May 21, 2019

Ms. Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted via regulations.gov

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA20) (84 Fed. Reg. 10900, March 22, 2019)

Dear Ms. Stanton:

The Society for Human Resource Management (SHRM) is pleased to provide the Department of Labor ("DOL" or "the Department") with comments on its proposed revisions to the executive, administrative, professional, outside sales, and computer employees exemptions under the Fair Labor Standards Act (FLSA).

SHRM's mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. With 300,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. Changes to the overtime regulations affect the workplaces of nearly every SHRM member. Our comments are joined by SHRM's 51 affiliated state councils.

SHRM supports regular updates to the overtime salary threshold and has argued for reasonable increases to ensure that HR professionals and employers are able to classify employees with certainty while maintaining the ability to offer flexible schedules, opportunities for advancement and access to the professional development that many employees currently enjoy.

SHRM opposed the 2016 Final Rule on overtime exemptions which would have fundamentally changed the rules for employee classification and has since been invalidated by the U.S. District Court of the Eastern District of Texas in their August 31,

2017 decision. As we detailed in our 2017 response to the Department's Request for Information,[1] the 2016 Rule resulted in many SHRM members adjusting their policies.

Many of these changes had a direct financial impact on employees:

- decreasing work hours to avoid overtime;
- reducing the effective hourly rate so that total pay would remain the same while accounting for usual hours worked;
- removing eligibility to earn incentive compensation; and
- redistributing work responsibilities to shift duties to employees who would have remained exempt.

Other changes directly impacted employees' professional development and flexibility:

- reducing access to training programs, especially if travel would have been required;
- reducing flexible workplace offerings, such as job sharing and part-time exempt work; and
- removing the ability of employees to use mobile devices outside of work hours.

In order to provide employers with a clear understanding of the status of their obligations, SHRM urges DOL, as part of this rulemaking, to formally rescind the 2016 Final Rule.

SHRM is pleased that the Department has proposed an update to the overtime rules providing employers with finality as they craft policies regarding compensation and flexibility to drive employee engagement. As explained more fully below, SHRM supports the Department's decision to retain the current duties test and adjust the nationwide salary level using the same methodology used in previous rulemakings, without regional variation. As part of the salary level calculation, SHRM urges the Department to include the full amount of all types of bonuses and commissions and to regularly update the salary threshold under existing notice and comment rulemaking procedures. Lastly, SHRM urges the Department to harmonize the regular rate regulations with the rulemaking and provide at least 120 days for implementation of any final rule.

I. Using the Department's 2004 Methodology for Establishing the Minimum Salary Threshold for Exempt Status is Appropriate and Consistent with the Threshold's Historical Purpose of Screening Out Obviously Non-Exempt Employees.

The Department proposes to update the 2004 standard salary level by applying the same methodology to current data. According to the NPRM, "The Department proposes to set

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information, 82 Fed. Reg. 34,616.

the standard salary level at approximately the 20th percentile of earnings for full-time salaried workers in the lowest-wage Census region, again the South in this case, and/or in the retail sector. Normally, this would result in a weekly salary level of $641 per week ($33,332 annually), which is also approximately the 20th percentile of both: (1) Earnings for full-time salaried workers in the South, and (2) earnings for full-time salaried workers in the retail sector. However, the Department proposes to inflate this figure to reflect anticipated wage growth through January 2020. This results in the standard salary level proposed in this NPRM, which is $679 per week ($35,308 annually)."[2]

Since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[3] That is, the salary level should be set so that the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. In setting the threshold to serve this screening function, DOL has historically looked to set it "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." [4]

In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, in part due to the elimination of the long duties test. This regulatory history reflects both Democratic and Republican administrations adjusting the salary level between 10 and 20 percent while taking into consideration regional and industry differences.

The salary threshold provides employers with an abbreviated method to appropriately classify employees by screening out those who are obviously non-exempt. The 2004 methodology remains the best measure to achieve this goal.

[2] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees;* 84 Fed. Reg. 56 (March 22, 2019).

[3] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

[4] Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) at 6-7.

II. The Department Should Reconsider its Proposed Calculation of the Minimum Required Salary for the Highly Compensated Employee Exemption.

Since 2004, DOL has set the salary level for the Highly Compensated Employee (HCE) test at $100,000. For the last 15 years, the difference between the standard and HCE levels has been $76,340. In the 2016 Final Rule, the Department for the first time articulated a methodology for setting the HCE threshold: the 90th percentile of full-time salaried workers generally. In 2016, that was $134,004. The difference between the standard and HCE levels in the 2016 Final Rule was $86,528.

In the current proposal, the Department proposes to use the same methodology it used in 2016, resulting in a figure even higher than the 2016 figure -- $147,414. This increase in the HCE level is proposed despite the fact that the current proposal's standard salary threshold is significantly reduced from the 2016 Final Rule. As a result, the proposed HCE level is $112,106 more than the standard threshold.

The Department has offered no reason why the proposed level should be higher than the level in the 2016 Final Rule. And the Department offers no explanation for the gap between the standard threshold and the HCE threshold increasing from the 2016 Final Rule – more than 2.5 times more than it did from 2004 to 2016 ($10,000 vs. $26,000).

A significant amount of administrative effort will be needed to determine that an employee who had been classified as exempt through application of the HCE test remains exempt under application of the standard duties test. The Department should reconsider the proposed increase to the minimum salary required for application of the HCE exemption and either leave it at the current level or adjust with consideration of a more appropriate gap between the standard and HCE thresholds.

III. Bonuses and Commissions Should be Counted Toward the Salary Threshold as Part of Total Compensation.

The Department proposes to allow employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided such bonuses are paid annually or more frequently. SHRM supports DOL's proposal to allow employee nondiscretionary bonuses paid quarterly, semi-annually, or annually to be included toward the salary threshold, but recommends removing the ten percent and nondiscretionary limitations.

As SHRM expressed in previous comments, we appreciate and commend the Department's willingness to consider inclusion of nondiscretionary bonuses toward the minimum salary level but suggested that some changes be made to make this option more attractive for a greater variety of employers. In its current proposal, the Department addresses some of those concerns by allowing inclusion of employee bonuses paid quarterly, semi-annually, or

annually as this better reflects the timing of how these incentive payments are made by employers.

Similarly, SHRM encourages the Department to include all types of bonuses toward the minimum salary level in their full amount. In certain industries and jobs, bonuses and other incentive payments, both discretionary and nondiscretionary, account for a significant increase in an employee's total compensation. Employees who qualify to receive such incentive payments are typically those who would otherwise qualify for exemption because of the duties they perform. When employers create bonus plans, they do so with an eye toward the total compensation package. As such, these payments should count toward to salary threshold in full rather than limiting the contribution to an arbitrary ten percent.

Because the timing of bonus and incentive payments can vary across employers, we agree that the Department should allow a "catch-up" payment in the event that payments to the employee over the course of the preceding year do not satisfy the salary level and qualify the employee for exempt status. Given the manner in which annual bonuses are calculated and paid, SHRM suggests that the Department extend the time limitation for making such catch-up payment from the proposed one pay period to a longer period of time, such as a quarter of a year. This allows the employer to obtain a complete understanding of the annual performance by an employee and reduces the likelihood that compliance errors will be made in an effort to reconcile the employee's annual pay against the salary level within the brief time frame of one pay period.

IV. The Department Should Regularly Update the Salary Threshold Through Notice and Comment, But There Should be no Automatic Adjustments.

As mentioned earlier, SHRM supports regular updates to the salary threshold through the Department's existing notice and comment rulemaking authority. SHRM supports the Department's proposed rejection of automatic increases to both the standard salary level and the highly compensated employee (HCE) level for both legal and practical reasons.

The Administrative Procedure Act (APA) requires notice and comment rulemaking for informal rules, such as the current proposal issued by the Department. The purpose of the notice and comment requirement is, in part, to ensure that the regulated community has sufficient notice of proposed changes to which they will be bound so that they have an opportunity to respond to the proposal and offer the regulator opinions, facts, and other information that will be helpful in crafting a final rule.

The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. An automatic update mechanism would allow the Department to announce a new salary level on a predetermined schedule in the *Federal Register* without providing notice and an opportunity for public comment, without conducting a Regulatory Flexibility Act analysis, and without satisfying any of the other regulatory requirements established by various Executive Orders. Future

automatic salary threshold increases would certainly take effect during economic downturns—exactly the wrong time to be increasing labor costs on employers.

Likewise, implementing a regulatory preset schedule for updating the salary threshold, like the periodic increases every four years proposed by the Department, can cause unanticipated problems. Automatic or preset mechanisms for updating the thresholds cannot account for ways in which the workforce changes over time. Making adjustments to the salary thresholds through notice and comment rulemaking helps ensure that geographical and sectoral disparities in pay are accounted for. Similarly, there may be times of economic downturn or other economic conditions that make an update unrealistic.

For the foregoing reasons, the Department should regularly update the threshold through notice and comment rulemaking. This allows DOL to take into consideration current economic conditions and the ability of the existing salary threshold to continue to serve as an appropriate method for screening out the clearly nonexempt employees under existing economic conditions.

V. The Department Should Not Set Varying Salary Thresholds Based on Geography or Other Factors.

Faced with the dramatic salary increase proposed during discussion of the 2016 Rule, some stakeholders proposed regional variations to address the difficulties that the salary level would cause for various industries or geographic regions.

While it is critically important for DOL to consider data from different regions of the country, different size employers, and different industries, this data should be considered to develop a single standard salary threshold, not to adopt multiple thresholds, which will only serve to increase compliance costs and create confusion for employers and employees alike. A salary level that is set appropriately for the lowest wage region, or lowest wage industry, will serve adequately in other regions. In addition, having different salary levels will significantly increase compliance costs on businesses as they will necessarily expend resources determining which salary level should be applied for each covered employee. No compelling reason has been articulated that would justify this significantly increased burden. The fact is that a single standard salary threshold will always be easier to apply than multiple thresholds.

By returning to the 2004 methodology, the Department has satisfied the District Courts criticism that the 2016 proposed rule was inconsistent with the salary level's historical purpose of setting a floor for exemption. By setting the threshold at a level that restores its role of screening out obviously exempt employees, the Department eliminates any need for such variations.

VI. SHRM supports the position taken in the proposal to refrain from making any changes to the existing duties test.

SHRM supports the Department's position that no changes should be made to the duties test. Employers and HR professionals have experience applying the current duties tests. In addition, application of the duties tests has been shaped by litigation. Making changes in this rulemaking would increase FLSA litigation at a time when such litigation is already exploding. Increasing these litigation costs is not good for employers, employees, or the economy.

For these reasons, the Department should not over complicate the rule by changing the duties test. Therefore, SHRM supports the Department's decision not to address the duties test in this rulemaking.

VII. The Department Should Harmonize Overtime and Regular Rate of Pay Regulations.

On March 29, 2019 the Department issued a proposed regulation to update and clarify the regular rate requirements of the FLSA.[5] Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. The Department proposes clarifications to confirm what employers may exclude from an employee's regular rate of pay. The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, "call back" pay, and others.

As part of the overtime rulemaking, the Department should include as appropriate to the calculation of the salary threshold for overtime, the same forms of compensation that can be used toward the regular rate. If an employer must include a non-hourly payment in the regular rate, that payment also should count towards the salary threshold. If the employer can exclude the payment, it should not count towards the salary threshold. For consistency and ease of administration, payments that count towards regular rate should count towards both the standard salary threshold and the HCE threshold.

VIII. The Department Should Provide as Least 120 Days for Implementation

In 2004, the Department established an effective date for its final revisions that was 120 days after publication of its final rule. Based on our experience at that time, compliance within that window was extremely challenging for employers given the substantial changes to the classification scheme. While these regulations will be more familiar to employers, many will need to re-engage on this issue after a long period of awaiting resolution. At a

[5] *Regular Rate Under the Fair Labor Standards Act;* 84 Fed. Reg. 61 (March 29, 2019)

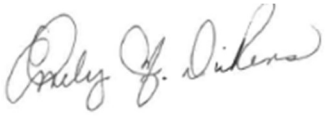
minimum, we urge the Department to provide employers with at least 120 days after publication to implement the rule.

IX. Conclusion.

SHRM supports the Department's proposal to rescind the 2016 Final Rule and return to the 2004 methodology in setting a single, nationwide salary threshold for determining exempt status under the FLSA. However, we request the Department:

- Remove limitations on the type and amount of bonus and incentive pay that can count toward the salary threshold;
- Standardize the types of compensation that can be considered to satisfy the salary thresholds with the regular rate regulations and
- Provide at least 120 days to implement the final rule.

Sincerely,



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