



November 7, 2023

VIA ELECTRONIC SUBMISSION

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Acting Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Jessica Looman  
Principal Deputy Administrator  
U.S. Department of Labor  
Wage and Hour Division  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152 (Sept. 8, 2023).

Dear Ms. Su and Ms. Looman:

On September 8, 2023, the U.S. Department of Labor (DOL) Wage and Hour Division published a proposed rule that will increase the standard salary threshold for the executive, administrative, and professional (EAP) overtime exemption under the Fair Labor Standards Act (FLSA) from \$35,568 to \$55,068 annually.<sup>1</sup> This threshold will likely be increased in the final rule, up to \$60,209.<sup>2</sup> This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152 (proposed Sept. 8, 2023) [hereinafter 2023 Proposed Rule].

<sup>2</sup> *Id.* at n.3. The proposed rule figure of \$55,068 relies upon Current Population Survey Merged Outgoing Rotation Group Earnings Data (CPS MORG) for 2022 to develop the NPRM. In the first quarter of 2024 (when the final rule is estimated to be released), DOL estimates that the salary threshold could be \$1,258 per week or \$60,209 yearly utilizing a 4.5 percent growth rate.

Advocacy is concerned that DOL has proposed a costly increase to the EAP overtime exemption, which will have a significant economic impact on a substantial number of small entities. DOL's rule will increase the standard salary levels under the EAP overtime exemption by over \$24,000 and almost 70 percent.<sup>3</sup> Advocacy believes that DOL's Initial Regulatory Flexibility Analysis (IRFA) is deficient because it underestimates the economic impact of this rule on small entities. Small entities have commented that this rule will have detrimental impacts to their operations, particularly during the current difficult business environment of high inflation, supply chain disruptions, shutdowns, and tighter labor markets. This rule may also lead to unintended negative consequences for employees, as it may affect worker morale, limit flexible working arrangements, and access to benefits. This rule may also have significant economic impacts to small nonprofit organizations, resulting in reduced services.

Advocacy recommends that DOL reassess the compliance costs in a Supplemental Regulatory Flexibility Analysis and publish this expanded economic analysis in the *Federal Register* for public comment. As part of the supplemental analysis, DOL must consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act. Based on feedback from small entities, Advocacy recommends that DOL consider adopting a lower standard salary level and seek public feedback before future updates to this level.

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.<sup>6</sup> If a rule will not have a significant

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<sup>3</sup> Advocacy calculated the percent increase from the current salary threshold of \$35,568 to the expected threshold of \$60,209 in the first quarter of 2024, which is 69.2 percent.

<sup>4</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

<sup>5</sup> Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§ 601-612).

<sup>6</sup> 5 U.S.C. § 603.

economic impact on a substantial number of small entities, agencies may certify the rule.<sup>7</sup> The agency must provide a statement of factual basis that adequately supports its certification.<sup>8</sup>

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>9</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.<sup>10</sup>

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”<sup>11</sup>

## **B. The Proposed Rule**

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay of time and a half for work over 40 hours a week.<sup>12</sup> While these protections extend to most workers, the FLSA provides numerous exemptions. This exemption is for executive, administrative and professional (EAP) employees.<sup>13</sup> For employees to meet this EAP exemption, they must be paid on a salary basis, at a standard salary level set by DOL, and their primary duty must be consistent with those in executive, administrative, or professional positions.<sup>14</sup>

The FLSA provides that the terms of this exemption are “defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of the Administrative Procedure Act.”<sup>15</sup> In the last 20 years, DOL has proposed and/or finalized multiple updates to the EAP standard salary level test (see Table 1). In each of these rulemakings, DOL bases the salary levels on a percentile of weekly earnings of full-time salaried workers (20<sup>th</sup>, 35<sup>th</sup>, and 40<sup>th</sup>), and these salaries are adjusted based on the lowest-wage Census region and/or industry (retail). DOL has not updated the duties test since 2004. In 2015 and 2023, DOL has proposed automatic updates in the salary level every three years.

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<sup>7</sup> *Id.* § 605(b).

<sup>8</sup> *Id.*

<sup>9</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

<sup>10</sup> *Id.*

<sup>11</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

<sup>12</sup> 29 U.S.C. § 206(a)(1)(c); *see also* 29 U.S.C. § 207(a)(1).

<sup>13</sup> 29 U.S.C. § 213 (a)(1), §13(a)(1).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

**Table 1: DOL’s EAP Rulemakings (2004-2023)**

	2004 Final Rule <sup>16</sup>	2016 Final Rule (Rule was invalidated) <sup>17</sup>	2019 Final Rule (Current Rule) <sup>18</sup>	2023 Proposed Rule <sup>19</sup>
Salary Level	\$23,600 per year \$455 per week	\$47,476 per year \$913 per week	\$35,568 per year \$683 per week	\$55,068 per year \$1,059 per week \$60,209 in 2024
Percentile	20 <sup>th</sup> percentile of weekly earnings in lowest wage region (South) and retail industry	40 <sup>th</sup> percentile of weekly earnings in lowest wage region (South)	20 <sup>th</sup> percentile of weekly earnings in lowest wage region (South) and retail industry, with 2019 data.	35 <sup>th</sup> percentile of weekly earnings in lowest wage region (the South)
Automatic Increases in Salary Level	No.	Yes. Every 3 years.	No. DOL would update every 4 years with notice and comment rulemaking.	Yes. Every 3 Years

In the last eight years, Advocacy has completed extensive outreach to small entities across the country on DOL’s overtime regulations and has submitted public comment letters to DOL on this feedback:

- In response to the 2015 proposed overtime rule which set the salary threshold at \$50,440,<sup>20</sup> Advocacy held multiple small business roundtables in Colorado, Kentucky, Louisiana, and Washington, D.C. Advocacy submitted a comment letter citing concerns that the increase in the standard salary threshold would add significant costs and burdens on small entities.<sup>21</sup> On November 22, 2016, one month before the rule setting the standard salary level to \$47,476 was to become effective, the rule was temporarily enjoined by a federal court.<sup>22</sup> On August 31, 2017, the United States District Court for the Eastern District of Texas invalidated the final rule.<sup>23</sup>

<sup>16</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004) [hereinafter *2004 Final Rule*].

<sup>17</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 81 Fed. Reg. 32391 (May 23, 2016) [(hereinafter *2016 Final Rule*].

<sup>18</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 84 Fed. Reg. 51230 (Sept. 27, 2019) [hereinafter *2019 Final Rule*].

<sup>19</sup> 2023 Proposed Rule, *supra* note 1.

<sup>20</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 80 Fed. Reg. 38516 (proposed July 6, 2015).

<sup>21</sup> U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Sept. 4, 2015), <https://www.regulations.gov/comment/WHd-2015-0001-5093>.

<sup>22</sup> Nevada v. U.S. Dep’t of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

<sup>23</sup> Nevada v. U.S. Dep’t of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

- In response to the 2019 proposed rule setting the standard salary level to \$35,568,<sup>24</sup> Advocacy held three small business roundtables in Alabama, Florida, and Washington, D.C.<sup>25</sup> Advocacy supported this more moderate salary threshold and the DOL proposal to seek public feedback before updating the threshold every four years.
- The current proposed rule changes the standard salary threshold to \$55,068 per year.<sup>26</sup> DOL projects that the standard salary threshold could be up to \$60,209 when this rule is finalized in 2024.<sup>27</sup> On September 26 and 27, 2023, Advocacy held virtual roundtables with DOL officials and over 300 small entities from across the country, including small businesses, small nonprofits, and small jurisdictions with a population of fewer than 50,000. The following comments reflect the issues raised during the roundtables, meetings, and other discussions with small businesses and their representatives. Advocacy recommends that DOL consider these concerns in any final rule.

## II. DOL’s Compliance with the Regulatory Flexibility Act

### A) DOL’s Small Business Analysis Underestimates Compliance Costs of the Rule

Under the RFA, an Initial Regulatory Flexibility Analysis (IRFA) must contain: 1) a description of the reasons why the regulatory action is being considered, 2) the objectives and legal basis for the proposed rule; 3) a description and estimated number of regulated entities to which the proposed rule will apply; 4) a description and estimate of compliance requirements; 5) identification of duplication, overlap, and conflict with other rules and regulations; and 6) a description of significant alternatives with the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.<sup>28</sup>

Advocacy believes that DOL’s IRFA is deficient because it underestimates the economic impact of this rule on small entities. Small entities will not be able to provide meaningful comments to the agency based on this inadequate analysis. DOL’s IRFA estimates an average first year cost of only \$4,323 per small entity to comply with this rule, which includes management costs and payroll costs.<sup>29</sup> DOL also estimates the average first year costs by industry: construction (\$4,028); retail (\$5,210); recreation (\$4,397); accommodation (\$3,506); food services and

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<sup>24</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 84 Fed. Reg. 10901 (proposed Mar. 22, 2019).

<sup>25</sup> U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Defining and Delimiting the Exemptions for Executive, Administrative, Professional and Outside Sales and Computer Employees (May 20, 2019), <https://advocacy.sba.gov/2019/05/20/letter-to-dol-most-small-businesses-support-35k-overtime-threshold-rural-businesses-seek-relief/>.

<sup>26</sup> 2023 Proposed Rule, *supra* note 1, at 62,152.

<sup>27</sup> *Id.*, *supra* note 2, at 62,152.

<sup>28</sup> 5 U.S.C. § 603.

<sup>29</sup> 2023 Proposed Rule, *supra* note 1, at 62,230, tbl.34: Overview of Parameters Used for Costs to Small Businesses and Impacts on Small Businesses.

drinking places (\$9,332); nonprofit (\$3,570); and state and local government (\$9,264).<sup>30</sup> Advocacy believes that DOL's analysis is not a clear and accurate assessment of the likely compliance costs. Participants at Advocacy's roundtables reported much higher first year cost estimates at \$20,000 to over \$200,000 per small entity.

DOL's analysis fails to estimate the compliance costs of the rule by small entity size and revenue, as required by the RFA.<sup>31</sup> For example, DOL averages the economic impacts of this rule on all small businesses in an industry like food services, without looking at the differences in the numbers of affected employees, amounts of overtime, and revenues between small entities. Averaging impacts across all affected small entities can miss the burdens of a regulation on the smallest entities with limited revenues.<sup>32</sup>

Advocacy recommends that DOL reassess the management costs and direct payroll costs on small entities in a Supplemental Regulatory Flexibility Analysis. DOL should be transparent and break down the costs of this rule to different sized small entities. DOL should provide more analysis on the compliance costs of this rule after the first year, and in particular focus on the impact of the proposed rule's provisions that would automatically update the standard salary threshold every three years.

### *Management Costs*

Roundtable participants told Advocacy that small entities will spend much more in first year management costs than the \$265 to \$1,640 per entity estimated by DOL.<sup>33</sup> This estimate of management costs includes one hour to read the rule, 75 minutes per worker to adjust or reclassify each worker, and 10 minutes per affected worker weekly whose hours change.<sup>34</sup> Small businesses may have to hire outside staff to understand and implement this rule, as they often have limited to no human resources personnel, legal counsel, or financial personnel on staff.

Managers will have to spend significant time to analyze and possibly reclassify their workforce, evaluating pay, job duties, benefits, and tax implications. Small entities faced with this increased standard salary level have two main options: increasing worker pay to continue to utilize this

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<sup>30</sup> *Id.* at 62,233, tbl.37: Year 1 Small Establishment Direct Costs and Payroll Increases, Total and Per Entity.

<sup>31</sup> U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 17 (Aug. 2017), <https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf> [hereinafter ADVOCACY RFA GUIDE] (“Agencies should identify and examine various economically similar small regulated entities so that they will have a baseline from which to determine whether a significant regulatory cost will have an impact on a substantial number of entities. An understanding of the differences in economic impacts across the various regulated communities often generates different regulatory alternatives.”).

<sup>32</sup> Michael J. McManus, *Examining Small Business Impacts in the Regulatory Development Process: The Drawbacks of Averaging* 6 (Aug. 30, 2018), <https://advocacy.sba.gov/2018/08/30/examining-small-business-impacts-in-the-regulatory-development-process-the-drawbacks-of-aver/>.

<sup>33</sup> 2023 Proposed Rule at 62,230, tbl.35: Year 1 Small Establishment Direct Costs, Total and Per Establishment.

<sup>34</sup> *Id.* at 62,230, tbl.34: Overview of Parameters Used for Costs to Small Businesses and Impacts on Small Businesses.

exemption or reclassify these workers as hourly workers eligible for overtime pay. Some small businesses in industries with longer hours such as amusement parks and restaurants believe that they may have to increase manager salaries over this new salary threshold, at a cost of tens of thousands of dollars. A representative from the National Federation of Independent Business commented that many of their small business members do not have the extra funds to pay for the increased salaries. Under this scenario, small entities face vast administrative and operational costs to schedule and track employee hours to minimize overtime costs. DOL should consider these extra costs when evaluating the impact of this rule on small entities.

### *Payroll costs*

DOL's IRFA estimates average first year payroll costs at \$360 to \$2,683 per small entity.<sup>35</sup> DOL estimates an increase in payroll costs of about \$6.91 per week per affected employee, which is not even one hour of overtime pay (at time and a half).<sup>36</sup> With this significant understatement of costs, DOL goes on to estimate that the average payroll increases per entity would exceed one percent in only three sectors: food services and drinking places (2.5 percent); management, administrative and waste management services (1.2 percent); and transportation and warehousing (1.1 percent).<sup>37</sup>

Advocacy expects that impact of the rule will likely exceed one percent in many more cases if the costs were estimated adequately. For example, DOL estimates that for a small business in the food services industry, the increased payroll for the first year is estimated at only \$808 per employee a year or \$15 a week; or \$7,345 a year if all of employees are affected.<sup>38</sup> In 2022, the annual mean wage for first-line supervisors of food prep and serving workers was \$41,020 at the national level, \$40,190 in Pennsylvania, and \$32,380 in Mississippi.<sup>39</sup> If the final rule is updated to \$60,000, a restaurant employer in Pennsylvania could either increase the salary of a first-line supervisor \$20,000 to retain this EAP exemption or reclassify this worker to an hourly pay and eligible for overtime at \$10.87 per hour. The costs would be high per year for this one employee if they had five hours of overtime (\$2,826) or 10 hours of overtime (\$5,622) weekly. A representative for a franchise chain in the Washington, D.C. area noted that most small restaurants have at least four managers that typically work 50 hours a week.

Roundtable participants report much higher payroll costs. A representative from an Arkansas restaurant with four locations stated it would cost almost \$200,000 to increase manager salaries to make them compliant. Advocacy also heard from multiple small amusement park locations who reported that they may have to pay the increased standard salary threshold due to the long hours that their operations are open. These small amusement businesses reported estimated salary

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<sup>35</sup> *Id.* at 62,231, tbl.36: Year 1 Small Establishment Payroll Increases, Total and Per Establishment.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> U.S. Bureau of Labor Stat., *Occupational Employment and Wages, May 2022: 35-1012 First-Line Supervisors of Food Preparation and Serving Workers*, (Apr. 25,2023), <https://www.bls.gov/oes/current/oes351012.htm>.

increases for their businesses in Oklahoma (\$57,000), New Jersey (\$172,000), and Indiana (\$250,000).

### **B) DOL’s Proposed Rule Adds to Current Difficult Business Environment**

Advocacy recommends that DOL consider the difficult business environment that small entities currently face in the development of this rulemaking and consider alternatives such as lowering the standard salary level.

Overall, raising the standard salary level would be costly to small firms who have struggled to survive in the past few years. Following the COVID-19 pandemic, firms have faced high inflation, supply chain disruptions, shutdowns, and tighter labor markets. This rule would result in even higher costs that they simply cannot afford. Wages have been rising in recent years. For instance, total compensation for workers rose in the past year between June 2022 and 2023 by 4.5%.<sup>40</sup> Total compensation in the accommodation/food service sector has been even higher. In the past year, wage inflation rose by 5.4% and it has risen 26% since 2019.<sup>41</sup> During Advocacy’s roundtable, many firms echoed the sentiment that they simply have no room for higher wages and would have to fire employees, not promote workers, and limit hours worked, undermining the DOL’s goals in this rulemaking.

Many firms cannot afford this cost increase, and some will have to take extreme and unfavorable measures to compensate. Restaurants at Advocacy’s roundtable also commented that they may have to raise their prices, reduce hours, delay renovations and equipment purchases, and have less money to give back to the community. Small amusement businesses commented that they may try to raise the prices of their admission or food to make up these increased wage costs, but they risk losing customers who may be resistant to spending extra funds for a recreational activity. A convenience store owner in Louisiana commented that they would have to close their business if this rule goes into effect.

A representative from the America Outdoors Association commented that seasonal businesses may be hit hard, as these businesses have workers only working for nine months of the year on a salary basis. These recreational workers like outfitters and tour companies also work non-traditional work schedules, which would make them difficult to reclassify as hourly workers. A representative for the Independent Community Bankers of America commented that members in rural or less profitable areas may have to cut hours or close branches due to the compliance costs of this rule.

### **C) DOL’s Proposed Rule Will Have Significant Impacts on Small Nonprofits**

Advocacy believes that DOL has underestimated the impact of this rule on small nonprofit organizations and recommends that DOL reexamine these impacts in a Supplemental Regulatory

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<sup>40</sup> U.S. Bureau of Labor Stat., *Employment Cost Index*, <https://www.bls.gov/eci/> (last visited Nov. 2, 2023).

<sup>41</sup> Bureau of Labor Statistics (2023), *Employment Cost Index Summary*, U.S. Department of Labor, Retrieved from <https://www.bls.gov/eci/>

Flexibility Analysis. According to Advocacy’s RFA compliance guide, one measure for determining the economic impact on small entities is whether the cost of a rule exceeds one to three percent of gross revenues of affected small entities.<sup>42</sup> The National Council of Nonprofits commented that 97 percent of nonprofits have budgets of less than \$5 million annually and 92 percent operate with less than \$1 million a year.<sup>43</sup>

DOL’s IRFA only estimates average first year costs for small nonprofit organizations at \$3,570 per entity.<sup>44</sup> Small nonprofits report very high costs from this rule, which would place them above the one to three percent threshold of their revenue. For example, a small nonprofit in Oklahoma providing camps and afterschool programs estimated having to pay \$183,000 in costs for 13 workers if they were required to increase salaries to comply with the proposed rule. With only a \$1.5 million dollar budget, this rule would account for over 12 percent of their budget. This nonprofit will need to reclassify these salaried workers to hourly and stop services such as weekend camping events.

The North Carolina Center for Nonprofits reported that 25 of their members estimated costs ranging from \$33,000 to \$500,000 per year to comply with this regulation. Small nonprofits commented that while they support the proposed rule’s goal to provide fair wages for workers, they have operational anxiety because they may have to cut important public services such as childcare, senior care, food pantries, health care, and arts. A child welfare nonprofit in Kentucky commented that they are funded by government contracts and grants that cannot be renegotiated to cover these costs. This organization will not be able to meet required caseloads, and it will be difficult to reclassify therapists and case managers due to their nontraditional schedules handling crisis situations.

#### **D) DOL’s IRFA Does Not Account for Non-Financial Costs to Small Entities and Employees**

Small entities at Advocacy’s roundtable commented that DOL’s proposed increase may be too costly for many employers to implement and may result in large scale reclassifications of employees. DOL’s analysis does not consider the non-financial consequences to reclassify workers, such as the effect on worker flexibility, worker morale, and loss of benefits and career advancement.

Small entities commented that they would have to limit remote work and flexible working

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<sup>42</sup> U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 19 (Aug. 2017), <https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf> (“Other measures may be used; to illustrate, the impact could be significant if the cost of the proposed regulation (a) eliminates more than 10 percent of the business’ profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector or (c) exceeds 5 percent of the labor costs of the entities in the sector.”).

<sup>43</sup> Nat’l Council of Nonprofits, Comment Letter on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (88 Fed. Reg. 62152), 2 (Oct. 30, 2023), <https://www.regulations.gov/comment/WH-2023-0001-14373>.

<sup>44</sup> 2023 Proposed Rule, *supra* note 1, at 62,233, tbl.37: Year 1 Small Establishment Direct Costs and Payroll Increases.

arrangements for workers that are reclassified as hourly workers. Small entities commented that they are likely to require reclassified hourly workers to go into the office and clock in to track and minimize overtime hours. Flexible and remote work arrangements were a necessity during the pandemic and remain extremely popular for workers. Salaried employees not tied to the clock have flexibility in their work schedules. For example, one small hotel operator mentioned that they have many single moms that leave in the middle of the day to take their child to the doctor. This small entity does not want to micromanage these types of workers, because taking away this freedom and flexibility will make it more difficult to attract employees. Small entities may lose these workers, during a time of record high workforce shortages.

Small businesses are concerned that this rule may lead to lower worker morale, and by extension productivity, because many employees may believe that transferring from a salaried position to an hourly position is a demotion in their career advancement. Employees converted to hourly positions may also lose benefits, paid sick leave, maternity/paternity leave, paid vacation time, and other benefits associated with salaried positions. Small employers are concerned they may also need to take away employee commissions and bonuses and move to an hourly model. Moving to an hourly model may lower employee motivation, earnings, and business sales.

#### **E) DOL Does Not Consider Less Burdensome Alternatives that Would Still Accomplish the Agency's Objectives**

Under the RFA, an IRFA must contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes, like the FLSA, and which minimize any significant economic impact of the rule on small entities.<sup>45</sup> DOL's IRFA is incomplete because it does not analyze any regulatory alternatives that would minimize the economic impact of the rule for small businesses, such as lower salary levels. Based on feedback from small entities, Advocacy believes that DOL's cost estimates are extremely low. Advocacy recommends that DOL reassess the economic impact of this rule on small businesses in a Supplemental Regulatory Flexibility Analysis. With more accurate information, DOL can better analyze less burdensome significant regulatory alternatives that would also meet the agency objectives.

### **III. Advocacy's Recommendations**

#### **A) DOL Should Issue a Supplemental Regulatory Flexibility Analysis to Reanalyze Small Entity Impacts**

Advocacy recommends that DOL reassess the compliance costs in a Supplemental Regulatory Flexibility Analysis and publish this expanded economic analysis in *Federal Register* for public comment. DOL should reexamine direct management and payroll costs for small entities. DOL should consider the current business environment and impacts to small nonprofits. DOL should also consider the non-financial consequences of this rulemaking. The agency should also analyze

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<sup>45</sup> 5 U.S.C. § 603(c).

the impacts of adopting alternative salary thresholds on different sizes of small businesses. DOL should also provide analysis on the compliance costs of this rule after the first year. In particular, DOL should focus on the impact of the proposed rule's provisions that would automatically update the standard salary threshold every three years. With more accurate information, DOL can better analyze less burdensome significant regulatory alternatives that would also meet the agency objectives.

## **B) DOL Should Adopt a Lower Standard Salary Level**

Advocacy is concerned that DOL's final rule sets a standard salary threshold that is too high at \$60,209. Advocacy recommends that DOL consider adopting a lower standard salary level that considers the significant small business impacts from this rulemaking.

Advocacy cautions that the rule, if finalized at the proposed salary level, may be vulnerable to a legal challenge based on recent court rulings. Previously, a federal district court struck down DOL's 2016 rule that increased the standard salary level to \$47,476.<sup>46</sup> The court held that the Department did not have the authority to use a salary level test that will effectively eliminate the duties test.<sup>47</sup> In the 2016 final rule, DOL increased the standard salary level from \$23,600 to \$47,476, which is a 101 percent increase. DOL went from the 20<sup>th</sup> percentile to the 40<sup>th</sup> percentile of weekly earnings of full-time workers.<sup>48</sup> Similarly, a federal court may also find that DOL's rule which sets the threshold at \$60,209 or the 35<sup>th</sup> percentile is still too high.<sup>49</sup> This proposed rule is a 69 percent increase and potential raise for these EAP workers. This proposed rule also excludes many employees who perform exempt duties from utilizing this exemption. DOL estimates that 3.6 million workers (1.3 million from small employers) currently ineligible for overtime, will automatically become eligible under this rule without a change in their duties test.<sup>50</sup>

Advocacy recommends that DOL consider adopting a lower standard salary level, based on our roundtable feedback on the significant economic impacts this rule will have for small entities. One alternative is to retain the current standard salary threshold. Some small businesses commented that DOL's proposal is unnecessary because the regulation was just updated in 2019. Small businesses have urged DOL to reconsider the dramatic increases in this proposed rule, as small entities currently face an incredibly difficult business environment.

Advocacy recommends that DOL complete a Supplemental Regulatory Flexibility Analysis that analyzes the impacts of adopting alternative salary thresholds and percentiles of weekly earnings on all sizes of small businesses. Advocacy supports that DOL has continued to adjust the standard salary level by the lowest wage Census region or the South, which the agency has done

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<sup>46</sup> Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

<sup>47</sup> *Id.* By raising the salary level in this matter, the Department effectively eliminates a consideration of whether an employee performs "bona fide executive, administrative, or professional capacity" duties.

<sup>48</sup> *See supra* Table 1. The 2004 Final Rule uses the 20<sup>th</sup> percentile of weekly earnings in lowest wage Census region (South) and retail industry. The 2016 Final Rule uses the 40<sup>th</sup> percentile of weekly earnings of the lowest wage Census region (South).

<sup>49</sup> *Id.* The 2023 Proposed Rule uses the 35<sup>th</sup> percentile of weekly earnings in the lowest wage Census region (South).

<sup>50</sup> 2023 Proposed Rule, *supra* note 1, at 62,227.

since the 2004 final rule. Advocacy recommends that DOL analyze and possibly consider adjusting the standard salary threshold by a particular industry sector that will experience the greatest economic costs. For instance, in 2019 DOL adjusted the standard salary threshold by both the retail industry wages and the lowest wage region.<sup>51</sup> Small entities at Advocacy’s roundtable also recommend that DOL consider a gradual or a phased increase in the standard threshold.

### **C) DOL Should Seek Public Feedback Before Updating Regulations**

This rule proposes to automatically update the standard salary level every three years by adjusting it to remain at the 35<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census region (the South).<sup>52</sup>

DOL may be vulnerable to legal challenges by automatically updating the standard salary level. The FLSA provides that the terms of this exemption are “defined and delimited *from time to time by regulations* of the Secretary [of Labor].”<sup>53</sup> This statutory provision requires that DOL issue regulations periodically to set this standard salary level. In the 2004 rulemaking, DOL stated that “it found nothing in the legislative or regulatory history that would support indexing or automatic increases.”<sup>54</sup> In 2016, a federal district court also invalidated the automatic updating mechanism, finding it unlawful.<sup>55</sup>

Advocacy is also concerned that the automatic update provision would drive wage inflation for salaried workers rather than reflecting the current economic circumstances. To comply with this rule, employers may raise the salary of their workers to the standard salary level amount to keep them exempt or move them to hourly work. The rule has a self-perpetuating threshold, as the salary level of the 35th percentile would grow each iteration or three years. For instance, a firm coming into compliance today would raise the salaries of full-time workers. Then in three years, the threshold level of income would increase as the 35th percentile is based on a set of higher paid employees following the existing rule.

Small businesses at Advocacy’s roundtable oppose this automatic update provision because it creates steep and unpredictable changes to the EAP exemption and uncertainty for employers. Small entities commented that this will create administrative burdens for employers, who now must constantly reclassify their workforce and track employee hours. Small businesses in construction and professional services commented that this provision creates difficulty in planning and signing long term federal and private contracts, as changing the threshold will change the price structure on projects.

Advocacy recommends that DOL update the standard salary threshold once every four years through a proposed rule published in the Federal Register, followed by a notice and comment

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<sup>51</sup> 2019 Final Rule, *supra* note 17, at 51,235.

<sup>52</sup> 2023 Proposed Rule, *supra* note 1, at 62,179.

<sup>53</sup> 29 U.S.C. § 213 (a)(1), § 13(a)(1) (emphasis added).

<sup>54</sup> 2023 Proposed Rule, *supra* note 1, at 62,178.

<sup>55</sup> *Nevada v. U.S. Dep’t of Labor*, 275 F. Supp. 3d 795 (E.D. Tex 2017).

rulemaking. DOL proposed and finalized this provision in the 2019 rulemaking.<sup>56</sup> Advocacy believes that this will ensure that the updates are reasonable and reflect the current economic conditions.

#### **D) DOL Must Publish a Small Entity Compliance Guide**

DOL must publish a small entity compliance guide for this regulation.<sup>57</sup> For all rules with a final regulatory flexibility analysis, agencies are required to publish the guides with publication of the final rule, post them to websites, distribute them to industry contacts, and report annually to Congress.<sup>58</sup> Advocacy is available to help DOL in the writing and dissemination of this guide.

Roundtable participants seek clarification on how this proposed EAP exemption works with the exemption for seasonal amusement or recreational establishments under the FLSA.<sup>59</sup> For example, DOL should clarify how to determine compliance for a company that has employees who work at multiple locations —some locations covered by the seasonal exemption and some not. Seasonal businesses also request guidance on how to determine the salary for a salaried employee who works for 9 months or a partial year. Nonprofit organizations also seek clarification on when or whether the FLSA applies to their employees and operations, in particular the application of the FLSA to charitable organizations.<sup>60</sup>

#### **E) DOL Should Provide More Time for Compliance**

DOL is proposing that all aspects of this proposed rule would become effective 60 days after the publication of a final rule. Advocacy recommends that DOL provide at least one year or 18 months to comply with this rule. Small entities told Advocacy that they need more time to understand this rule, evaluate and possibly reclassify their workforce, and budget for expenditures.

#### **F) DOL Should Add Provisions to Help Small Nonprofits Comply**

Small nonprofit organizations expressed that their biggest concern with this overtime rule is the inability to renegotiate government grants and contracts to respond to the costs in this

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<sup>56</sup> 2019 Final Rule, *supra* note 17, at 51,235. DOL affirmed its decision to issue a proposal to update the earnings thresholds every four years unless the Secretary determines that economic or other factors warrant forestalling such an update. The 2023 proposed rule falls within this four-year update.

<sup>57</sup> Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 212, 110 Stat. 857, 858 (1996) (codified at 5 U.S.C. §601 note).

<sup>58</sup> The Small Business and Work Opportunity Act of 2007, Pub. L. No. 110-28, § 8302, 121 Stat. 204-05 (codified at 15 USC § 631 note) (added these additional requirements for agency compliance to SBREFA).

<sup>59</sup> 29 U.S.C. § 213 (a)(1), §13(a)(3). U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #18: Section 13(a)(3) Exemption for Seasonal Amusement or Recreational Establishments Under the Fair Labor Standards Act (FLSA) (July 2008), [https://www.dol.gov/agencies/whd/fact-sheets/18-flsa-seasonal-amusement#:~:text=Section%2013\(a\)\(3\)%20provides%20an%20exemption%20from%20the,the%20preceding%20calendar%20year%2C%20its](https://www.dol.gov/agencies/whd/fact-sheets/18-flsa-seasonal-amusement#:~:text=Section%2013(a)(3)%20provides%20an%20exemption%20from%20the,the%20preceding%20calendar%20year%2C%20its).

<sup>60</sup> U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #14A: Non-profit Organizations and the Fair Labor Standards Act (FLSA) (Aug. 2015), <https://www.dol.gov/agencies/whd/fact-sheets/14a-flsa-non-profits>. Roundtable participants also expressed confusion on the application of the FLSA to nonprofits and charitable organizations.

rulemaking. The National Council on Nonprofits has multiple recommendations on mechanisms through which nonprofits with government grants and contracts can seek adjustments to cover unanticipated increased costs.<sup>61</sup>

#### **IV. Conclusion**

Advocacy is concerned that DOL has proposed a costly increase to the EAP overtime exemption, which will have a significant economic impact on a substantial number of small entities. DOL's IRFA is deficient because it underestimates the economic impact of this rule on small entities. Small entities have commented that this rule will have detrimental impacts to their operations, particularly during the current difficult business environment. This rule may also lead to unintended negative consequences for employees and small non-profit organizations.

Advocacy recommends that DOL reassess the compliance costs in a Supplemental Regulatory Flexibility Analysis and publish this expanded economic analysis in the *Federal Register* for public comment. As part of the supplemental analysis, DOL must consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act. Based on feedback from small entities, Advocacy recommends that DOL consider adopting a lower standard salary level and seek public feedback before future updates to this level.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 798-5798 or by email at [Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov).

Sincerely,

/s/

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Office of Advocacy  
U.S. Small Business Administration

/s/

Janis C. Reyes  
Assistant Chief Counsel  
Office of Advocacy  
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<sup>61</sup> Nat'l Council of Nonprofits, *supra* note 43.

Copy to: The Honorable Richard L. Revesz, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget