RESPONSES TO QUESTIONS FOR THE RECORD FOR PAUL DECAMP

ON: **BAD FOR BUSINESS: DOL'S PROPOSED OVERTIME RULE**

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
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HEARING

BAD FOR BUSINESS:
DOL'S PROPOSED OVERTIME RULE

HEARING DATE: NOVEMBER 29, 2023
RESPONSES SUBMITTED: JANUARY 8, 2024

Chairwoman Virginia Foxx (R-NC) on behalf of Rep. Rick Allen (R-GA)

Q. The Department of Labor overtime proposal creates a dual financial challenge for businesses, with managers first having to comply with an increased salary threshold—and then the on-going automatic increases every three years. Mr. DeCamp, are we setting companies up for failure by implementing these drastic changes and not first assessing the potential impact?

A. The drastic changes the Department of Labor has proposed will create enormous operational challenges for businesses and great personal hardship for many workers. Strictly speaking, compliance with the new salary standard should be fairly straightforward: employees who after the effective date of the new salary threshold earn less than the required minimum will generally not qualify for the executive, administrative, or professional exemption and thus will have a right to premium overtime pay if they work more than 40 hours in a workweek.

The difficulties for businesses arise when they must face either (1) potentially steep increases in labor costs due to raising employee salaries to maintain exempt status or (2) the employee relations and management challenges inherent in reclassifying employees from exempt to non-exempt status. From the employer's perspective, moving a worker from exempt to non-exempt takes away scheduling flexibility, reduces labor cost predictability, and generates a less desirable set of employee behaviors.

To the affected worker, getting moved from exempt to non-exempt feels like a slap in the face, a demoralizing loss of status that undercuts wage predictability, reduces promotion and benefits opportunities, flattens one's career trajectory, and eventually results in less pay. The reduction in pay stems from employers responding to the incentives at the heart of the overtime requirement, which exists to pressure employers to spread work among more workers by making overtime hours significantly more expensive than non-overtime hours.

In my experience, businesses that move employees from exempt to non-exempt do not want these individuals to suffer a pay loss, nor do they want to pay more for the same level of productivity or to receive less productivity for the same level of pay. Thus, they normally try to model the pay in such a way as to mirror both the productivity and the earnings the employee had while exempt. So, for example, if an employee while exempt earns a salary of $900 per week and works an average of 50 hours per week, the employer would ordinarily set an hourly rate designed to produce $900 in pay for working 50 hours. In this example, that would mean an hourly rate of $16.36, which produces $899.80 for a 50-hour week.[1]

The challenge arises, however, when, over the next several months following the conversion to non-exempt status, the employer sees the high marginal cost of the overtime hours payroll after payroll. Whereas before the conversion the employer was paying roughly $18 per hour for the employee's work—i.e., $900 for 50 hours per week—under a non-exempt scenario the first 40 hours of work cost $16.36 per hour, while the final 10 hours of work cost $24.54 per hour. The likely consequence of that cost pressure will be that the employer will cut the employee's hours to 40 per week if possible, resulting in the employee's earnings dropping from $900 per week to $654.40 per week, a decline of more than 24%. That change will probably not happen immediately upon conversion, but over the course of the 12-18 months following the move to non-exempt this reduction in hours is very likely, and it is exactly the result the Fair Labor Standards Act seeks to achieve. The statute pushes employers to redistribute work beyond 40 hours a week to other employees where possible. And then if that same employee tries to make up that lost $245.60 per week in earnings by obtaining a second job at an equivalent $16.36 per hour, he or she will have to work 15 hours per week, rather than 10, to achieve total earnings of $900 per week. In the end, the most likely outcome for an employee who experiences conversion to non-exempt status is either a loss of pay or working more hours for the same pay, either of which makes the employee worse off than before the reclassification.

The Department's failure to use currently available economic data, rather than 2022 data, when conducting the economic impact analysis for a proposal issued in late 2023 obscures the real-world effect of the planned regulatory changes by understating, most likely to a large degree, the number of workers who will lose exempt status if their employers do not increase their pay. Footnote 3 of the proposed rule states, in pertinent part:

> The Department relied on CPS MORG data for calendar year 2022 to develop this NPRM, including to determine the proposed salary level. In the final rule, the Department will use the most recent data available, which will change the dollar figures. For example, if after consideration of comments received, the final rule were to adopt the proposed salary level of the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region (currently the South),

[1] The way to derive the hourly rate needed to generate weekly earnings equivalent to a salary is to divide the salary by the sum of the straight-time hours plus one and a half times the overtime hours, represented by the following equation: *hourly rate = weekly salary / (40 + (1.5 * (hours worked per week – 40)))*, where the hours worked per week figure is not less than 40. In the example used in the main text, the difference between $900 and $899.80 is due to truncating the hourly pay rate at the level of whole cents. Leaving in two additional decimal places—$16.3636—leads to a figure of $899.998, which rounds to $900.00.

> in the fourth quarter of 2023 the Department projects that the salary threshold could be $1,140 per week or $59,285 for a full-year worker. . . . As an additional example, in the first quarter of 2024, the Department projects that the salary threshold could be $1,158 per week or $60,029 for a full-year worker . . . .[2]

The $1,059 weekly salary threshold in the proposed rule already represents a $375-per-week increase over the $684 weekly standard now in effect. If, instead of $1,059, the Department elects to go with the figure it anticipates will be the number its methodology yields in the first quarter of 2024—$1,158 per week—that represents an increase of $474 per week over the current figure, which is more than 26% larger than the increase that served as the basis for the Department's economic impact analysis.

In short, using older economic data enables the Department to state a lower affected employee number in its economic impact analysis, thereby concealing from Congress and the public the true anticipated effect of this misguided rulemaking.

Rep. James Comer (R-KY)

Q. Mr. DeCamp, I want to ask you a question as a workforce expert and someone who had been with the Department of Labor leading these types of regulations at one point. We have providers of health care services in Kentucky, including Medicaid providers who support adults with intellectual and developmental disabilities, who are going to be impacted in the millions of dollars by this overtime proposal. Health care providers and especially Medicaid providers are extraordinarily strained and cannot withstand this unfunded mandate, so I would expect to see reduction in services and even changing salaried workers back to hourly wages in order to stay afloat. That does not seem like a positive outcome for anybody. What would you advise DOL to do in order to avoid this impending result in our health care system?

A. I would begin by advising the Department of Labor to withdraw the current proposal, which is substantially out of step with earlier increases in the salary threshold and would result in either increased labor costs or substantial employee unhappiness and loss of wages, leading to increased consumer prices or cut-backs in services provided in the health care industry and many other industries. Along with that recommendation, I would urge the Department to abandon any effort to embed automatic updates into a regulation in the absence of clear statutory authority exempting that action from further notice-and-comment rulemaking.

I would then encourage the Department to seek public input, through either hearings or a request for information, regarding whether changes in compensation norms since 1938 render a salary threshold no longer necessary or appropriate in implementing the Fair Labor Standards Act's executive, administrative, and professional exemptions. Particularly with respect to the rise in employee benefits since World War II as an increasingly important part of the overall compensation landscape, as well as other non-salary factors such as bonuses and other perquisites often available to exempt employees, the Department may well find that payment

[2] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62,152, 62,153 n.3 (Sept. 8, 2023).

on a salary basis, and at a certain level, is no longer a reliable indicator of exempt status, if indeed it ever was.

Given the widely disparate wage levels throughout the United States, it is undeniable that any salary threshold the Department selects will have little or no impact in many parts of the country where wages tend to be higher, while at the same time having disproportionately heavy effects in other parts of the country where wages tend to be lower. As a result, the salary threshold, particularly at the level currently proposed, becomes the main driver of exempt status for millions of individuals in certain parts of the country and in certain industries, while being a negligible part of the exemption analysis in the rest of the economy.

The Department itself acknowledges in the rulemaking that it is dissatisfied with the currently operative duties standards for these exemptions. Now, more than 85 years after the enactment of the FLSA, the time is right to update the duties tests to truly bring these exemptions into the 2020s. Frankly, the best option of all would be for Congress to retake the wheel with respect to setting federal labor policy and to recraft the FLSA stem to stern for today's economy. But while we wait for that to happen, the Department should refocus its rulemaking efforts to ensure that its regulations are consistent with the statute that Congress wrote. The proposed rule, by denying exempt status to millions of individuals who plainly perform work in line with these exemptions, is not consistent with the FLSA.

If the Department is not prepared to take a more realistic, and lawful, approach to implementing these exemptions, then I would advise the Department to forego further rulemaking and to allow the States to handle any future increases to their own compensation standards for exemption based on their prevailing local economic conditions.

January 8, 2024