphs 38-40
7. Background: The allegations in paragraphs 41-46 describe the FLSA and the regulations which speak for themselves but to the extent these descriptions mischaracterize or misstate the same, Texas AFL-CIO denies paragraphs 41-46
8. Texas AFL-CIO denies paragraphs 47-54 because those paragraphs mischaracterize the regulatory and statutory record and/or take statements out of proper context.
9. DOL's New Overtime Rule: Texas AFL-CIO denies paragraphs 55-62
10. Count One: Texas AFL-CIO states paragraph 63 merely restates paragraphs they have already responded to and repeats their responses
11. Texas AFL-CIO denies paragraphs 64-68
12. Count Two: Texas AFL-CIO states paragraph 69 merely restates paragraphs they have already responded to and repeats their responses
13. Paragraph 70 describes the a provision of the APA which speaks for itself, to the extent the comment misstates the statute, Texas AFL-CIO denies paragraph 70
14. Texas AFL-CIO denies paragraphs 71
15. Texas AFL-CIO admits paragraphs 72-73.

16. Texas AFL-CIO denies paragraphs 74 and 75
17. Count Three: Texas AFL-CIO states paragraph 76 merely restates paragraphs they have already responded to and repeats their responses
18. Paragraph 77 describes a provision of the APA which speaks for itself, to the extent the description mischaracterizes the statutory provision or applicable law, Texas AFL-CIO denies paragraph 77.
19. Texas AFL-CIO denies paragraphs 78-82
20. Prayer for Relief: No admission or denial is required but the Texas AFL-CIO asserts that the Business Plaintiffs are not entitled to the relief they seek.

II. Answer to Allegations in Complaint filed by Plaintiff Nevada et al.:

1. Introduction and Nature of Action is either introductory or by way of argument and does not require admission or denial but to the extent any factual assertions are included, Texas AFL-CIO denies them.
2. Paragraphs 1-21 are descriptions and characterizations of the parties to which no response is required but to the extent a response is required, Texas AFL-CIO is without knowledge as to whether bona fide EAP employees are paid less than $913 a week and therefore denies those allegations.
3. Texas AFL-CIO admits paragraphs 22-26
4. Jurisdiction and Venue: Texas AFL-CIO admits paragraphs 27-29.
5. Factual Background: Paragraphs 30-43 purports to describe the legislative history and Supreme Court precedent and as such requires no response but to the extent that it

mischaracterizes or takes out of context these matters, Texas AFL-CIO denies paragraphs 30-43.

6. Paragraphs 44-61 purports to describe the most recent regulatory rulemaking and to the extent that these paragraphs mischaracterize and/or take statements out of context or misstate the process, Texas AFL-CIO denies the paragraphs.
7. Texas AFL-CIO is without sufficient knowledge of the matters asserted in paragraphs 62-77 to admit or deny and therefore denies each of these paragraphs and demands strict proof thereof.
21. Count One: Texas AFL-CIO states paragraph 78 merely restates paragraphs they have already responded to and repeats their responses.
8. Paragraphs 79-81 purport to describe certain statutory or constitutional provisions which speak for themselves but to the extent that this paragraphs misstate or mischaracterize these provisions, Texas AFL-CIO deny these paragraphs.
9. Texas AFL-CIO denies paragraphs 82-87.
10. Count Two: Texas AFL-CIO states paragraph 88 merely restates paragraphs they have already responded to and repeats their responses.
11. Paragraphs 89-90 purport to describe certain statutory provisions which speak for themselves but to the extent that these paragraphs misstate or mischaracterize these provisions, Texas AFL-CIO deny these paragraphs.
12. Texas AFL-CIO denies paragraphs 91-95.
13. Count Three: Texas AFL-CIO states paragraph 96 merely restates paragraphs they have already responded to and repeats their responses.

14. Paragraph 97-99 purport to describe certain statutory provisions which speak for themselves but to the extent that these paragraphs misstate or mischaracterize these provisions, Texas AFL-CIO denies these paragraphs.
15. Texas AFL-CIO admits paragraph 100.
16. Texas AFL-CIO denies paragraphs 101-103
17. Count Four: Texas AFL-CIO states paragraph 104 merely restates paragraphs they have already responded to and repeats their response.
18. Texas AFL-CIO denies paragraphs 105-106.
19. Count Five- In the Alternative: Texas AFL-CIO states paragraph 107 merely restates paragraphs they have already responded to and repeats their response.
20. Paragraphs 108-109 purport to describe certain statutory and Constitution provisions which speak for themselves but to the extent these paragraphs misstate or mischaracterize the provisions or the law thereunder, Texas AFL-CIO denies these paragraphs.
21. Texas AFL-CIO denies paragraphs 110-113.
22. Paragraphs 114-121 constitute a demand for relief and as such, no response is necessary but Texas AFL-CIO denies that the State Plaintiffs are entitled to any relief.

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

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Counsel for the Texas AFL-CIO

CERTIFICATE OF SERVICE

I certify that on December 9, 2016, the foregoing Proposed Answer was attached to electronically to the motion to intervene by submission to the Court's civil ECF email address and served on all counsel of record by electronic mail.

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al.*,
Plaintiffs,

No. 4:16-CV-731-ALM

v.
UNITED STATES DEPARTMENT OF LABOR,
et al.,
Defendants.

PROPOSED ORDER GRANTING TEXAS AFL-CIO'S MOTION TO INTERVENE

The Court has considered the motion filed by the Texas AFL-CIO seeking to intervene as of right or, in the alternative to be granted permissive intervention, and have considered the motion and all responses thereto, and having found the motion to be well-founded;

IT IS HEREBY ORDERED THAT, the motion is **GRANTED, and** The Texas AFL-CIO is allowed to intervene in the consolidated cases in this Court on the following basis:

_________Of right pursuant to Rule 24 (a) (2)

________ Permissive Intervention pursuant to Rule 24 (b)(2)

__________The Texas AFL-CIO is given leave to file a supplemental opposition to the motion for summary judgment consisting of no more than_____pages by _________________.