May 22, 2019

ATTORNEY GENERAL RAOUL OPPOSES FEDERAL ROLLBACK OF OVERTIME PROTECTIONS

Chicago — Attorney General Kwame Raoul today joined a coalition of 15 attorneys general in urging the U.S Department of Labor (DOL) not to adopt its proposal which reverses federal overtime protections for workers. It is estimated that under the proposed rule, over 8 million workers will lose overtime protections.

"This proposed rule change would cause immediate harm to millions of workers and put them at risk of unlawful exclusion from minimum wage and overtime protections," Raoul said. "I have long advocated against unlawful employment practices and will continue to protect workers across Illinois by ensuring labor laws are enforced."

Raoul and the coalition filed a comment letter detailing states' concerns that the U.S. DOL's weakening of the salary level test will make it harder for the states to enforce labor laws, and it will lead to more the Fair Labor Standards Act (FLSA) violations by employers who misclassify workers as white-collar employees.

The U.S. DOL's proposed rule would change the white-collar exemptions under the FLSA, which currently exempts from overtime protections those in executive, administrative, and professional "white-collar" positions. In order for an employer to classify an employee as exempt, the employee must:

1. Be paid a fixed salary (the "salary basis test").
2. Be paid a minimum specified salary (the "salary level test").
3. Have a job with duties that are executive, administrative, or professional in nature (the "duties test").

In 2016, the U.S. DOL adopted a rule that raised the minimum salary level set in 2004 from $455 in weekly earnings to $913 in weekly earnings. This change resulted from a review which concluded that the higher salary level would be an effective way to protect employees against misclassification and would be consistent with the U.S. DOL's historical practice of a setting salary level. The U.S. DOL also included an automatic updating provision that would increase the salary level every three years. The U.S. DOL's proposed rule seeks to rescind the 2016 Final Rule by lowering the salary level from $913 to $679 and eliminating the automatic updating provision, which would make labor laws more difficult for state attorneys general to enforce and result in more pervasive misclassification.

Joining Raoul in filing the comment letter are attorneys general from California, Connecticut, Delaware, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Virginia, Washington and the District of Columbia.

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May 21, 2019

By Electronic Filing (http://www.regulations.gov)

The Honorable Alexander Acosta
Secretary
United States Department of Labor
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Melissa Smith
Director of the Division of Regulations,
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Re: Notice of Proposed Rulemaking (RIN: 1235-AA20)
Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of New York, Pennsylvania, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Rhode Island, Virginia, Washington and the District of Columbia in opposition to the proposed rulemaking by the U.S. Department of Labor ("DOL" or the "Department") that would weaken significantly the overtime protections for American workers by expanding the provisions exempting certain executive, administrative, and professional ("EAP") employees from the protections of the Fair Labor Standards Act (the "FLSA"). *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10,900 (Mar. 22, 2019) (the "NPRM" or "Proposed Rule").

Based on our collective experience, the Proposed Rule will leave millions of workers in our states without the federal overtime protections that Congress intended to extend to them under the FLSA. These workers will be vulnerable to EAP misclassification, which remains a pernicious and growing problem in our states. The Proposed Rule's weakening of the bright-line salary level

test will make labor law enforcement in our states significantly more difficult and result in an increase in unchecked violations of the FLSA by employers who misclassify workers as EAP employees.

The DOL recognized each of these issues when it last revised the EAP exemptions in 2016, specifically rejecting the approach taken by the Proposed Rule and instead setting a higher salary level that would automatically update every three years. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,393 (May 23, 2016) (the "2016 Final Rule"). As discussed further below, by disregarding its own previous findings and adopting without any reasoned explanation an approach that it specifically rejected in a prior rulemaking, the DOL's adoption of the Proposed Rule would raise serious concerns under the Administrative Procedure Act.

I. The EAP Exemption's Regulatory History

Congress enacted the FLSA in 1938 to "correct and as rapidly as practicable to eliminate . . . conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Fair Labor Standards Act, 29 U.S.C. § 202 (1938). Workers in our states rely on the FLSA's protections, including the right to overtime pay, to discourage employers from requiring them to work extremely long workweeks, compensate them for the burden of such workweeks, and encourage employers to hire more workers and spread employment throughout the workforce. *See* 81 Fed. Reg. at 32,391; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942).

Congress exempted from the FLSA's overtime protections, among others, those in "bona fide executive, administrative, or professional" positions only because it viewed such "white collar" employees to be well-compensated enough and to exert sufficient bargaining power to render the FLSA's protections unnecessary. *See* 81 Fed. Reg. at 32,406; 29 U.S.C. § 213(a)(1). Unlike non-exempt employees, bona fide white collar employees generally have the ability to decide how to get their work done in whatever hours or time is required, and have elevated status due to their relatively high salaries, fringe benefits, job security, and opportunities for advancement. *See* 81 Fed. Reg. at 32,449.

Historically, DOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive, administrative, or professional in nature (the "duties test"). *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 C.F.R. Part 541. The Department "has always recognized that the salary level test works in tandem with the duties tests to identify bona fide EAP employees." 81 Fed. Reg. at 32,400. Since 1949, the Department's longstanding view has been that "the salary paid to an employee is the 'best single test' of exempt status" and that setting the salary level "too low" would prevent the salary test from being effective. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,165 (Apr. 23,

2004) (the "2004 Final Rule"). Despite this view, DOL has updated the salary level infrequently—only eight times since it was first set in 1938.

A. The 2004 Regulations

In 2004, DOL issued regulations updating the salary level to $455 per week (or $23,660 for a full-year worker), which corresponded to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region. *See* 69 Fed. Reg. at 22,126. The 2004 Final Rule also weakened the duties test, making the salary level test even more important for protecting workers against misclassification. *Id.* at 22,122-23. While DOL acknowledged that it had allowed too much time to elapse since the last update of the salary level—nearly three decades prior—the 2004 Final Rule did not provide for automatic updating, instead resolving only to perform updates "on a more regular basis." *Id.* at 22,171-72.

B. The 2016 Regulations and Subsequent Litigation

In 2016, DOL revisited the salary level, conducting an exhaustive review of the impacts of the 2004 Final Rule and considering detailed economic research as well as over 270,000 public comments. Based on this voluminous administrative record, DOL concluded that the 2004 Final Rule had set the salary level so low that it was inconsistent with the Department's historical practice and the goals of the FLSA. *See* 81 Fed. Reg. at 32,392, 32,410. The Department found significant the RAND Corporation's 2015 survey, which determined that EAP misclassification improperly deprived approximately 11.5 percent of salaried workers of overtime protection. *See* 81 Fed. Reg. 32,405, 32,484 (citing S. Rohwedder & J.B. Wenger, *The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage*, RAND Labor and Population (2015)). Accordingly, DOL found that 1.8 million salaried workers were misclassified as exempt. 81 Fed. Reg. at 32,464.

DOL determined that the low salary level, combined with the elimination of the more rigorous duties test, had exposed millions of workers that Congress had intended the FLSA to protect to potential EAP misclassification. *See* 81 Fed. Reg. at 32,403-04. DOL concluded that "[l]owering the salary threshold below the amount set in this Final Rule would result in a salary level that is inappropriate for traditionally nonexempt workers in high wage areas, especially when paired with the less rigorous standard duties test." *Id.* at 32,410.

In order to remedy the problems with the 2004 salary level, DOL set the standard salary level for exempt EAP employees at the 40th percentile of weekly earnings of full-time salaried workers from the lowest-wage census region ($913 per week, or $47,476 annually for a full-year worker). 81 Fed. Reg. at 32,393. This threshold addressed the concerns of many stakeholders by restraining misclassification, while still accounting for regional variation in wages. *Id.* at 32,408, 32,411-12. By raising the salary level from the 20th percentile to the 40th percentile, the 2016 Final Rule reduced the risk of EAP misclassification for over 8 million workers. *See* 81 Fed. Reg. at 32,405.

In addition to changing the salary level, DOL also found that it had failed to follow through on its resolution in 2004 to perform updates on a more regular basis. *See* 81 Fed. Reg. at 32,435. Since 1975, the salary level had only been updated once. *See* 81 Fed. Reg. at 32,395. By 2014, the overtime threshold had eroded by 57.5 percent from its peak value in 1970, which was $1,071 per week or $55,692 per year in real 2013 dollars. *See* Hilary Wething & Ross Eisenbrey, *The Overtime Threshold Has Eroded 57.5 Percent from Its Peak Value*, Economic Policy Institute (Mar. 19, 2014), https://www.epi.org/publication/overtime-threshold-eroded-57-5-percent-peak/. The 2016 Final Rule thus created a mechanism for updating the salary level automatically every three years. *See* 81 Fed. Reg. at 32,438.

Before the 2016 Final Rule went into effect, it was challenged in a federal district court, resulting in a nationwide injunction based on the court's finding, discussed below, that the 2016 Final Rule was not consistent with congressional intent. *See Nevada v. DOL*, 218 F. Supp. 3d 520, 531-34 (E.D. Tex. 2016); *Nevada v. DOL*, 275 F. Supp. 3d 795, 804-07 (E.D. Tex. 2017). The appeal of the decision is currently being held in abeyance pending the conclusion of the instant rulemaking process. *See* 84 Fed. Reg. at 10,901. Because the 2016 update never went into effect, the erosion of the overtime threshold continues.

C. The Proposed Rulemaking

In light of the *Nevada* court's decision, DOL issued a Request for Information ("RFI") seeking input on potential revisions to the 2016 Final Rule. *See* Request for Information, 82 Fed. Reg. 34,616 (July 26, 2017). Over 200,000 public comments were submitted in response to the RFI, including one by the states of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington. (*See* Exhibit A attached.) The states' comment letter explained that a meaningful salary level test is essential to effective state labor law enforcement against EAP misclassification. (Ex. A at 5-6, 8-9.) The states' comment letter further explained why the *Nevada* court's decision was erroneous, the concerns raised by the district court were without merit, and the 2016 Final Rule was consistent with congressional intent. (*Id.* at 7-8.)

Now, in apparent disregard of the concerns raised in the states' comment letter and of its own prior findings and historical practice, DOL has issued this NPRM proposing to rescind the 2016 Final Rule and instead to set the salary level at $679 per week (or $35,308 for a full-year worker). In other words, the NPRM would revert the salary level to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region—a standard specifically rejected by the 2016 Final Rule. In addition, the NPRM proposes to eliminate automatic updating of the salary level, instead reverting to a non-binding commitment to update the salary level more frequently than it has done in the past—the same commitment DOL has failed to meet for decades. *See* 84 Fed. Reg. at 10,953 (expressing the intent to update the salary level every four years).

As discussed below, if DOL implements the regulations proposed in the NPRM, it will significantly weaken federal overtime protections and cause immediate harm to workers in our states. The Proposed Rule would expose millions of workers in our states—including minimum-wage and median-wage workers who lack anything resembling the bargaining power and

compensation typical of "white collar" workers—to EAP misclassification, a practice that remains as pervasive in our states, if not more so, as it was in 2016.

II. The Proposed Rule Will Harm Workers in Our States

A. The Proposed Rule Disregards the Continuing Danger of Misclassification in Our States

The undersigned attorneys general have an interest in protecting the workers in our states, advising state labor enforcement agencies, and ensuring that labor laws are enforced. Many signatories have extensive experience ensuring proper payment of wages, including minimum wage and overtime. We all have a shared interest in the well-being of workers nationwide, and multiple signatory state attorneys general have authority to enforce both state labor laws and the FLSA. Based on our collective experience, DOL's proposed expansion of the EAP exemption beyond the scope that was set by the 2016 Final Rule will result in more workers in our states being subjected to EAP misclassification and unlawful exclusion from minimum wage and overtime protections under the FLSA.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. Under the salary test proposed by the NPRM, many of these workers will be subject to misclassification as EAP exempt. From experience, we know that large categories of employees can be misclassified as EAP exempt, such as crew leaders and supervisors who work alongside janitorial, car wash, retail, construction, and fast-food workers (executive); clerical and office workers (administrative); and medical and dental technicians, film and television production assistants, and mid-level information technology employees (professional).

DOL statistics are consistent with our experience, indicating high rates of misclassification of first-line supervisors in food preparation and service (41%), sales (34%), landscaping (26%), construction and extraction (19%), and other occupational categories. *See* 81 Fed. Reg. at 32,464 tbl. 10. This is particularly true in large cities, where higher median wage rates result in higher wages for these non-EAP employees than suburban and rural workers performing the same jobs. *See id.* at 32,409.

More generally, state attorneys general see workers who make weekly wages above $679—including workers in the janitorial, waste processing, transportation and delivery, elder care, and food service occupations—filing complaints at high rates alleging exploitative labor practices, including failure to pay overtime. The fact that these workers are paid above minimum wage does not mean they are free from exploitation; to the contrary, such workers often come to our offices precisely because they lack the financial resources and bargaining power that are hallmarks of bona fide white-collar employees.

A salary level of $679 per week would make it more difficult to enforce labor laws in our states than the threshold provided by the 2016 Final Rule. As a result, misclassification would be

even more pervasive, due to employer and employee uncertainty, as well as intentional abuse by employers. In the absence of a meaningful salary level test, labor law enforcers must rely solely on the multifactorial duties test that is more susceptible to exploitation. The fact-specific determination required by the duties test forces labor law enforcers to spend valuable resources gathering facts—interviewing workers, analyzing documents, and taking testimony—in order to assess whether employees were properly classified. If labor law enforcers determine that a worker should not have been EAP exempt, they then often must engage in a resource-intensive litigation in which these issues of fact will need to be determined and proven, even in clear-cut cases of misclassification.

Since its adoption, workers in many of our states have relied on the FLSA as their primary guarantee for receiving overtime pay. When the salary level is set too low, workers in our states suffer from lower incomes and longer hours. States have a limited ability to remedy this issue for our constituents due to resource constraints and reliance on federal authorities to set a guiding example, as discussed below. This is why the federal government must provide the level of protection contemplated by Congress in the FLSA.

B. The Proposed Rule's Salary Level Exempts Far More Than "White Collar" Employees

As discussed above, unlike the workers that the overtime laws seek to protect, the relatively high status, compensation, and bargaining power of bona fide white collar employees enables them to decide how to get their work done in whatever hours or time is required. *See* 81 Fed. Reg. at 32,400 (citing 1940 DOL Report by Harold Stein on EAP exemption); Nat'l Emp. Law Project, *The Case for Reforming Federal Overtime Rules* (Dec. 2014), *available at* http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf. The danger of defining the EAP exemption too broadly is that, in addition to applying to bona fide EAP employees, it will sweep up workers who are misclassified as EAP—whether inadvertently or in an attempt to evade labor laws—depriving them of the FLSA's protections.

Nineteen states, including many of the signatories of this comment, do not have any overtime laws, leaving workers in those states entirely reliant on the federal standards. *See* National Conference of State Legislatures, Overtime, Breaks & Wage and Hour Violations (March 21, 2019), http://www.ncsl.org/research/labor-and-employment/overtime-breaks-wage-and-hour-violations.aspx. Other states among us have their own overtime regulations but either cite to the FLSA definitions for EAP exemptions[1] or have lower salary levels than the federal standard.[2] For

[1] States that have explicitly tied their EAP exemptions to the FLSA include Alaska, Arkansas, Illinois, Maryland, Massachusetts, Nevada, New Jersey, and Ohio. *See, e.g.*, AS § 23.10.055(c); A.C.A. § 11-4-211(d); 820 Ill. Comp. Stat. § 105/4a(2)(E); COMAR 09.12.41.01, 09.12.41.05, and 09.12.41.17; 454 CMR 27.03(3); NAC 608; N.J.A.C. 12:56-7.2 (adopting the federal definitions for the EAP exemption in New Jersey); Ohio R.C. § 4111.03(A).

[2] Many states have set their own salary threshold, including Connecticut, Hawaii, Indiana, Kansas, Kentucky, Michigan, Minnesota, Pennsylvania, Rhode Island, and Washington, but have set it lower than or at the current federal standard of $455 per week. *See, e.g.*, Regs. Con. State Agencies

these states, the federal definitions in this Proposed Rule would become either the definition incorporated by the state or the strictest overtime standard and, therefore, the primary protection for workers. Only a few states have enacted salary levels above the federal standards.[3]

States risk creating uneven standards for employment and competition with neighboring states if the federal government does not level the playing field with a sufficiently high salary level that all must follow. Therefore, the inadequate federal overtime threshold currently controls in all but very few of our states, and workers in our states rely on an increase to avert a nationwide race to the bottom.

Some states have faced significant resistance to the idea of raising the salary level above the federal standard to avoid such competition. In Pennsylvania, for example, the Department of Labor and Industry attempted to align its duties test with the 2016 Final Rule and raise its overtime thresholds above the federal level in 2018. *See* Department of Labor & Industry, Proposed Amendment to 34 Pa. Code Chapter 231, IRRC No. 3202, 2 (June 12, 2018), http://www.irrc.state.pa.us/docs/3202/AGENCY/3202PRO.pdf. Many suggested that the Department should avoid updating the regulation until this federal rulemaking on the EAP exemption threshold was finalized over concerns that the "state regulations and the federal regulations will once again be misaligned." IRRC, Comments on Department of Labor & Industry Regulation No. 12-106, IRRC No. 3202, 5, 7 (Sept. 21, 2018), http://www.irrc.state.pa.us/docs/3202/IRRC/3202%2009-21-18%20 COMMENTS.pdf. Some commenters suggested legislation requiring alignment between the federal and state overtime definition to avoid interstate competition. *Id.* at 2.

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§ 31-60-14 (setting the lowest threshold at $400 per week); Haw. Admin. Rules §§ 12-20-2, 12-20-03, and 12-20-05 (setting the threshold at not less than $210 per week); Ind. Code § 22-2-2-3 (stating the threshold as $150 per week); Kan. Admin. Reg. § 49-30-1(i)-(k) (including thresholds of $155 per week and $170 per week); 803 Ky. Admin. Regs. 1:070 (setting the threshold at $455 weekly); Mich. Admin. Code R 408.701 (setting the threshold at $250 per week); Minnesota Rules 5200.0190-5200.0210 (setting lower thresholds at $155 and $170 weekly and the higher salary threshold set at $250 weekly); 34 Pa. Code §§ 231.82-231.84 (setting thresholds at $155 per week and $170 per week); R.I. Gen. Laws § 28-12-4.3(a)(4) (stating the threshold is $200 per week); WAC § 296-128-510 to § 296-128-530 (setting lowest thresholds at $155 per week and $170 per week).

[3] *See, e.g.,* Cal. Lab. Code § 515(a) (defining EAP employees in California with a salary threshold of "no less than two times the state minimum wage for full-time employment," which would currently amount to an annual threshold of $45,760); 25 M.R.S. § 663(3)(K) (defining EAP workers in Maine as anyone who has regular compensation that exceeds 3,000 times the State's minimum hourly wage, which is currently $11 per hour or $33,000 per year, or the federal rate, whichever is higher); and 12 NYCRR 142-2.14 (setting rates for the overtime threshold at varying levels throughout the State of New York for executive and administrative employees, but with none lower than $885 per week ($46,020 annually)).

An ongoing Washington State rulemaking to update its state salary level has similarly faced resistance. The current effective federal salary level is less than the minimum wage for full time Washington workers, and Washington's own 40-year old state salary levels are even lower. The Washington State Department of Labor and Industries has nonetheless been urged for the past several years not to engage in a rulemaking updating its state threshold to meet current economic realities for Washington workers, but rather to wait for the federal DOL to update its own levels. Since the Department initiated the rulemaking, stakeholders have continued to resist, arguing that differing from the federal salary level increases confusion and burden for employees and employers. Other states likely face similar opposition.

Additionally, the NPRM sets the salary level far lower than is justified based on the statutory purpose for overtime and the EAP exemptions. The Department's proposed weekly salary level of $679, which corresponds to an annual salary of $35,308, is dramatically below what general earnings data suggest would be appropriate—not to mention more specialized employment law and labor economics analyses—for typical executive, administrator, or professional compensation. For perspective, a household income of $35,308 would put a household in approximately the bottom 30 percent of all U.S. household incomes. *See* 2013-2017 American Community Survey 5-Year Estimates, 2017, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

The salary level proposed in the NPRM equates to an hourly wage of only $14 for a worker who performs 50 hours of work per week, a modest amount of overtime in most of our states for many of the workers at risk of misclassification. Indeed, several states among us will have *minimum wages* that are higher than $14 per hour before the proposed overtime threshold would be adjusted again. *See* National Conference of State Legislatures, State Minimum Wages | 2019 Minimum Wage by State (Jan. 7, 2019) (showing states including California, D.C., Illinois, Maryland, Massachusetts, New Jersey, and New York with plans for the minimum wage to be $14 per hour or more in the next four years), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.[4]

In those states, the salary level will be meaningless because all full-time, salaried workers will earn more. Bona fide exempt employees should have "*[h]igher base pay*, greater fringe benefits, improved promotion potential and greater job security . . . which set them apart from non-EAP employees." Report of the Minimum Wage Study Commission, v.4, p. 236 (June 1981) (emphasis added). Workers who earn the local minimum wage, or even the median wage, are certainly not so highly compensated that Congress contemplated exempting them from overtime protections. *See id.* at 240 ("EAP salaries are usually well above the minimum wage . . . ."). In

[4] While Pennsylvania's minimum wage is the same as the federal minimum wage, the median hourly wage in Pennsylvania was $15.00 in 2018. *See* Analysis of the Pennsylvania Minimum Wage, Minimum Wage Advisory Board, Pennsylvania Department of Labor & Industry, 3 (March 2019), https://www.workstats.dli.pa.gov/Documents/Minimum%20Wage%20Reports/Minimum%20Wage%20Report%202019.pdf.

fact, from 1950-1975, the salary level roughly corresponded to twice the minimum wage. *Id.* at 236.

The salary level proposed in the NPRM is merely $10,000 over the poverty line for a family of four. *See* Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1167 (Feb. 1, 2019). It is also about $11,750 below the annual median earnings of full-time workers in the United States, or approximately $220 less per week. *See* Bureau of Labor Statistics, Usual Weekly Earnings of Wage and Salary Workers: First Quarter 2019 (April 16, 2019), https://www.bls.gov/news.release/pdf/wkyeng.pdf. For workers that hold at least a bachelor's degree—which many consider to be a requirement for a "professional" employee—the national median weekly earnings are $1,350, approximately twice the proposed salary threshold. *Id.*; *see also* 29 C.F.R. § 541.300 (stating that a professional requires "knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction.").[5]

Workers in our states who earn only the proposed salary threshold struggle to afford basic housing, and cannot be considered "white collar." For instance, to afford a modest two-bedroom apartment in a non-urban area, a Pennsylvania worker would need to earn a salary of $40,616 per year, which is higher than the threshold proposed by the DOL. *See* Out of Reach: The High Cost of Housing, National Low Income Housing Coalition 2018, 201, https://reports.nlihc.org/sites/default/files/ oor/OOR_2018.pdf. According to its proposal, the Department believes workers in our states who can barely afford decent housing and other necessities could be "white collar," which is inconsistent with the economic realities of working and living in the United States.

Moreover, in the experience of the signatory states, the duties test has proven woefully inadequate for protecting workers that earn more than the salary threshold from EAP misclassification. This fact-intensive inquiry requires significant investigative resources and case-by-case adjudication. Our enforcement efforts focus on curbing wage theft, including its two most common forms: failure to pay overtime and misclassification. *See* Philip Mattera and Adam Shah, Grand Theft Paycheck: the Large Corporations Shortchanging Their Workers' Wages, 15 (Good Jobs First and Jobs with Justice Education Fund, June 2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf. But the proposed threshold is low enough to encompass many non-exempt workers, as discussed above, thwarting its purpose as a bright line rule that creates a presumption of bona fide exemption.

Understanding the limitations of our respective state enforcement efforts, businesses may choose to pay workers slightly more than the salary threshold, and assign minimal exempt duties,

[5] Approximately one in six workers in Pennsylvania are classified as "Office and Administrative Support," and earn even less; their mean annual wage is $38,190 or about $734 per week. May 2018 State Occupational Employment and Wage Estimates Pennsylvania, Bureau of Labor Statistics, https://www.bls.gov/oes/current/oes_pa.htm. In contrast, the average income in "management occupations" is $125,800. *Id.* The mean annual wage is $50,030, well above the proposed threshold. *Id.*

in order to pass a superficial inquiry. *Id.* at 6. We have seen these practices firsthand, and litigation has been on the rise in our states to ensure compliance with the law and to level the field for law-abiding companies. *Id.* at 17, 27-43. These evasive tactics rob workers of their earned overtime, and impose significant costs on workers and our states in order to enforce the law. Such a low threshold also disadvantages employers who comply with the FLSA. With a salary level that more closely corresponds to salaries of bona fide EAP workers, businesses are less likely to try to skirt the regulations because it is easier to identify violations.

C. The Proposed Rule's Abandonment of Automatic Updating Will Increase Misclassification

The NPRM proposes eliminating the automatic updating mechanism that the 2016 Final Rule incorporated. Automatic updating ensures the salary threshold is tied to relevant economic indicators so that it continues to serve as a bright line between presumptively exempt and nonexempt employees for businesses and workers. Eliminating this mechanism would harm workers by increasing the risk of misclassification as the value of the threshold erodes over time, and require labor law enforcers to engage in more invasive and fact-intensive duties inquiries. As evidenced by the states' experience over the past 50 years, the salary threshold must account for changing employment and compensation conditions, as well as inflation, and the Department has failed to credibly commit itself to regular reevaluations without automatic updating.

The Department's failure to update the threshold sufficiently often to keep the value from eroding has had a negative effect on the ability of our states to protect workers. States enforcing overtime protections must expend significant resources to determine the duties of workers above the threshold as its value drops. As outlined above, many states either explicitly base their definitions of EAP workers on the federal regulations, or they have adopted separate thresholds that are similarly outdated and lower than the current federal standard. For states that will not raise their own salary levels, automatic updating of the federal salary level would ameliorate the problem of outdated state-law thresholds that do not adequately protect workers.

Our experience indicates, and DOL recognizes, that misclassification of workers occurs more often when states enforce under a regime with a threshold that is outdated. *See* 81 Fed. Reg. at 32,402 (citing a 1958 report where DOL recognized the same correlation). An estimated 8.2 million fewer workers will receive overtime or "strengthened protections" against misclassification from the Proposed Rule as compared with the 2016 Final Rule and, because of the elimination of the indexing provision, that number will grow to 11.5 million by 2029. *See* Heidi Shierholz, *More than Eight Million Workers Will be Left Behind by the Trump Overtime Proposal*, Economic Policy Institute (Apr. 8, 2019), https://www.epi.org/publication/trump-overtime-proposal-april-update/. This uptick in misclassification between updates will require expending significant resources to combat.

Without the automatic updating provision, the proposed threshold will quickly lose value and become less effective as a presumptive division between exempt and non-exempt workers. Because the majority of states tie their overtime provisions to the federal standards or have lower thresholds, they will continue to enforce a threshold that is inadequate. A threshold that remains unchanged for nearly 30 years loses much of its value. Automatic updating would conserve

Department and state resources, and the Department could continue to revisit periodically the effectiveness of the salary level. The signatory states find a promise to consider updates every four years insufficient protection for workers who are at risk of misclassification in lieu of automatic updating, especially in light of the Department's historical failure to fulfill that promise.

III. The Proposed Rule Would Violate the Administrative Procedure Act.

When a challenge to an agency action is brought under the Administrative Procedure Act ("APA"), a court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The APA requires an agency to engage in "reasoned decisionmaking" that rests on a "logical and rational" "consideration of the relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). DOL has not done so here, and the Proposed Rule would be arbitrary and capricious because it irrationally restores excessively low salary levels, relies on flawed legal analysis, and improperly removes automatic updating.

A. Restoring Excessively Low Salary Levels Is Arbitrary and Capricious

The proposal to return to the 20th percentile minimum salary level is not based on any rational connection to the facts before the agency as described in the Proposed Rule. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (when an "agency has failed to offer the rational connection between facts and judgment," its actions do not "pass muster under the arbitrary and capricious standard"). Although DOL continues to acknowledge, as it did in 2016, that misclassification under the EAP exemption remains a significant problem, it has nonetheless proposed to set the salary threshold back at the 20th percentile level.

In 2016, the Department raised the salary level to the 40th percentile to address the misclassification that resulted from the changes in the 2004 Final Rule, which both eliminated the more protective duties test and set a salary level so low that it was inconsistent with historical practice. *See supra* at 4-5. Setting a higher salary level allowed DOL to provide employers and employees a "bright-line test for EAP exemption" that effectively differentiated between exempt and non-exempt workers. 81 Fed. Reg. at 32,464. DOL further recognized the 40th percentile level was consistent with the salary minimums from prior decades. *See id.* at 32,409 (the 40th percentile salary level "is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels").

The NPRM recognizes the value of having a robust salary test to decrease the incidence of misclassification. It concludes that:

> A lower or outdated salary level would result in a less effective bright-line test for separating workers who may be exempt from those nonexempt workers intended to be within the Act's protection. A low salary level would also increase the burden on the employer to apply the duties test to more employees in determining whether an employee is exempt, which would inherently increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive

> overtime and minimum wage protections under the FLSA are denied those protections.

84 Fed. Reg. at 10,967.

Without explaining why DOL's 2016 findings about the magnitude of misclassification were incorrect, the Department instead proposes a salary test that again increases the risk of misclassification by pairing a low minimum salary level with a less rigorous duties test. Moreover, DOL could not have based this proposal on evidence from observing the effects of the 2016 Final Rule, because that salary level was enjoined before it ever took effect. In contrast, in 2016, DOL had over a decade of evidence demonstrating that, in conjunction with the standard duties test, the 20th percentile level was too low to act as a meaningful screen against misclassification. *See supra* 3-4.

That the Department proposes to restore the 20th percentile level in the face of recent data revealing that level to be ineffective would, if finalized, be arbitrary and capricious. *See State Farm*, 463 U.S. at 56 (agency's rescission of protective standard requiring seatbelts and airbags was arbitrary and capricious where agency failed to adequately explain why protective standard was no longer necessary to protect car passengers); *ANR Storage Co. v. Fed. Energy Regulatory Comm'n*, 904 F.3d 1020, 1027-28 (D.C. Cir. 2018) (an agency may not "tur[n] on a dime" in its reasoning, especially where its analysis is "internally inconsistent").

B. Reliance on the Flawed Legal Analysis in Nevada v. DOL *Is Arbitrary and Capricious*

Having failed to rely on any actual evidence of reduced EAP misclassification or other relevant changes since 2016 in promulgating the Proposed Rule, DOL instead bases its Proposed Rule almost entirely on a single district court's flawed interpretation of the EAP exemption. *See Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 529-31 (E.D. Tex. 2016); *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 804-07 (E.D. Tex. 2017) ("*Nevada II*"). The *Nevada* court erroneously concluded that the 2016 Final Rule's salary level of $913, which excluded certain workers from the EAP exemption who otherwise satisfied the duties test, violated the APA. Because the *Nevada* court misconstrued and misapplied the FLSA, and the appeal remains pending, DOL's uncritical reliance on the court's reasoning in the NPRM is arbitrary and capricious. *See Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 505 (9th Cir. 2018) ("[I]t is black letter law that where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

The *Nevada* court enjoined the 2016 Final Rule based on its finding that DOL had exceeded its authority by setting a salary level so high that it was effectively an independent requirement for EAP exemption, and, alternatively, that the inclusion of such a test was an impermissible construction of the EAP exemption under the FLSA. *See Nevada*, 218 F. Supp. 3d at 529-31; *Nevada II*, 275 F. Supp. 3d at 804-08. The *Nevada* court interpreted the FLSA to require the duties test to predominate the exemption inquiry; the salary test, it reasoned, served only to screen out jobs that were so low paying that application of the duties test was unnecessary in the first

instance.[6] *Nevada*, 218 F. Supp. 3d at 530-31; *Nevada II*, 275 F. Supp. 3d at 806-07. In other words, the salary test could not function as a separate requirement that "supplanted" the outcome of the duties test. *Nevada,* 218 F. Supp. 3d at 531; *Nevada II*, 275 F. Supp. 3d at 806-07.

The court purportedly discerned congressional intent, not through legislative history, but through review of the dictionary definitions of "executive," "administrative," and "professional." The court reasoned that because the dictionary definitions of these job categories did not specify a salary amount, the salary test could not exclude workers that met the other requirements of the duties test. *Nevada,* 218 F. Supp. 3d at 529; *Nevada II*, 275 F. Supp. 3d at 804-05.

The NPRM offers the district court's decision as the primary reason for proposing to rescind the 2016 Final Rule. *See, e.g.*, 84 Fed. Reg. at 10,909 ("The Department is engaging in this rulemaking to realign the salary level with its appropriate limited purpose, to address the concerns about the 2016 final rule identified by the district court, and to update the salary level in light of increased employee earnings."). DOL references the *Nevada* decisions over 30 times in the Proposed Rule. The NPRM, however, makes no mention of how the statutory language, the Department's longstanding interpretation of the EAP exemption, the case law, and even the NPRM's own reasoning all directly contradict the *Nevada* court's legal analysis.

The FLSA itself expressly delegates authority to DOL to issue regulations defining and delimiting the terms in the EAP exemption. *See* 29 U.S.C. § 213(a)(1). In such circumstances, "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect." *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

Pursuant to that authority, DOL for over 75 years has consistently defined the salary test as separate and distinct from the duties test. *See* 29 C.F.R. pt. 541 (an employee must (1) be paid on a salary basis, (2) receive a minimum salary amount, *and* (3) perform a job primarily involving EAP duties). The Department "has always recognized that the salary level test works in tandem with the duties tests"—not as a subordinate component—"to identify bona fide EAP employees." 81 Fed. Reg. at 32,400.

Courts have also recognized with regularity the multifactor EAP exemption test, which requires an employer to satisfy all three independent prongs, as a permissible construction of the FLSA. *See, e.g.*, *Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275, 289-90 (D.D.C. 2017) (recognizing three prongs of EAP exemption test as separate requirements); *Cannon v. District of Columbia*, 717 F.3d 200, 204-05 (D.C. Cir. 2013) (employees do not fall into the EAP exemption

[6] The court quoted a DOL report from 1949 for the proposition that "salary level was purposefully set low to 'screen[ ] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'" *Nevada*, 218 F. Supp. 3d at 531 (quoting Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949)). That same report, however, concluded the salary test had other purposes as well, which included "furnish[ing] a practical guide to the inspector as well as to employers and employees in borderline cases." 69 Fed. Reg. at 22,165.

if they meet the duties test but not the salary level test); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 847-48 (6th Cir. 2012) (employees not exempt from overtime even if they meet two out of three EAP exemption prongs). Indeed, the *Nevada* court is the *only* court that has found to the contrary.

The NPRM itself acknowledges that the salary test has an important independent function: to protect employees who may satisfy the salary basis and duties tests. Even under the salary test proposed in the NPRM, 1.3 million additional workers making less than $679 but more than $455, who may have otherwise satisfied the duties test, will become overtime eligible. *See* 84 Fed. Reg. at 10,949. Similarly, under the 2004 Final Rule, which tripled the previous salary level from $155 to $455, DOL strengthened overtime protections for 2.8 million additional workers that previously met the duties test criteria. *See* 69 Fed. Reg. at 22,199-201.

As DOL has previously explained, a bright-line salary test guards against abuse of the EAP exemption by preventing employers from saddling low-wage employees with EAP duties in order to avoid paying overtime. *See supra* 5-6. The inclusion of a meaningful salary test in the 2016 Final Rule, instead of being an unauthorized exercise of authority or an impermissible construction of the FLSA, is crucial to giving effect to the statute's purpose. Accordingly, DOL's reliance on the *Nevada* court's erroneous interpretation of the EAP exemption is irrational.

C. Removal of Automatic Updating Is Arbitrary and Capricious

In proposing to remove automatic updating, DOL ignores its own experience and again recommits to a course of action that it knows to be ineffective. The NPRM contains only a brief discussion of the decision to remove automatic updating and entirely fails to address the impracticality and ineffectiveness—demonstrated clearly by DOL's own repeated failure to timely update the salary level—of non-binding commitments to raise the salary level through the notice and comment process. 84 Fed. Reg. at 10,914-15.

DOL has emphasized repeatedly the need for an up-to-date salary test in order to protect "workers whom Congress intended to be covered by the minimum wage and overtime pay provisions of the FLSA." 81 Fed. Reg. at 32,504; 84 Fed. Reg. at 10,914; *see also supra* 2. Yet, as noted above, since 1938, DOL has only updated the salary level eight times. 81 Fed. Reg. at 32,392. The NPRM acknowledged that as early as 1970, the "Department remarked that one commenter's suggestion to implement automatic annual updates to the salary tests based on BLS earnings data 'appear[ed] to have some merit' given the delays between some of the Department's earlier updates." 84 Fed. Reg. at 10,914. Despite the DOL's awareness of the problem, however, it neglected to update the salary level for another three decades. In 2004, DOL recognized once more the need to adjust the salary level with more frequency and resolved to do so "on a more regular basis." *Id.* Following that commitment, the Department again took no action for over a decade.

Based on the agency's experience with the history of salary level updates, DOL chose in 2016 to set a carefully considered automatic updating mechanism based on the Consumer Price Index ("CPI"). 81 Fed. Reg. at 32,504. DOL found that the mechanism made sure that the salary level kept pace with changes in earnings, "allowing it to continue to serve as an effective dividing

line between potentially exempt and nonexempt workers," in order to fulfill the purpose of the FLSA to protect non-exempt workers. *Id.* DOL also found that automatic updating would offer employers more predictability and notice with respect to salary level changes and allow these increases to occur gradually, instead of by factors of two or three every few decades. *Id.* Because DOL disclosed in detail the methodology for the updates in the NPRM and the 2016 Final Rule, notice and comment were not required each time an update went into effect. *Id.*; *see* 5 U.S.C. 553(b)(B).

The NPRM not only disregards the benefits of automatic updating, but also fails to adequately explain how DOL will avoid the pitfalls of prior alternatives. The NPRM states that the Department "intends" to update the salary threshold every four years, but does not address the likelihood that this will occur, particularly in light of the DOL's inability to meet prior commitments to increase salary levels more regularly through the notice and comment process. *See* 84 Fed. Reg. at 10,915.

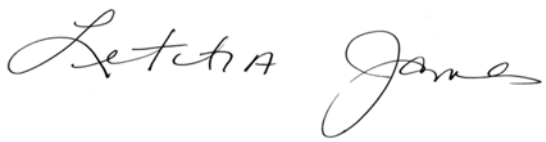
The NPRM observes that certain commenters "argued that the Department lacked the authority to update the salary level automatically," but it does not itself conclude that DOL lacks such authority. 84 Fed. Reg. at 10,914. Nor could it, as administrative agencies regularly use regulations to create automatic updating mechanisms that do not require notice and comment rulemaking in advance of each update. *See, e.g.*, 16 C.F.R. § 436.8 (Federal Trade Commission Franchise Rule providing for automatic updating of monetary thresholds for exemptions every four years based on the CPI); 20 C.F.R. § 655.173 (DOL Rule providing for automatic indexing of maximum allowable meal charges for H-2A workers).

In sum, the Department's failure to consider the evidence of the disadvantages and impracticability of adjusting the salary level through formal rulemaking each time is without rational basis. *See State Farm*, 463 U.S. at 43 ("[a]n agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem" or "if the agency offers an explanation for the decision that is contrary to the evidence"); *Michigan*, 135 S. Ct. at 2699.

III. Conclusion

For the foregoing reasons, the undersigned states urge the Department to refrain from further expansion of the EAP exemption and to instead issue a final regulation that is at least as protective of workers as the 2016 Final Rule, including retaining its salary level and automatic updating mechanism. Workers and agencies enforcing labor laws in our states are depending on the DOL to provide the meaningful protections from EAP misclassification that Congress intended to afford under the FLSA.

Respectfully submitted,



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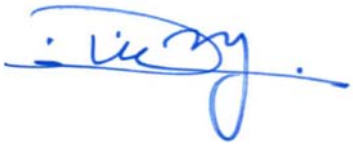

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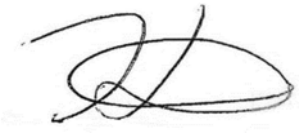

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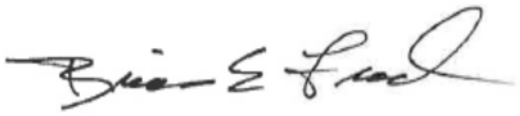

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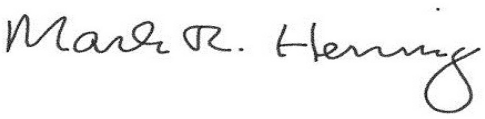

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Virginia Attorney General

EXHIBIT A

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
LABOR BUREAU

September 25, 2017

Via Electronic Submission (Regulations.gov)

The Honorable R. Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Ave. NW
Washington DC 20210

Melissa Smith
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Information (RIN 1235-AA20)
Defining and Delimiting the Exemptions for Executive,
Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington to comment in response to the Request for Information ("RFI") by the U.S. Department of Labor ("USDOL") regarding the regulations at 29 C.F.R. part 541 (RIN 1235-AA20), which define exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") for certain executive, administrative, and professional ("EAP") employees.

The undersigned state attorneys general believe that expansion of the EAP exemption, also known as the "white collar" exemption, would considerably scale back federal worker protections in a manner that will hurt the workers in our states and make our jobs enforcing labor laws harder. As detailed in this comment, we believe that the standard for EAP exemption should be at least as protective of workers—who remain at significant risk of being misclassified as EAP—as the 2016 regulations concerning the EAP exemption promulgated by USDOL (the "2016 Final Rule"),

including retaining a meaningful salary level test and automatic updating mechanism. The 2016 Final Rule was recently struck down by a Texas federal district court,[1] and thus the USDOL rule, including the salary level test, adopted in 2004 remains in effect.

I. Statement of Interest

The undersigned attorneys general have an interest in protecting the workers in our states, advising state labor enforcement agencies, and in many cases, enforcing labor laws. Many signatories have extensive experience ensuring proper payment of wages, including minimum wage and overtime. We all have a shared interest in the well-being of workers nationwide, and multiple signatory state attorneys general have authority to enforce both state labor laws and FLSA.

Based on our collective experience, if USDOL expands the EAP exemption beyond the scope that was to be set by the 2016 Final Rule, it will result in more workers in our states being subjected to EAP misclassification and unlawful exclusion from minimum wage and overtime protections under FLSA. Weakening the bright-line salary level test and requiring law enforcement to rely increasingly on the easily manipulable "duties" test will make it significantly more difficult to investigate and prosecute EAP misclassification, which remains a pernicious and growing problem in our states.

Despite federal and state enforcement efforts, rampant violations of labor laws have continued nationwide. A 2009 study of over 4,000 low-wage workers in New York City, Chicago, and Los Angeles found that nearly 26% of workers were paid a sub-minimum wage, and of the workers who had worked over 40 hours in a week, over 76% were not paid overtime in accordance with FLSA. *See* Nat'l Emp. Law Project, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 20, *available at* http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf. Workers who were not paid on an hourly basis faced even higher risk of violation, with 46% being paid sub-minimum wages and 92% not being paid overtime. *Id.* at 30. In other words, at a time when the 2004 salary level test was in effect, there were extremely high labor law violation rates, and salaried workers—who are most at risk of being misclassified as EAP and deprived of their rights under FLSA—were subject to the highest violation rates of all. Since the 2004 salary level has not increased, despite the increased cost of living over the past 13 years, it is reasonable to assume that the rates of violation revealed in this 2009 study are the same, or worse, today.

The EAP exemption makes minimum wage and overtime protections under FLSA inapplicable to workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Historically, USDOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary that does not change based on the quality or quantity of work done (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive (management, supervision,

[1] As discussed, *infra*, at p. 3, the court in *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017), struck down the 2016 Final Rule on the grounds that USDOL exceeded its statutory rule-making authority. As further discussed herein, the undersigned attorneys general believe that decision was wrongly decided.

hiring/firing), administrative (office/non-manual work, discretion/judgment), or professional (advanced scientific/academic knowledge) in nature (the "duties test"). *See* 29 C.F.R. § 541.0 *et seq.*

The purpose of the EAP exemption must be understood in the context of the purposes of the overtime laws, which include discouraging employers from requiring employees to work extremely long workweeks, compensating employees for the burden of such workweeks, and encouraging employers to hire more workers and spread employment throughout the workforce. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942). Unlike the workers that the overtime laws seek to protect, bona fide white collar employees have the ability to decide how to get their work done in whatever hours or time is required, and have elevated status—and thus increased bargaining power—due to salaries far above minimum wage, fringe benefits, job security, and opportunities for advancement. *See* Defining and Delimiting the Exemptions for EAP Employees, 81 Fed. Reg. 32,392, 32,400 (2016) (citing 1940 USDOL Report by Harold Stein on EAP exemption); Nat'l Emp. Law Project, *The Case for Reforming Federal Overtime Rules* (Dec. 2014), *available at* http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf. The danger of defining the EAP exemption too broadly is that, in addition to applying to bona fide EAP employees, it will sweep up workers who are misclassified as EAP—whether inadvertently or in an attempt to evade labor laws—and deprive these workers of minimum-wage and overtime protections.

With these considerations in mind, USDOL's 2016 Final Rule raised the minimum weekly salary level for the EAP exemption from $455 to $913 and created a mechanism for updating the salary level automatically every three years. *See* 81 Fed. Reg. 32,405, 32,408, 32,438. Before the 2016 Final Rule went into effect, it was challenged in a federal district court, resulting in a nationwide order partially enjoining the salary level test. *Nevada v. USDOL*, 218 F. Supp. 3d 530 (E.D. Tex. 2016). In a subsequent opinion and order, the court stated that it invalidated the 2016 Final Rule because the $913 salary level purportedly "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017).

We believe that the district court's opinion is wrongly decided and based on an incorrect interpretation of FLSA and the 2016 Final Rule that ignores the plain text and remedial purpose of the statute, as well as the broad authority of USDOL to implement it.[2] However, in response to the district court's decision, Labor Secretary Alexander Acosta "has decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule," instead issuing this RFI to "determine what the salary level should be." (RFI at 7.)[3] We believe that the 2016 Final Rule

[2] We note that the signatories are not parties to the Texas litigation largely for procedural reasons and have a significant interest in this issue.

[3] The RFI states that USDOL's review of the salary test will focus on "lowering the regulatory burden" consistent with President Trump's Executive Order 13777 on Regulatory Reform, which tasks federal agencies with identifying regulations for repeal, replacement, or modification, including regulations that "eliminate jobs, or inhibit job creation." (RFI at 8.) The 2016 Final Rule does not require modification on the grounds set forth in Executive Order 13777; indeed, the 2016 Final Rule furthers President Trump's job creation goals. As discussed above, an original purpose of the overtime requirement was to create a financial incentive for employers to hire *more* employees rather than requiring existing workers to work longer hours. *See Davis v. J.P. Morgan Chase*, 587 F.3d

fairly considered the comments of stakeholders and struck an "appropriate balance between minimizing the risk of employers misclassifying overtime-eligible employees as exempt, while reducing the undue exclusions from exemption of bona fide EAP employees." 81 Fed. Reg. 32,409. Furthermore, we note that the 2016 Final Rule was the carefully considered product of a two-year deliberative process in which USDOL reviewed more than 270,000 comments from a broad array of constituencies, including unions, worker advocacy groups, small businesses, Fortune 500 corporations, state and local governments, and economists. *Id.* at 32,397.

Accordingly, we urge USDOL to establish an EAP standard, including, but not limited to, a meaningful salary test and automatic updating mechanism, that is at least as protective of workers who are potentially subject to EAP misclassification as the 2016 Final Rule.

II. The Salary Level Test Makes State Labor Law Enforcement More Effective and Efficient (Response to RFI Question 7)

The RFI seeks input on a proposal that eliminates the salary level test entirely and instead relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer. (RFI at 11.) We urge USDOL to reject any such proposal.

The salary level test is essential to meaningful enforcement of FLSA. A salary level test makes it simpler for both workers and law enforcement agencies to identify underpayments of wages. Because enforcement is more difficult without a salary level test, misclassification would be even more pervasive, due to employer and employee uncertainty, as well as intentional abuse by employers. As discussed above, many employers do not pay overtime even with a bright-line test. Law enforcement agencies can more easily identify misclassified workers by clearly knowing which employees are overtime eligible using a salary test. In the absence of this bright-line test, law enforcement agencies must rely solely on a multifactorial duties test that is more susceptible to exploitation. The fact-specific determination required by the duties test forces law enforcement agencies to spend valuable resources gathering facts—interviewing workers, analyzing documents, and taking testimony—in order to assess whether employees were properly classified. If a law enforcement agency determines that a worker should not have been EAP exempt, it then often must engage in a resource-intensive litigation in which these issues of fact will need to be determined and proven.

A clearly defined EAP exemption under FLSA is also critically important to states' enforcement of labor laws. Workers across the country rely on FLSA, and its implementing USDOL rules and regulations, to protect them on the job. Some states have more limited labor protections than those provided under FLSA, and any expansion of the EAP exemption will directly impact workers and employers in these states. Other states have passed their own overtime protections, which in some cases include their own versions of an EAP exemption. These states will also be impacted to the extent that their laws are less protective than FLSA, and because many of these states' laws expressly reference FLSA or look to FLSA for guidance. Accordingly, a clear EAP exemption with a meaningful salary test is required for our states to achieve effective labor enforcement.

529, 535 (2d Cir. 2009). The 2016 Final Rule took this job-creation goal into account in devising the final rule. *See* 81 Fed. Reg. 32,394.

A salary test also facilitates compliance and detection of noncompliance because it creates a clear, bright-line rule for employers. Even for well-intentioned, law-abiding employers, a salary level test is a useful bright line, particularly for small companies that may not have sophisticated employment counsel to advise them on the complexities of the duties test. Further, employees themselves can more easily detect and report misclassification.[4] Indeed, in promulgating the 2016 Final Rule, USDOL estimated that "5.7 million white collar workers who are currently overtime eligible because they do not satisfy the EAP duties tests and who currently earn at least $455 per week but less than $913 per week will have their overtime protection strengthened [immediately] because their status as overtime-eligible will be clear based on the salary test alone without the need to examine their duties." 81 Fed. Reg. 32,393.

With a salary test in place, law enforcement resources can focus on investigating and litigating the proper payment of overtime to employees falling below a salary threshold rather than investigating and litigating whether a given employee satisfies the duties test for exemption, as would be required *in every case* in the absence of a salary test. *See id.* at 32,463 ("The salary level test has historically been intended to serve as an initial bright-line test for overtime eligibility for white collar employees."). If USDOL eliminates the salary test, law enforcement will be forced to undertake a fact-intensive analysis in every instance of suspected violations, and employers would be required to expend resources on this same analysis in monitoring compliance. *See id.* at 32,419–20 (observing that "[g]iven the new standard salary level, there will be 9.9 million fewer white collar employees for whom employers could be subject to potential litigation regarding whether they meet the duties test"). A meaningful salary test, used in conjunction with the duties test, allows law enforcement to assess the bona fide status and bargaining power of employees designated as EAP more accurately, and allows for more efficient and effective enforcement by federal and state law enforcement.

III. A Meaningful Salary Test Is Essential to Protecting Workers from EAP Misclassification (Response to RFI Question 1)

The RFI seeks input on multiple proposals, including retaining the salary level established by USDOL in 2004 ($455 per week) adjusted for inflation (approximately $595 per week). (*See* RFI at 9.) Adopting these proposals would be a large step backwards, as they would significantly increase the number of workers potentially subject to EAP misclassification.

If USDOL expands the EAP exemption by setting the salary level test significantly below $913, the adverse impact on workers in our states would be significant. The population of workers most directly affected by rolling back the 2016 Final Rule's EAP salary threshold to the 2004 level is employees classified as EAP and making salaries between $455 per week ($23,660 annually) and $913 per week ($47,476 annually). USDOL estimated in 2016 that 4.2 million workers perform qualifying duties and have salaries in this range, and another 5.7 million workers do not perform qualifying duties but make less than $913 per week. These 9.9 million workers would all receive additional protection from the bright-line salary test. USDOL observed that these workers are "at particular risk of misclassification," and, indeed, that 732,000 of them were likely already

[4] Establishing a clear, bright-line salary test thus also furthers President Trump's Executive Order 13777 on Regulatory Reform by streamlining compliance with regulations. *See supra* note 3.

misclassified. *See* 81 Fed. Reg. 32,500. Retaining the 2004 salary level would again expose all of these workers to EAP misclassification and deprive them of FLSA protections.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. Under the 2004 salary test, many of these workers could potentially be subject to misclassification as EAP exempt. Based on our enforcement experience, we have observed that large categories of employees can be misclassified as EAP exempt, such as crew leaders and supervisors who work alongside janitorial, car wash, retail, construction, and fast-food workers (executive); clerical and office workers (administrative); and medical and dental technicians, film and television production assistants, and mid-level IT employees (professional).

USDOL statistics are consistent with our experience, indicating high rates of misclassification of first-line supervisors in food preparation and service (41%), sales (34%), landscaping (26%), construction and extraction (19%), and other occupational categories. *See* 81 Fed. Reg. 32,464 tbl. 10. This is particularly the case in large cities where higher median wage rates results in higher wages for non-EAP employees. *See id.* at 32,409 ("As we have previously explained when discussing the salary level to be paired with the more rigorous long duties test, the threshold can be of little help in identifying bona fide EAP employees when large numbers of traditionally nonexempt workers in large cities earn more than this amount." (internal quotation marks omitted)).

More generally, state attorneys general regularly see workers who make weekly wages between $455 and $913—including workers in the janitorial, waste processing, transportation and delivery, elder care, and food service occupations—filing complaints at high rates alleging exploitative labor practices, including failure to pay overtime. The fact that these workers are paid above minimum wage does not mean they are free from exploitation; to the contrary, such workers often come to our office precisely because they lack the financial resources and bargaining power that are hallmarks of bona fide white-collar employees. The clear intent of FLSA is to protect these types of vulnerable employees, some of whom may have duties that could be classified (or misclassified) as administrative, executive, or professional in nature, but who nonetheless lack the status and power associated with bona fide EAP capacity. *See* 81 Fed. Reg. 32,413 (observing that "the purpose of the salary level test has always been to distinguish bona fide [EAP] employees from those who were not intended by Congress to come within these exempt categories" (internal quotation marks omitted)).

Accordingly, USDOL should adopt a salary level test at least as protective as the one set forth in the 2016 Final Rule. *See id.* at 32,465 (observing that USDOL findings "underscore[] the large number of overtime-eligible workers for whom employers must perform a duties analysis, and who may be at risk of misclassification as EAP exempt").

IV. A Salary Level of $913/Week Is Consistent with Congressional Intent (Response to RFI Question 5)

The RFI asks whether a $913 salary level "work[s] effectively with the standard duties test or, instead . . . eclipse[s] the role of the duties test in determining exemption status?" (RFI at 10.) The Texas district court, in considering this issue and invalidating the 2016 Final Rule, ruled that

the $913 salary level "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employer's job duties" and ignoring Congress's "intent for employees doing 'bona fide executive, administrative, or professional capacity' duties to be exempt from overtime pay." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017). This ruling was clearly erroneous for the following reasons, and should not be given deference in the USDOL's rulemaking process.

First, the court improperly substituted its judgment for USDOL, which comprehensively detailed its rationale and methodology in determining the salary level in the implementing regulations of the 2016 Final Rule. Specifically, USDOL observed that the 2004 salary level ($455) "was too low to effectively screen out from exemption overtime-eligible white collar employees" for a number of reasons, including both inflation and the fact that the 2004 revisions to the EAP standard had weakened the duties test, thus exposing greater numbers of workers to potential misclassification.[5] 81 Fed. Reg. 32,404. USDOL thus concluded that revising the EAP regulations was necessary to "effectively distinguish between overtime-eligible white collar employees who Congress intended to be protected by FLSA's minimum wage and overtime provisions and bona fide EAP employees whom it intended to exempt." *Id.* at 32,393.

We believe that the 2016 Final Rule was reasonable in observing this shortcoming of the 2004 salary level. For example, adjusting the salary level that was in effect in 1975 (and paired with a more rigorous duties test) for inflation results in a salary level of $1,100 (in 2016 dollars), which is significantly higher than the $913 salary level set forth in the 2016 Final Rule. Indeed, from 1958 to 1975, the real value of the salary level associated with the more rigorous duties test was *always* higher than $913. (*See* 81 Fed. Reg. 32,450 & fig. 1.) Indexing the 2004 salary level for inflation results in a salary level (approximately $595) that is significantly less protective than both the pre-1975 levels and the 2016 Final Rule. Thus, while the court relied heavily on the 2004 salary level, we submit that in the long history of FLSA and its EAP exemption, the 2004 level should be viewed as the outlier, not the standard-bearer.

Second, the court incorrectly concluded that Congress, in passing FLSA, "defined the EAP exemption with regard to duties" primarily, and that salary may *only* be used as a secondary "defining characteristic" when determining who performs EAP duties. *Nevada v. USDOL*, 2017 WL 3837230, at *8. Neither "duties" nor "salary" is referenced in the text of FLSA, which states only that "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt, and the Labor Secretary may "define[] and delimit[]" those terms. 29 U.S.C. § 213(a)(1). If Congress had wanted to exempt categorically any employee performing executive, administrative, or professional duties, it easily could have done so—but it did not. Instead, as discussed above, USDOL has for over 75 years defined the term EAP to mean that an employee must (1) be paid on a salary basis, (2) receive a minimum salary amount, and (3) perform a job

[5] "In the [2016] Final Rule, the Department corrects for the elimination of the [more rigorous] long duties test [in 2004] and sets a salary level that works in tandem with the [more easily manipulable] standard duties test [adopted in 2004] to appropriately classify white collar workers as entitled to minimum wage and overtime protection or potentially exempt. [The] standard salary level [of $913] set by the Department . . . is set at the low end of the range of the historical short test levels, based on the ratios between the short test and long test levels, and much lower than the historical average for the short test." 81 Fed. Reg. 32,463.

primarily involving EAP duties. *See* 29 C.F.R. pt. 541. In other words, USDOL "has always recognized that the salary level test works in tandem with the duties tests"—not as a subordinate component—"to identify bona fide EAP employees." 81 Fed. Reg. 32,400. Accordingly, it is well within USDOL's authority and historical practice, and Congress's intent, to adopt a salary test that renders certain employees exempt *even if* they satisfy the duties test.[6]

Third, even accepting the court's flawed premise that the salary test is subordinate to the duties test, it is empirically false that using a $913 salary level makes overtime status depend "predominately" on salary, thereby "supplanting" the duties test. The court relies heavily on the 2016 Final Rule's finding that 4.2 million employees who pass the standard duties test no longer qualify for the EAP exemption, concluding that the 2016 Final Rule must be invalid if it "would exclude so many employees who perform exempt duties." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (citing 81 Fed. Reg. 32,405). But the $913 salary level plainly does not predominate the EAP exemption. The additional 4.2 million workers who cannot be exempt from FLSA overtime and minimum wage protections because of the $913 salary level test are dwarfed, for example, by 78.3 million workers who cannot be exempt because of the salary basis test (*i.e.*, EAP workers must be paid on a non-hourly basis). *See* 81 Fed. Reg. 32,456 (observing that of the 132.7 million workers potentially subject to FLSA and its regulations in Part 541, 78.3 million are hourly workers and thus excluded from the EAP exemption). Similarly, USDOL estimated in 2016 that there are 12.2 million salaried, white collar workers who earn more than $455 per week but are overtime eligible because they fail to meet the duties test. *Id.* at 32,465.[7] Thus, of the three factors determining EAP status, it is clear that the salary basis test and the duties test continue to predominate, and the salary level test does not supplant them even when set at $913.

Accordingly, the 2016 Final Rule's salary level of $913 is consistent with Congressional intent and we urge USDOL to use a salary level at least as protective of workers as this amount.

V. Automatic Updating Is Essential to a Meaningful Salary Level Test (Response to RFI Question 11)

Automatic updating is necessary to ensure that the salary level test remains a meaningful, bright-line test for the reasons set forth above, and that the salary level's effectiveness is not eroded over time as the wages of employees rise with inflation. As USDOL observed in promulgating the 2016 Final Rule, "misclassification of overtime-protected employees occurs more frequently when the salary levels have become outdated by a marked upward movement of wages and

[6] And this was precisely USDOL's intent in adopting a higher salary test to compensate for the weakening of the duties test caused by the 2004 revision to the EAP regulations. *See supra* note 5. This is quite different from an impermissible "salary only" test, which would permit USDOL to exempt workers from FLSA protections based solely on their high salaries, even though they have no executive, administrative, or professional characteristics whatsoever, such as "mechanics, carpenters, or linotype operators." 81 Fed. Reg. 32,446 n. 84. The 2016 Final Rule does not do this; it continues to require a worker's duties to be considered and determined to qualify as EAP if he or she is to qualify for the exemption from FLSA.

[7] Indeed, there are many factors in the EAP analysis that have a greater effect than the increase of the salary level to $913. *See, e.g.*, 81 Fed. Reg. 32,451 (noting that "14.9 million workers do not satisfy the duties tests for EAP exemption and/or earn less than $455 per week" and another 7.4 million are not even subject to a salary test—only a duties test—because they are in certain statutorily enumerated occupations).

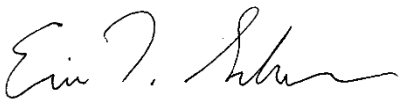
salaries." 81 Fed. Reg. 32,402 (quotation omitted). We need not imagine whether this could happen; the RFI acknowledges that federal labor protections did, in fact, atrophy over time due to failure to update the EAP exemption's salary threshold. In the 1970s, USDOL set "what were intended to be 'interim' salary levels," which, in fact, remained unchanged for nearly 30 years. By that point, "the passage of time had eroded the . . . salary levels below the . . . minimum wage," and thus the salary test "as a practical matter . . . fell out of operation." (RFI at 5–6.)

With the 2016 Final Rule, USDOL "established a mechanism for automatically updating the salary level every three years to ensure it remained a meaningful test for helping determine an employee's exempt status." (RFI at 6–7.) In contrast, the 2004 rule that the RFI proposes retaining did not have such a mechanism. USDOL should ensure that the salary threshold is automatically updated to remain an accurate measure of the line between bona fide EAP employees and non-EAP employees, as was provided for in the 2016 Final Rule. USDOL should not risk letting labor protections erode again due to legislative or regulatory inaction. The signatory states believe that an automatic updating formula should be used that is at least as protective of workers as the one set forth in the 2016 Final Rule.

VI. Conclusion

For the foregoing reasons, the signatory states urge USDOL to refrain from further expansion of the EAP exemption and to adopt a standard that is equally or more protective of workers—who remain at significant risk of being misclassified as exempt from minimum wage and overtime protections—than the 2016 Final Rule, including retaining a meaningful salary test and automatic updating mechanism.

Respectfully submitted,



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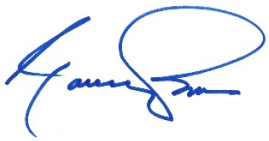

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