



November 7, 2023

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Submitted electronically via www.regulations.gov

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, Docket ID: WHD-2023-0001

Dear Amy DeBisschop:

As the voice of all things work, workers and the workplace, [SHRM](http://www.shrm.org) is the foremost expert, convener and thought leader on issues impacting today’s evolving workplaces. With over 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally.

SHRM’s membership of HR professionals and business executives sits at the intersection of all things work, workers and the workplace, helping to set positive collaboration and workplace cultures where workers and employers thrive together. Our membership of HR professionals and business executives is well-versed in workplace issues including, but not limited to, defining job duties and responsibilities; setting salary ranges, bonuses and other total compensation packages; and a myriad of considerations and concerns that businesses address every single day involving overtime policies. As such, our membership is uniquely positioned to offer this comment to aid the U.S. Department of Labor’s (“DOL” or “the Department”) Wage and Hour Division (“WHD” or “the Division”) in its consideration of the rule as proposed. SHRM respectfully offers the following considerations to the Notice of Proposed Rulemaking.

I. Introduction.

The proposed rule touches upon several responsibilities and duties squarely within the purview of HR professionals. Additionally, the successful implementation and application of any changes to the overtime scheme will likely fall on HR professionals and business executives as they decide whether to adjust salaries, switch workers to hourly or move workers into nonexempt salaried status. This, of course, is not new, as HR professionals are generally already well-versed in the practical applications of the Fair Labor Standards Act (FLSA) and in applying overtime exemptions for executive, administrative, professional, outside sales and computer employees, sometimes called “white-collar” or “EAP” workers.

Overall, SHRM’s comment on the regulation as proposed seeks to add certain revisions and

clarifications aimed at providing a clear road map for compliance and implementation of the policies surrounding overtime and exemptions therein. In an effort to pursue data-driven, nonpartisan policy solutions to today's most pressing issues affecting work, workers and the workplace, SHRM surveyed its membership through the SHRM Voice of Work Research Panel, a diverse group of HR professionals who represent U.S. organizations and the HR profession by serving as the voice of all things work, workers and the workplace. With our contemporary and comprehensive survey data ("2023 Survey"), SHRM hopes that our comment will help the WHD in its effort to craft a rule that is fair and forward-moving for workers and employers alike.

II. SHRM and Its Membership Support Reasonable Increases to the EAP Salary Threshold.

Overall, SHRM's members support a reasonable increase to the rule's minimum salary threshold. This is reflected in our 2023 Survey analysis, as only 4% of the total number of respondents indicated that they would not support *any* increase. Where SHRM seeks to express concern is at the considerable leap from the current threshold as proposed. Among those who indicated that they did not support the rule as proposed, the most cited reason (72.8%) was that "the proposed minimum salary threshold is too big of a leap from the current minimum salary threshold," and the second most cited reason (56.1%) was that "the proposed minimum salary threshold is too high." Moreover, SHRM's 2023 Survey found that companies headquartered in different regions will feel the impact of such a leap differently. Amongst organizations that are unsupportive, those headquartered in the Midwest (79%), South (76%) and Northeast (72%) were more likely to indicate that the proposed minimum salary threshold is too big a leap from the current minimum threshold than were organizations headquartered in the West (57%). The nearly 55% increase from the current \$684 per week threshold, implemented just four years ago, should give pause to the Division as to how this would impact the operations of multistate organizations across the country.

SHRM's focus and reliance on reasonableness serve to underscore the importance of centering the salary threshold on the reality of what it should be—one part of a three-part test to determine if an employee is a bona fide EAP-exempted employee under the law. Going back nearly 20 years, in 2004, Congress modernized the bona fide EAP exemption process by creating the current framework in which to evaluate whether a "white collar" or executive, administrative or professional (EAP) overtime exemption applies under the FLSA. When Congress implemented this framework, it afforded the Department the authority to define and delimit the terms of the exemption, including the evaluation of the salary threshold as it relates to the other parts of the analysis. The DOL has long recognized that the salary level test's purpose is to "provid[e] a ready method of screening out the obviously nonexempt employees." The salary floor should be set to ensure that it operates as intended, acting as a method to screen out bad faith attempts to place people in exempted EAP status. The sharp increase announced in the proposed rule would supplant the other two tests, which is not what Congress intended. Of SHRM's 2023 Survey respondents, only 22% indicated that the proposed increase is appropriate for a good faith determination of exempt EAP employees, and, even among those who indicated support for the rule as proposed, only about 33% of respondents felt that the proposed increase is appropriate for good faith determination of exempt EAP employees. As the Division seeks to set a single standard as favored

by our membership, SHRM encourages regulators to look back to the 2004 amendment and look at those levels for guidance on increases.

III. While SHRM Supports Reasonable Increases, SHRM Does Not Support Automatic Increases.

While SHRM supports regular and reasonable increases/updates to the overtime salary threshold, SHRM members would like to express concern about the proposed rule's provisions automatically increasing salary levels every three years without a notice-and-comment rulemaking process, a contemporaneous analysis of worker earnings and macroeconomic trends, and other relevant considerations. We appreciate the WHD's desire to create a mechanism to help ensure the salary level remains a meaningful test to screen out clearly nonexempt employees and agree that WHD can and should review the salary level periodically. However, this should not come at the expense of providing the regulated community the opportunity to receive notice and comment. Furthermore, the Division should not ignore or limit its opportunity to evaluate the evolving economic landscape and conditions.

The issue remains that the proposed rule creates a mechanism that automatically adjusts the salary threshold, potentially setting up a system in which, over time, the salary threshold would vastly outflank the duties test in terms of impact and importance. This elevates our concerns surrounding tying the salary threshold into the 35th percentile (or, for the HCE exemption, 85th percentile) for full-time, nonhourly workers in the lowest-wage census region (currently the South).

SHRM respectfully argues that tying the salary threshold to the 35th percentile of full-time, salaried workers presents a major problem—it may create a never-ending cycle that accelerates the raising of the salary threshold in a way that is not at all representative of, or even related to, impacted workers' job duties. SHRM would proffer that a better reference point could be an inflation-related index that is not susceptible to being artificially inflated by the WHD's rulemaking. Additionally, tying increases to the cost of living or inflation was supported by our membership, who view it as a more accurate measure of wages and a better way to assess the salary threshold.

To elevate our membership's collective experience and expertise, SHRM directs the Division's attention to the undue financial burden that may result from the proposal to increase the salary threshold automatically. These changes, again without proper examination of the economic environment and wage landscape, would undoubtedly extend well past the immediate impact of raised salaries or new overtime expenses. Our membership, who are responsible for the case-by-case analysis of potentially exempted EAP workers, knows that the financial impact also encompasses the hidden costs associated with workforce analysis, reclassification and communication. Additionally, employers must account for potential salary adjustments further up the organizational hierarchy to alleviate salary compression issues.

IV. Employers Need More Than 60 Days to Review, Analyze and Come into Compliance with an Increased Salary Threshold.

As previously stated, SHRM's membership is well-versed and uniquely positioned to articulate an organization's policies surrounding overtime intricacies. The myriad business considerations are not merely related to deciding whether to raise an employee's salary to the new threshold. Furthermore, wherever the Division lands following its review of the regulated community's comments on the issue, employers will require an appropriate amount of time to make important decisions related to whether to reclassify employees; whether and how to adjust compensation plans and rates; whether and how to adjust work schedules, settings and other aspects of impacted employees' work; and whether and how to restructure their workforces—for instance, hiring more employees (whether full-time or part-time), or downsizing. According to SHRM's survey, 64.5% of respondents indicated that they would engage in a case-by-case analysis of current salary levels and average hours worked by salaried employees to determine the appropriate new salary or hourly rate for each employee. For employees who may changeover into nonexempt status, new policies and procedures for timekeeping will need to be implemented and communicated, as 63% of organizations indicated that they do not track the hours of exempt salary workers (this was compared to only 26% of respondents who indicated that they track the hours of *all* exempted salaried workers and 11% of those who track the hours of *some* exempted salaried workers).

Additionally, the decisions that must be made encompass more than just the employees impacted by whichever new rule the Division enacts. Finance teams will need time to analyze and revise budgets, which is a difficult undertaking in a short time frame or in the middle of a fiscal year. HR teams will have to update HR information systems, including payroll and timekeeping systems, adjust benefits packages, and coordinate timekeeping and overtime policy training for reclassified employees and their supervisors. Information technology (IT) teams will have to ensure that these information systems can correctly account for any policy changes resulting from reclassification decisions, such as new restrictions on work-from-home setups. Equally important, as noted earlier, employers will need time to develop a separate communications strategy to inform, educate and train employees on relevant changes. For these reasons, SHRM strongly urges the Division to consider a longer compliance window than the 60 days offered within the proposed rule.

SHRM's membership represents the entire breadth of U.S. companies and industry sectors. Our members work for organizations from all regions, industries and organizational sizes. The simple reality is that, while some organizations may be equipped to handle such a change, not every organization is similarly situated to adjust entire office policies so quickly. There must be consideration for micro, small and medium-sized organizations that may have limited capacity and resources to undertake such drastic changes, especially in the time offered in the proposed rule. SHRM expresses concern for all of our members—from the companies with large HR departments to our members who operate in an "HR department of one." SHRM strongly encourages more implementation time following a final rule to account for the differences in organizational size, industry and varied capabilities for compliance.

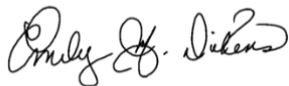
As proposed, 60 days is simply insufficient time for many businesses to assess the final rule, identify impacted employees and roles, and decide and execute an organizational strategy and structural changes. In 2004, the Division established an effective date for its final rule that was 120 days after publication of the rule. Compliance, even within that window, was extremely challenging for many employers. We urge the Division instead to provide that any salary threshold increase or other change made to its revisions take effect on the later of: (i) January 1, 2025, which

allows employers to tie any classification or pay-related changes into budgeting efforts and operational changes for the new year; or (ii) 180 days after publication.

X. Conclusion.

SHRM appreciates the opportunity to offer this comment to help the WHD as they finalize the regulations for the rule as proposed for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees. To be sure, there are many laudable points within the rule as proposed. SHRM shares the WHD's stated goals of enacting "effective earnings thresholds to help define and delimit the FLSA's EAP exemption" by setting a reasonable, or "appropriate," single standard salary threshold level. SHRM respectfully offers this comment in the earnest hope that it is utilized to shape a policy that works for the betterment of work, workers and the workplace. The comment and concerns offered herein seek to point the Division's interest to the real-world consequences associated with the sharp increase in salary threshold, the creation of a mechanism that enables automatic updates of the salary level test without a notice and comment period, and a relatively short compliance window afforded to employers to implement a change that has major organizational implications. In support of the professionals and executives charged with the day-to-day application of this critical workplace protection, SHRM believes that the regulation should seek to provide as much clarity and consistency as possible to avoid disruption to organizational operations. As always, SHRM is committed to elevating the collective experience and expertise of our membership to assist the WHD and the DOL at large in creating policies that protect work, workers and the workplace.

Sincerely,



Emily M. Dickens
Chief of Staff, Head of Public Affairs & Corporate Secretary

SHRM State Councils:

Alaska State Council

Alabama SHRM

Arizona SHRM State Council

California State Council of SHRM

HR Florida State Council

SHRM-Georgia State Council

Iowa SHRM State Council

Idaho State Council of SHRM

HR Indiana SHRM

Kansas Society of Human Resource Management

Maryland SHRM State Council, Inc.

SHRM Maine State Council

Minnesota SHRM State Council

Mississippi State Council of SHRM

Montana State Council

North Carolina SHRM State Council

North Dakota SHRM State Council

Garden State Council-SHRM

SHRM NM

New York State Council SHRM

Pennsylvania Society of Human Resource Management (PASHRM)-State Council

SoDak SHRM State Council

Texas SHRM State Council

Utah SHRM

HRVirginia

WVSHRM

Wyoming SHRM State Council