May 21, 2019

Submitted electronically via Federal eRulemaking Portal

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U.S. Department of Labor
200 Constitution Avenue NW, Room S–3502
Washington, DC 20210

Re: *NPRM Changing EAP Exemption Regulations RIN 1235–AA20* * **These are REVISED Comments of the National Employment Lawyers Association (NELA). Please disregard NELA comments dated 4/15/2019.**

Dear Ms. Smith:

The aim of this letter is to provide the Department of Labor (DOL) with the collective comments of the more than 4,000 members of the National Employment Lawyers Association (NELA) and its 69 affiliates concerning the proposed changes to the regulations regarding exemptions applicable to executive, administrative, and professional employees ("white collar" exemptions) of the Fair Labor Standards Act (FLSA).

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and often comments on relevant Notices of Proposed Rulemaking (NPRMs). NELA also engages in legislative advocacy on behalf of workers throughout the United States.

NELA members represent thousands of individuals in this country who are subjected to employer violations of the wage and hour laws, as well as unlawful employment discrimination. Further, NELA members are committed to advocating for a narrow interpretation of the exemptions under the Fair Labor Standards Act (FLSA) so as to reduce the number of workers

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who are exempt from the protection of the overtime rules. Exempt workers comprise a disproportionate and growing share of the workforce, and have been harmed by the erosion of the right to overtime pay. NELA's interest in the proposed revisions to regulations promulgated under the FLSA is to protect the rights of its members' clients, by ensuring that the goals of the FLSA are fully realized.

These comments were drafted by members of NELA's Wage and Hour Committee who have been involved in wage and hour litigation for decades and are intimately familiar with the current regulations. These comments should not be viewed as the comments of a single organization or of a few NELA members, but as the comments of the 4,000 members of NELA whose clients are working people who do not have the resources to pay professional lobbyists to influence regulatory changes.

NELA wishes to direct its comments to three aspects of the NPRM. *First*, NELA is gravely concerned and disappointed by the unconscionably low salary level proposed in the NPRM, which would set the salary level at a woefully inadequate level of $35,308 per year. The salary level to meet the EAP Exemptions from overtime pay coverage should be set no lower than the median salary level for American workers, which is $61,152.[1] *Second*, NELA opposes the absence of any real updating mechanism which was a critically important component of the 2016 Final Rule. The NPRM deletes the current (though not enforced) updating mechanism while purporting to affirm an "intention" to propose increasing the salary thresholds every four years. Without an updating mechanism, it is predictable and unavoidable that the overtime rules will all-too-quickly become outdated and inadequate. *Finally*, NELA advocates continuing to exclude nondiscretionary bonuses and incentive payments (including commissions) from the calculation of the salary requirement. The NPRM's proposal to allow some nondiscretionary bonuses and incentive payments to count towards the salary level will create hardships for workers and open up a myriad of problems and complications for the effective enforcement of the FLSA overtime guarantees.

I. <u>THE SALARY THRESHOLD IS TOO LOW TO PROTECT AMERICAN WORKERS' HISTORICAL RIGHT TO OVERTIME PAY</u>

The Labor Department's NRPM proposes to set the salary threshold under which workers are entitled to overtime pay of $35,308 a year. *See* 84 Fed. Reg. 10900 (March 22, 2019) (NPRM). The adoption of the Department's proposed rule would leave behind millions of workers who would have been entitled to overtime protections under the 2016 guidelines that were proposed by the Department of Labor. *See* Economic Policy Institute, *More than Eight Million Workers Will Be Left Behind by the Trump Overtime Rule* ("EPI Report"), available at

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[1] Using 2018 data, and the same methodology that the Bureau of Labor Statistics would use if had not stopped calculating this in 2018, the 50th percentile of the weekly earnings of full-time non-hourly workers in the South was $1,152. Inflating that to 2019 using CBO's inflation projections, that is $1,176 in 2019. For a full-year worker, that's $61,152 per year. See, Economic Policy Institute Analysis of 2018 Current Population Survey Outgoing Rotation Group microdata.

https://www.epi.org/publication/trump-overtime-proposal-april-update/ (an additional 3.1 million workers would have received overtime under the 2016 rule). The Labor Department's proposed overtime rule is nothing short of an abdication of its responsibility to provide meaningful overtime protections to American workers. By capitulating to business lobbyists and setting a near poverty salary level for employers to pay workers in order to satisfy the EAP exemption and, thus, evade its duty to pay overtime to workers, the Department of Labor has turned its back on millions of workers all across America who have been historically entitled to overtime pay.

In 2016, the Obama Labor Department published its proposed regulation that would have provided automatic overtime coverage to any worker making less than $47,476 per year in 2016 — a salary level that would have increased to $51,064 by 2019 and was projected to increase to $55,068 by 2022. That regulation was supported by rigorous economic analysis. It would have meant that about a third of the salaried workforce in the United States would receive the protections of our nation's overtime laws — a far cry from the more than 65 percent who were covered in the 1970s, but much better than the less than 7 percent presently covered.[2] The Obama Labor Department's proposal set the salary level at the 40 percentile level, which was well below the 50% or median level which NELA advocated and below the (inflation-adjusted) levels set in 1975. Nonetheless, the level set by the 2016 final rule was a big improvement over the long outdated and woefully inadequate 2004 level currently in force.

The current NPRM issued by the Trump Labor Department represents a regressive step backwards from the regulation adopted in 2016—it is a proposal to ensure overtime coverage only for those who make no more than $35,308. By the Department's own analysis, that means that in year one, 2.8 million fewer workers will receive protection under the overtime laws than would have received overtime under the 2016 rules, and the number of workers who will not be protected by overtime laws grows to 4.3 million by year ten. The Department's estimate undercounts the number of affected workers because it uses data from 2015-2017, benchmarked to 2017 wage and employment levels, which fails to account for employment growth and other changes in the three years between 2017 and 2020.[3] Regardless, the net effect of this shameful

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[2] As noted in a recent report by the Economic Policy Institute:

> The 2016 rule was by no means overly expansive. In fact, it covered far fewer workers than the threshold had covered historically. In 1975, more than 60 percent of full-time salaried workers earned below the threshold. By 2016, the share of workers covered had dropped to less than 7 percent. The 2016 rule would have only partially restored this coverage, to roughly 33 percent of the salaried workforce. If the rule had simply been adjusted for inflation since 1975, today it would be over $55,000.

See https://www.epi.org/press/the-trump-administration-wants-to-prevent-millions-of-workers-from-getting-paid-overtime/.

[3] *See* EPI Report at page 2. The EPI Report corrects for this issue to the extent possible by using more updated data — pooled 2016-2018 data, benchmarked to 2018 wage and employment levels — and inflating employment and wage levels based on Congressional Budget Office economic projections for 2018–2020.

proposal is that millions more workers can be made to work overtime hours — away from loved ones and to the detriment of their own health and well-being — without receiving the premium overtime pay for those hours. This result flies in the face of Congressional intent underlying the Fair Labor Standards Act ("FLSA").

NELA strongly urges the Department of Labor to rescind its current proposal and issue a new NPRM that sets the salary threshold at a level high enough so that only truly "bona fide" executives and administrators whom Congress intended to exclude from the FLSA's protections will be excluded. The salary level should be set no lower than the median salary level for American workers, which is $61,152.

A. The Standard Salary Threshold Is The Most Effective Check On The Invalid Exclusion of Workers Under The White Collar Exemption.

In passing the FLSA, Congress sought to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The core elements of its solution were guarantees of a minimum wage and overtime compensation for hours worked in excess of a forty-hour week. 29 U.S.C. §§ 206-07. Overtime compensation is central to the Act's objectives because it reduces the likelihood that employers will subject employees to excessive work hours while also ensuring that those workers who endure long hours are compensated for sacrificing essential aspects of their lives beyond the workplace, such as caring for young children, meeting family responsibilities, or engaging in the community.

At the center of the Department's NPRM is the "EAP" exemption from FLSA protections for those "employed in a bona fide "executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Congress did not define these terms in the statute itself, but instead charged the Department with "delimiting" which employees fall under the exemption. From the outset, the Department's regulations construed the exemption narrowly as intended for employees at the top of the economic ladder who did not need overtime protection because, as the bosses themselves, they were not subject to the low wages and long hours that the FLSA remedies. As a result, the U.S. Supreme Court has historically limited FLSA overtime exemptions to those who "plainly and unmistakably" fall within them. *Arnold v. Ben Kanowsky*, 361 U.S. 388, 392 (1960). The EAP exemption, like any exemption from FLSA, must be construed in this manner to preserve the statute's remedial purposes.

The reach of the "white collar" exemption is much more limited than its colloquial name implies. Section 13(a)(1) does not exclude all or even most white collar workers from the FLSA's protections. The DOL's 1940 Stein Report wholly rejected the premise "that all salaried white collar workers enjoy satisfactory working conditions." *See* "Executive, Administrative, and Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition" (Washington: U.S. Govt. Print. Off., 1940) (hereinafter Stein Report) at p. 8. It presented evidence that many salaried workers worked long hours, did not receive paid vacations, and endured conditions not conducive to their health. In other words, despite their "white collar" titles and salaries, these employees encountered labor conditions that were often "detrimental to health, efficiency, and general well-being." *Id*. Unlike true executives, these "white collar" workers needed, and were indeed entitled to, the FLSA's protections. Similarly, the Department's 1958 Kantor Report characterized the salary threshold as an "index of the status that sets off the bona fide executive from the working squad-leader." Report and Recommendations on Proposed Revisions or Regulations, Part 541, Defining the Terms "Executive," Administrative," "Professional," "Local Retailing Capacity," [and] "Outside Salesman" (Washington: U.S. Govt. Print. Off., 1958) (hereinafter Kantor Report) at p.4. The salaried worker of today who earns $40,000 a year despite working sixty hours a week is clearly in this category. Certainly such an employee is not the bona fide executive that Congress intended to exclude from FLSA.

The Department has historically been concerned about misclassification of workers entitled to overtime. In 1938, in its first regulations on the EAP exemption, the Department introduced the minimum salary threshold to address this concern. *See* 3 Fed. Reg. 2,518 (Oct. 20, 1938). Below the minimum salary threshold, an employee is entitled to overtime regardless of his or her title or job duties. Since that time, the Department has consistently regarded an employee's compensation (and the status implied by such compensation) as a key determinant of whether the employee is the type of white collar worker whom Congress meant to exclude. Compensation for bona fide executives, administrators, and professionals takes the form, for example, of "wages well above the minimum" and privileges making up for the lack of overtime pay, such as "authority over others, opportunity for advancement, paid vacation and sick leave, and security of tenure." *See* Report of the Minimum Wage Study Commission, Vol. 4, (Washington: U.S. Govt. Print. Off., 1981) (hereinafter 1981 MWSC Report) at p. 243. Managerial titles and salaried status by themselves do not remove the need for the FLSA's protections unless they are also accompanied by considerably higher compensation and privileges.

Over the years, the Department has recognized that the standard salary threshold is an indispensable bright-line test that gives meaning to the "bona fide" language of the EAP exemption. *See* 84 Fed. Reg. 10961. As the Department noted in 1940, "[t]he final and *most effective* check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question." *See* Stein Report at p. 19 (emphasis added). It similarly commented in 1981 that "some employees whose duties conform to the specifications set out in the regulations may not be receiving the compensatory privileges that are considered a vital part of the character of employment exempted under this provision of the FLSA. Thus, a salary commensurate with the duties and responsibilities expected of an executive, administrative, or professional employee has traditionally been considered to be 'the single best test of the employer's good faith.'" *See* 1981 MWSC Report at p. 243. If an employee is not earning this minimum threshold, this makes it clear that, in all likelihood, she is a non-exempt employee rather than a bona fide executive. *See also* 84 Fed. Reg. 10967.

Thus, the salary level test is the "best single test" of exempt status. Kearns, *The Fair Labor Standards Act*, Third Edition, pp. 5-27; 29 Fed. Reg. at 22,165 (quoting Stein Report). It simplifies enforcement by screening out obviously non-exempt employees and provides an objective basis for the exemption determination that is not subject to interpretations of regulatory duties tests. As such, it serves to reduce unnecessary litigation of the EAP exemptions. There is simply "no satisfactory substitute for the salary test." 29 Fed. Reg. at 22,165. The salary test has been included in the EAP exemption criteria since the original 1938 regulations, and had been updated regularly until the more recent period (*i.e.*, between 1975 and 2004 and 2004 and 2016).

One recent case litigated by a NELA member shows the role a proper salary level could play in reducing litigation and providing proper overtime wages to employees. Fast food chain Steak-N-Shake titled a group of employees as overtime exempt "Managers." However, these employees had no actual management responsibilities and spent their shifts performing manual labor. These employees were paid an annual salary between $32,000 and $40,000 and worked between 50 and 70 hours per week. In November 2016, Steak-N-Shake began paying Managers overtime due to the Department's 2016 regulation increasing the salary level. But when the district court in Texas invalidated the 2016 regulation, Steak-N-Shake stopped paying Managers overtime and returned them to set salaries. These Mangers continued working the 50-70 hours per week, but no longer received the additional compensation for overtime. On February 27, 2019, a unanimous jury found that a class of 286 Managers were misclassified as overtime exempt and found Steak-N-Shake denied them $3 million in overtime pay (an average of $21,246 per Manager). The 2016 salary requirement rightfully forced this employer to pay these employees overtime for a short period of time, and had it stayed in place the misclassification litigation for the later time period would have been unnecessary.

The present concerns arise largely from this failure to update the salary level in the recent period. Against this backdrop, we turn to the merits of the Department's proposal and to the appropriate baseline for today's workforce.

In setting a new salary level, the Department must ensure that the threshold effectively distinguishes between overtime-eligible white collar employees whom Congress intended the FLSA to protect, and bona fide EAP employees whom it intended to exempt. Bona fide EAP employees are those who typically earn salaries well above the minimum wage and enjoy privileges such as above-average fringe benefits, greater job security, and better opportunities for advancement.

As the Department has recognized, when the salary level becomes outdated, employees whom Congress intended to protect receive neither the higher salaries and benefits expected for EAP employees, nor overtime pay, and employers do not have an efficient means of identifying workers who are entitled to FLSA protection.

The $455 per week threshold ($23,660 annually) that the Department set in 2004 is a prime example of how the salary level can become outdated and ineffective. In 2015, a worker earning $23,660 was under the poverty line for a family of four and yet still met the "white collar" salary threshold. *See* 81 Fed. Reg. 32,391, 32,396 (May 23, 2016). Unfortunately, the Department's new proposal still does not provide enough income for a family of four to meet its needs. According to the Economic Policy Institute's family budget calculator, which uses official data to calculate how much workers need to earn to pay for modest but adequate basic necessities like housing, food, transportation, child care, and health care, there is not a single county in the United States where the Department's proposed salary level will be sufficient for a family of four to meet its basic monthly needs in 2020. *See* https://www.epi.org/resources/budget. In fact, the costs for a modest but adequate standard of living for a family of four in the *least expensive* of all 3,142 U.S. counties is projected to be $59,295 in 2020, more than 1.7 times as high as the salary threshold in the Trump proposal. It is beyond question that many of today's salaried workers earning just $35,000 lack the pay, privileges, and protections that distinguish bona fide EAP employees.

Adjusting the 2004 salary level for inflation will not address this problem. As the Department acknowledged at the time, the standard duties test that the Department established in the 2004 Final Rule paired the test closely related to the *less-stringent* short duties test with the lower salary level derived from the *more-stringent* long duties test. *See* 69 Fed. Reg. 22,126, 22,168 (Apr. 23, 2004). This was an error because, historically, the Department had set the short test salary level significantly higher than the long test salary levels (ranging from approximately 130 to 180 percent of the long test salary levels). *See* Final 2016 Rule, 82 Fed. Reg. at 32,403 (May 23, 2016). As a result, in the ensuing years, employers classified many lower paid workers who performed little EAP work as exempt even though their work was often indistinguishable from their overtime-eligible co-workers. These workers would have failed the long duties test, and thus should have been overtime-eligible. As the Department recognized in 2016:

> Rather than pair the standard duties test with a salary level based on the higher short test salary level, the Department tied the new standard duties test to a salary level based on the long duties test. This resulted in a standard salary level that, even in 2004, was too low to effectively screen out from the exemption overtime-eligible white collar employees.
> 82 Fed. Reg. at 32,404.

Under the short test salary level that the Ford administration established in 1975, 62 percent of full-time salaried workers were eligible for overtime protection. The 20th percentile standard that the Department adopted in 2004—based upon the lower salaries of retail workers in the South—continues to exclude from overtime protection a significant number of employees at lower levels of the income ladder whom the FLSA sought to protect.

To correct this error, the Department must set the standard salary level equal to a higher percentile of the earnings of full-time salaried workers. In the 2016 Final Rule, the Department determined that, "[b]ased on the historical relationship of the short test salary level to the long test salary level, . . . a salary between approximately the 35th and 55th percentiles of weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test." 82 Fed. Reg. at 32,404.

B. To Fulfill Its Purpose, The Salary Threshold Must Be Far Higher Than The Department's Current Proposal In The Pending NPRM.

NELA's position is that there is a fundamental need to very substantially increase the standard salary threshold which has not been readjusted for more than fifteen years after it was set too low in 2004. Such a change is necessary to protect workers who should be entitled to overtime yet, due to their nominal status as "white-collar" employees, fall out of the Act's coverage. As discussed already, the $455 per week salary level that the Department set in 2004 is not an appropriate starting point for setting the current salary level because, as the Department recognized in 2015, that salary level was too low as a result of the elimination of the "long" duties test and in relation to increases the Department has historically made to the salary level. *See* 82 Fed. Reg. at 32,403.

Similarly, the newly proposed rule in the pending NPRM sets the salary level at the twentieth percentile of all full time salaried workers in the lowest census area. 84 Fed. Reg. 10901. The proposed threshold—$35,308—is pitifully low and does not go nearly far enough to remedy the problem. Allowing businesses to force employees earning such a low salary to work fifty, sixty, or seventy hours a week without paying them premium overtime pay would undermine the FLSA. Moreover, such a low threshold increases the risk that employers will misclassify workers who clearly lack the pay, privileges, and protections that the regulations interpreting Section 13(a)(1) have historically attributed to bona fide EAP employees.

NELA recommends that the Department adopt a threshold reflecting the 50th earnings percentile of full-time salaried workers, which is $1,176 per week or $61,152 per year for a 40-hour workweek. This would more effectively ensure that the exemption is applied only to workers who "plainly and unmistakably" fall within the class that the FLSA intended to exclude. It would provide an efficient means for employers to classify workers properly and sharply reduce the amount of overtime litigation.

This level, which is far higher than the Department's proposal, is still low in comparison to prior salary levels that the Department has set. In 1975, the short test salary level was 1.57 times the median wage of all full-time salaried workers. Using the same ratio today, based on wage data from the first quarter of 2019 would result in a salary level *much higher* than the median level of $61,152 advocated by NELA. Similarly, the median salary of people working in professional, management, and related occupations is $66,820 according to the Bureau of Labor Statistics, which seems to be an appropriate benchmark. See, BLS Press Release, "Usual Weekly Earnings of Wage and Salary Workers, First Quarter 2019," Table 4 (Apr. 16, 2019). Thus, using the median salary as a guideline allows the threshold to better keep pace with economic growth even though it is not as high as other appropriate metrics would suggest as a reasonable salary threshold.

As the Minimum Wage Study Commission noted in 1981, the lower the salary threshold, the easier it is "for employers to claim the exemption for workers who would otherwise be entitled to premium pay for overtime . . . defeat[ing] the 'good faith' aspects of the test." *See* 1981 MWSC Report. This is the concern today. A threshold based on the median full-time salary better addresses this concern. It is a clear, simple indicator of the true managerial status that often reduces an employee's need for FLSA protection.

II. NELA OPPOSES DELETING THE UPDATING MECHANISM IN THE CURRENT RULE

The NPRM deletes the current (though not enforced) updating mechanism while purporting to affirm an "intention" to propose increasing the salary thresholds every four years. The Department specifically sought "comment from the public regarding this proposal."

NELA opposes the deletion of the current updating mechanism which was a critically important component of the 2016 Final Rule. An automatic indexing for inflation is absolutely necessary if the Department is to maintain an effective EAP exemption. Good intentions are simply not enough. As the saying goes: "The road to Hell is paved with good intentions." History more than bears this out. The salary levels set in 1975 were not updated for 19 years, when the Department finally addressed the EAP exemptions in the 2004 revisions to the regulations. By that point in time, inflation had so eroded the Long Test requirement as to make it a mere formality, without any genuine function in enforcing the overtime requirements. By that time, the Short Test requirement was also woefully inadequate. In 2004, the Department inaugurated its new Standard Test, and again set the salary level far too low to be effective. The Department failed to update or increase the new salary level until the 2016 Rule, which still has yet to be enforced. Therefore, we have now gone another 15 years without updating the already low salary level established in 2004.

This history is unsurprising as the effort required to promulgate a new regulation through the notice-and-comment process is arduous and resource intensive. The 2016 rulemaking took over two years and the current NPRM has been in the works since the 2016 election. The past is prelude to the future, and it is easy to predict that regular updating will not occur without some indexing built into the regulation. The proposed "intention" is unenforceable and would be an inefficient way for the government to operate. The resource intensive rule making machinery would have to be cranked up periodically (and unpredictably) just to maintain the status quo. Rather, this is a sure fire recipe to guarantee that the already inadequate salary level will again erode into meaninglessness and absurdity, as in the past.

NELA's analysis on this point conforms to that of the Department as previously published in the Federal Register (80 CFR 38516):

> …a review of the salary test history shows that the Department has updated the salary level only once since 1975, and has gone nine or more years between updates on several occasions. This history underscores the difficulty in maintaining an up-to-date and effective salary level test, despite the Department's best intentions. Competing regulatory priorities, overall agency workload, and the time-intensive nature of notice and comment rulemaking have all contributed to the Department's difficulty in updating the salary level test as frequently as necessary to reflect changes in workers' salaries. These impediments are exacerbated because unlike most regulations, which can remain both unchanged and forceful for many years if not decades, in order for the salary level test to be effective, frequent updates are imperative to keep pace with changing employee salary levels. Confronted with this regulatory landscape, the Department believes automatic updating is the most viable and efficient way to ensure that the standard salary level test [and HCE tests] remain current and can serve their intended function of helping differentiate between white collar workers who are overtime-eligible and those who are not.

There is nothing in the current NPRM that addresses this analysis, nor any rationale for abandoning this part of the 2016 rule. Without automatic updating, it is all too predictable that whatever salary level emerges from this current round of rulemaking will soon be inadequate to serve the Department's or the Congressional intent of the FLSA.

Nor can the Department blithely ignore the intent of Congress to provide meaningful rules for protecting the overtime of otherwise eligible white collar workers. Where a regulation becomes arbitrary and capricious in light of the effects of inflation, it may no longer be enforced. *Gamboa v. Rubin*, 80 F.3d 1338 (9th Cir. 1996). In *Gamboa*, the Department of Health and Human Services (HHS) had failed to adjust the $1,500 automobile equity limit (exclusion from AFDC benefit recipients' assets for purposes of determining eligibility) at any time since the adoption of the applicable regulation in 1982. The record included evidence that the equity limit at the time of the initial rulemaking was then (1993) the equivalent of $3,242. The Ninth Circuit ruled that allowing the automobile equity limit to be progressively diminished by inflation had undermined the Congressional intent of allowing AFDC recipients to have a viable reliable family car and thus provided a basis for vacating the regulation. More broadly, the Court ruled that when a regulation's rationality depends on economic conditions, periodic review is essential. The Department's failure to adjust the regulation for inflation thus rendered it unreasonable and unenforceable. This will be the status of the current NPRM here, in light of the history of inadequate updating of the salary level tests and the Department's own analysis as previously published in the Federal Register.

Finally, built-in updating is the norm not the exception in the context of wage/hour protections and other remedial regulations. For example, many cities and states, including California, have built in annual increases in the state minimum wage laws in order to phase in increases in the minimum wage to more meaningful levels. Social Security benefits that provide retirement to the nation's aging population have long been subject to annual COLA adjustments. For decades back to 1981, annual inflation indexing was in place for the marginal tax brackets in the United State income tax program. *See*, Daniel Shaviro, "The More it Changes, the More It Stays the Same?: Automatic Indexing and Current Policy" (2015), New York University Law and Economics Working Papers, Paper 418, http://lsr.nellco.org/nyu_lewp/418. Other examples of automatic indexing abound: 20 CFR § 655.120 (Agricultural Employees Wage Rates); 38 CFR § 3.27 (Veterans' benefits); 5 CFR § 838.735 (Civil Service spousal survivor annuities); 37 CFR § 381.10 (copyright royalties COLA adjustments).

In sum, it is inexcusable for the Department to be locking in its new and inappropriately low salary level test without any requirement to adjust it for inflation in the years to come, guaranteeing the further erosion of the overtime rights promised by Congress in the FLSA, ignoring the history of the regulatory inaction, and contradicting the Department's own recent analysis which demonstrated the necessity for such indexing.

III. <u>NELA ENCOURAGES THE DEPARTMENT TO CONTINUE EXCLUDING NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS (INCLUDING COMMISSIONS) IN CALCULATING THE SALARY THRESHOLD REQUIREMENT.</u>

NELA continues to oppose the Department's effort to count, at any level, nondiscretionary bonuses, incentive payments, or commissions toward meeting the salary threshold requirement.

In the Department's 2015 Proposed Rulemaking it invited comment on the use of nondiscretionary bonuses and incentive payments in calculating the standard test salary requirement. In doing so, the Department suggested, based on **<u>employer</u> s**takeholder interests, that inclusion of nondiscretionary bonuses and incentive payments could contribute to employees' "ownership mindset." Over the objections of the employee stakeholders, the Department's 2016 final rule allowed employers to use nondiscretionary bonuses and incentive payments to meet the salary threshold. Subsequently, the 2016 regulations were invalidated. The Department now has a unique opportunity to avoid repeating the error by taking a different path.

The 2019 NPRM seeks comments on this same issue. The Department again focuses on what is important to **<u>employer</u>** stakeholders and notes that such bonuses and incentives "are an important part of many employers' compensation systems." 84 FR 10912. The only change in the 2019 proposed rule from the 2016 invalidated rule is that the Department heard the complaints of employers about the quarterly payment requirement so the proposed rule was relaxed even further to an annual payment requirement.

For reasons explained below, NELA believes the Department should not depart from salary threshold practices which have been in place for decades in favor of an unwarranted experiment solely because employer stakeholders think they want to do so. Continuing to exclude nondiscretionary bonuses and incentive payments (including commissions) from salary threshold calculations is in the best interest of employee stakeholders, and the Department has not based its change on any evidence or finding of need whatsoever.

The "ownership mindset" justification for including nondiscretionary bonuses and incentive payments in salary threshold calculations is misleading and inappropriate for several reasons. *First*, the "ownership mindset" justification fails to support inclusion because these types of bonuses do not convey any ownership interest and are not "executive" in nature. *Second*, such bonuses and incentive payments are mere promises of deferred pay to encourage employees to work more "steadily, rapidly, or efficiently," as recognized by the Department in its current regulations. *Third*, these types of bonuses have no bearing on whether an employee should be excluded from overtime requirements. And *fourth*, inclusion of such bonus payments harms workers by incentivizing deferred compensation and lowering the already too-low salary threshold.

A bonus is nondiscretionary if the employer contracts, agrees, or promises to pay it. DOL regulations provide several examples, including: bonuses designed to induce employees to work more steadily, rapidly, or efficiently; bonuses designed to incentivize employees to remain with the employer; attendance bonuses; individual or group production bonuses; and bonuses for quality and accuracy of work. All such bonuses are intended to incentivize workers of all types to perform their duties well; but no such bonuses afford employees any of the benefits of company ownership. NELA members have represented many categories of employees who receive various nondiscretionary bonuses, including middle management and lower level employees, as well as a wide array of employees in retail, grocery, health and service industries. None of these employees are afforded any benefits of company ownership, but all of them absolutely rely on their salaries to meet their monthly expenses. Given the number and variety of employees who receive nondiscretionary bonuses and incentive payments, as well as the unregulated variability in the timing and amounts of such payments, including such unpredictable bonuses in the means for employers to meet the salary threshold for exemptions from overtime is illogical and unfair to workers who must rely on predictable income to pay for their families' necessary expenses.

Including nondiscretionary bonuses and incentive payments to meet the salary threshold also is directly contrary to the stated purpose of the salary basis test, i.e., to ensure exempt employees are guaranteed a minimum level of income that is dependable and predictable to meet their families' monthly expenses before they are exempted from the protections of the overtime provisions of the FLSA. What seems to be lost in the Department's analysis is that the need to count these additional forms of income toward the salary threshold only occurs **for employees who are already below the minimum level in the first place.** If nondiscretionary bonuses and incentive payments are included in the salary threshold, the de facto result would be an even lower threshold than is reasonable for today's workforce, as outlined in Section I of these comments.

The Department's proposal may seek to address some of the foregoing concerns by capping at 10 percent of the standard salary level the dollar amount of nondiscretionary bonuses and incentive payments that can be used to satisfy the amount of the salary threshold requirement. However, no matter how small the percentage used to satisfy the salary threshold, the goal of making overtime exemptions easier to understand and implement will be undermined by implementation of the proposal. Business interests recognize that determining whether bonuses are nondiscretionary or discretionary is difficult and involves a "very fact intensive analysis." *See*, http://www.shrm.org/hrdisciplines/compensation/articles/pages/nondiscretionary-bonuses-overtime.aspx. Calculating the amounts of bonuses can also be complex. *Id*. Adding these "very fact intensive" components to the salary threshold inquiry would only make the calculation more confusing and greatly multiply the transaction costs of what should be a straightforward and simple computation. Moreover, because the timing and amounts of bonuses vary so greatly, adding this component to the salary basis test would create ongoing computation issues on a weekly or monthly basis leading to increased monitoring and compliance costs for employers, as well as higher monitoring costs for the Department. All of the foregoing in combination will surely generate increased litigation over whether the salary basis test has been satisfied.[4]

Indeed, considering the law of unintended consequences, if the proposal is implemented some less scrupulous employers could view the change as an opportunity to claim exemptions by

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[4] Determining whether bonuses are discretionary or nondiscretionary already generates considerable litigation in the context of whether certain kinds of bonuses must be included in the regular rate for purposes of calculating the overtime rate. See, e.g., O'Brien v. Town of Agawam, 350 F3d 279 (1st Cir. 2003); Featsent v. City of Youngstown, 70 F.3d 900 (6th Cir. 1995); Minizza v. Stone Container Corp, 842 F.2d 1456, 1465 (3rd Cir.) cert denied 488 U.S 909 (1988); Haber v. Americana Corp., 378 F.2d 854, 856 (9th. Cir.) cert denied 389 U.S. 914 (1967). It is a virtual certainty that determining whether bonuses are discretionary or nondiscretionary for purposes of the salary threshold will likewise generate significant litigation and increase the cost and difficulty of enforcement of the overtime laws by the Department of Labor and protected employees.

paying 90% of the salary threshold and then, only if caught, could pay an additional 10% as a "nondiscretionary bonus" to claim they are in compliance. Meanwhile, many employees would be treated as exempt, perhaps for years, while only receiving 90% of the salary threshold. It would be exceedingly difficult for the Department to monitor for compliance under such circumstances. Although this is a worst-case scenario, given the history of enforcement of the Act, it is entirely foreseeable that such issues could and likely would result from implementation of the 2019 proposal.

Additionally, the proposed rule creates potential scenarios for entirely new and difficult litigation issues. For example, the proposed regulation permits the employer to make a final payment "no later than the next pay period after the end of the year." What is the consequence if the employer fails to make the payment in a timely manner? Would the exemption be lost for the employee for the previous year? Can the company cure a late payment and still claim the exemption? How soon after being late must an employer cure the failure to claim the exemption? Other problems arise if employees leave employment before the bonus/incentive/commission amount is due to be paid. If the company's payment plan requires the individual to be employed on the date the payment is due, but the employee is no longer there, it is doubtful the salary threshold test is met – another litigable issue. In short, changing the nature of the salary test by allowing bonuses/incentives/commissions to be counted toward the threshold after the end of the year is going to result in additional litigation which will be a substantial and unnecessary cost to all stakeholders.

Changing the salary threshold calculation to include nondiscretionary bonuses and incentive payments also would create a very unproductive incentive even for honest employers to move towards implementing more deferred compensation pay structures. The balance of power in employment relationships already weighs heavily on the side of employers because virtually all non-exempt employees have little to no bargaining power when it comes to negotiating compensation structures. By incentivizing deferred compensation plans, the Department would add weight on the employer side of the scale and further diminish the very limited bargaining power of most working-class citizens. Given the industrial reality that today's workers change jobs more frequently during the calendar year than in the past, more workers subject to deferred compensation directly equates to more lost compensation for workers who need it most.

Adding to the foregoing concerns, the Department's 2019 proposed rule includes a confusing reference to "commissions" which creates ambiguities about whether the Department views applicable commissions as a form of incentive payment, as a form of nondiscretionary bonus, or as both. Given the wide variety of commissions in use, the ambiguities in the 2019 proposed rule would create problems for employers and ultimately for courts, attempting to interpret and define the types of commissions that could be included towards meeting the salary threshold. In addition, commissions generally arise in a sales setting where specific exemptions (e.g., outside sales) related to commissioned employees are typically in play. It is unclear how inclusion of commissions towards a portion of salary threshold would interact with exemptions that apply to commissioned employees, but certainly the possibility of creating confusion exists. In sum, the inclusion of "commissions" in the proposed rule adds multiple layers of complexity towards the interpretation and enforcement of the regulations which is directly contrary to the

Department's stated goal of simplifying the regulations. For these reasons, any reference to "commissions" in the proposed rule is misguided.

For all the foregoing reasons, NELA advocates continuing to exclude nondiscretionary bonuses and incentive payments (including commissions) from the calculation of the salary requirement.

IV. <u>CONCLUSION</u>

For the foregoing reasons, NELA urges the Department of Labor to adopt an overtime regulation that is no lower than $61,152 – the median salary level for salaried workers. NELA also urges the Department to include an automatic indexing and updating mechanism in the Final rule so that overtime rights are not effectively eroded and so that the salary level remains relevant and adequate. Finally, NELA advocates continuing to exclude nondiscretionary bonuses and incentive payments (including commissions) from the calculation of the salary requirement.

Respectfully submitted,

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