August 20, 2014

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Perez:

I am writing to follow up on our May 28 meeting on the March 13, 2014 Presidential Memorandum on “Updating and Modernizing Overtime Regulations.” We appreciate your receptiveness to our ideas on how the President’s directive can be fulfilled. However, we are concerned by some of your public statements that suggest the Department’s proposed rule will not completely accomplish all of the Memorandum’s stated objectives and strongly encourage you to issue an Advance Notice of Proposed Rulemaking (ANPRM) to ensure that the views and recommendations of all stakeholders are thoroughly considered in the process. In addition, we are requesting an additional meeting or meetings with the Department to further elucidate the points raised in this letter.

In that vein, the purpose of this letter is to articulate our concerns about how the current Fair Labor Standards Act (FLSA) regulations—specifically the Part 541 “white collar” exemption rules—are out of sync with today’s workplace, and some specific aspects of those regulations which are most in need of updating. Like the widespread support for eliminating the complexity, ambiguity, and potential for abuse of the U.S. tax code, most Americans can agree, at least as a guiding principle, that simplifying and streamlining the FLSA is in the best interest of employees, employers, and the U.S. economy.

The FLSA and Today’s Workplace  In considering the FLSA, it is important to understand the state of the American workplace when the 1938 law was enacted. The Depression-era workplace was characterized by:

- A fixed beginning and end to both the workday and workweek in most American workplaces;
- With the exception of certain occupations (e.g., repairmen, truck drivers, outside sales persons), the vast majority of work was performed in the employer’s workplace because the technology allowing the performance of jobs from remote locations was not yet available;
- A far more stratified and predictable designation of occupations, as compared to today’s workplaces where concurrent exempt and non-exempt duties are performed by a wide variety of employees, and there is a more rapid evolution of job descriptions and duties;
- Far fewer jobs requiring advanced knowledge in a field of science or learning that was customarily acquired by a four year college degree;
- Businesses and occupations which were primarily focused on and carried out within the United States, as opposed to the on-going globalization of markets and the corresponding expansion of the workday to accommodate different time zones;
• A greater preponderance of manual labor because of the relative absence of technology and mechanization that has transformed the way work is performed today; and

• Relatively little use of private litigation as a means to enforce federal laws and policies.

The FLSA was passed before the first commercial TV broadcast (1939), the first commercial jet airline (1949), and the founding of the first computer company (1949). To contrast today’s workplace with the one that existed when the FLSA was passed, consider automotive production. In the 1930s, at the height of the Ford Motor Company’s production of its popular Model A, the huge River Rouge plant, which embodied the then leading-edge concept of consolidated, integrated manufacturing, employed over 100,000 workers and churned out a finished Model A every 49 seconds. By contrast, in 2013 a GM facility in Kansas City, Kansas, employed 3,877 workers, and produced one of five different models of cars every 58 seconds. With the introduction of modern computing technology, robotics, and the shift to highly decentralized, just in time global production and logistics schemes, today’s auto plants would be unrecognizable to the 1930s workers, whom the law was designed to protect. With technology and robotics, many of today’s workers, who previously relied upon physical methods of production, now use their minds and computers to an extent that was beyond the imagination of most science fiction writers in the Depression.

Today, in fact, the entire concept of work is changing as the United States moves to highly automated manufacturing using fewer employees and an expanded service economy that is heavily dependent on technology and much more mobile. For example, today, inside salespeople “virtually” make outside sales calls on clients using the same technology outside salespeople use (e.g., laptops, smart-phones, and the Internet) to visit and call on customers. And, in many cases, the inside salespeople utilize complex engineering principles. Another example is the rapidly evolving duties of information technology professionals, to be discussed further below. For obvious reasons, virtually none of these jobs were contemplated during the formulation of the statute or its regulations.

To illustrate the challenges of keeping the FLSA relevant in a rapidly evolving workplace, in 1990 Congress directed the Department of Labor to publish regulations to treat similarly skilled computer employees as exempt under section 13(a)(1) of the FLSA, and then in 1996 Congress froze the definition of “Computer Professionals” in place when less than 40 percent of Americans owned a cell phone, let alone a smart-phone, less than 3 percent of U.S. homes had broadband access, and Facebook didn’t exist. Today over 90 percent of Americans own smart-phones, over 70 percent of U.S. homes have broadband, and over 70 percent of U.S. adults regularly use social networking sites. Needless to say, how and where work gets done has changed dramatically, and the computer professional exemption is woefully outdated.

Meanwhile, even the most traditional industries have undergone dramatic transformations in how and where work is done. For example, as discussed at our meeting, electric utility companies in the process of shifting from coal-fired to new generation turbine or combined gas cycle power plants have had to radically rethink workforce training, roles and responsibilities and staffing locals. Whereas workers in the old coal plants were typically divided into several different job categories, with many performing largely hands-on, physical tasks throughout the facility, the new plants are run almost entirely by a small group of employees working primarily in a single room filled with computers and instruments that control and monitor the plant. The employees at these facilities are multi-skilled, technically educated, highly paid professionals.
who effectively operate the facilities, often taking on roles ranging from operating equipment to handling purchasing, documentation, scheduling, and working with vendors. As one company’s representative at our meeting noted, “They’re operating more like asset owners.” By having more responsibility and impact on the overall running of a business, many employees who would have been viewed as non-exempt production employees in the 1950’s are more akin to exempt administrative and professional employees now.

In addition to enormous changes in the basic concept of work and transformations within major industries in the United States since passage of the FLSA, the use of private rights of action to enforce federal laws and policies has also undergone extraordinary growth, especially over the past 20 years. When Congress chose to create a private right of action in the FLSA, it did not anticipate the explosion of private litigation that would ensue beginning in the 1970s, accelerating exponentially over the last forty years. From 1942 to 1967, the rate of private litigation hovered around three cases per 100,000 people.10 It then climbed to 13 cases by 1976, 21 by 1986, and 29 in 1996—an increase of about 1,000 percent since passage of the FLSA in 1938.11 FLSA wage and hour litigation, in particular, has experienced a significant boom in the last decade beyond anything the law’s framers could have possibly envisioned.12

Yet, despite all these changes within American workplaces, industries and courtrooms during the last half century, the basic structure of the FLSA has never been fundamentally reexamined. The FLSA and its regulations simply have not kept pace with changes in the workplace. For example, the purpose of the FLSA’s executive, administrative, and professional exemptions is to recognize that certain employees have such a level of responsibility, skill, education/training, scheduling uncertainty/flexibility, and pay level, that they warrant being exempt under the basic principles of the law, but the current regulations do not recognize this because they don’t accurately capture the modern workplace. Our goal is not to move more employees into exempt roles, but to see that the regulations carry out the original intent of the law in this new global, wireless world. The previous administration made a laudable attempt to address a number of areas that needed to be updated at that time, but the process was constrained by political acrimony, strong opposition within Congress, and a limited scope that failed to fully address the problems. Thus, while the resulting changes in the 2004 rulemaking were improvements, they did not go far enough to fix the overall problem.

Admittedly, much of the problem is created by the outdated statute itself. The FLSA was enacted in 1938 when the unemployment rate had averaged 19.6 percent over the previous eight years and, though it has been amended in a noteworthy manner 17 times, those amendments have, for the most part, been limited to expanding coverage to specific categories of employees and increasing the minimum wage, while occasionally addressing very narrow aspects of the law, such as providing exemptions for “any employee employed by an establishment which is a motion picture theater.”13 Although the minimum wage seems to generate far greater attention in public policy discussions, most of the difficulties in the modern workplace created by the FLSA fall under the classification of employees as exempt or nonexempt and the corresponding overtime requirement.
Broadening the Coverage of the FLSA to More Employees Would Not Necessarily Benefit Those Employees

Although the President’s Memorandum ordering a modernization and updating of the FLSA regulations does not appear to be constrained by any limitations, we are concerned by reports and strong signals being sent by the administration that the process is primarily, if not exclusively, intended simply to narrow the FLSA’s statutory exemptions in order to broaden the coverage of the FLSA’s overtime requirements to a substantially greater number of employees.

In fact, narrowing the FLSA overtime exemptions will not necessarily benefit the affected employees for three reasons:

- Nonexempt status under the FLSA determines how an employee is paid, not how much, which means that an employee does not necessarily receive a larger paycheck by being covered by the law and in fact may receive a smaller one if her or his employer chooses to set a lower hourly wage to offset overtime costs, as was pointed out in our meeting.

- Nonexempt status under the FLSA significantly restricts the ability of employers to provide flexibility to employees through the use of the digital communications technology that today’s workforce prefers and expects.

- Experience has shown that employees whose positions change from exempt to nonexempt status often strongly resent being treated as an hourly employee, for professional and social status reasons, concerns over the loss of professional growth potential, and because of the limitations on workplace flexibility previously mentioned.

We will consider each of these points separately.

Nonexempt Status Does Not Necessarily Mean a Larger Paycheck

As previously noted, FLSA coverage does not necessarily determine how much employees get paid but how they get paid. The amount an employee is paid is determined by a variety of factors, including market rates, education, experience, performance and so forth. Employers will generally establish compensation for an employee based on these factors to meet talent attraction and retention needs. Additionally, in today’s service-based economy, labor rates are set for the length of contracts, and moving those rates around is not necessarily economically feasible or possible. Compensation is sometimes pre-negotiated and price sensitivities sometimes don’t allow for changes mid-contract.

In setting wage rates, an employer will consider the amount of hours an employee is likely to work, recognizing that that will impact employment costs. Indeed, nonexempt status may very well mean less pay if the employer has overestimated the amount of overtime likely to be worked in establishing the base. Needless to say, these uncertainties do not exist for exempt employees who enjoy the predictability of a salary. (It should be noted that, to be exempt as an executive, administrative or professional employee, an employee must be paid “on a salaried basis.”)
The reality that nonexempt status does not necessarily result in increased pay was acknowledged by the Department in 2003 when it said:

Affected employers would have four choices concerning potential payroll costs: (1) Adhering to a 40 hour work week; (2) paying statutory overtime premiums for affected workers’ hours worked beyond 40 per week; (3) raising employees’ salaries to levels required for exempt status by the proposed rule; or (4) converting salaried employees’ basis of pay to an hourly rate (no less than the federal minimum wage) that results in virtually no (or only a minimal) changes to the total compensation paid to those workers. ... Nothing in the FLSA would prohibit an employer affected by the proposed rule, or under the current rule, from implementing the fourth choice above that results in virtually no (or only a minimal) increase in labor costs. For example, to pay an hourly rate and time and one-half that rate for 5 hours of overtime in a 45-hour workweek and incur approximately the same total costs as the former $400 weekly salary, the regular hourly rate would compute to $8.421 ((40 hours × $8.421) + (5 hours × (1.5 × $8.421)) = $399.99).14

Further, a recent Economic Policy Institute study, noted it is highly likely there will be “little change” in employees' total pay if the salary threshold is increased. According to the EPI report:

Since employers have a rough sense of how much they want to pay for a given worker, including any time-and-a-half overtime costs, they will adjust their ‘straight-time,’ or base wage, down to a level that will make the total hourly wage, including [overtime] costs, equal to their intended rate of pay. Under this model, wage offers adjust to hold labor costs constant.15

The EPI report also notes that narrowing the FLSA’s statutory exemptions could lead to employers hiring additional workers instead of increasing overtime pay to complete necessary work. Indeed, this goes to one of the original rationales for the Fair Labor Standards Act, which was to view the new law as a job-creating mechanism during the Depression. However, this rationale has been largely overtaken by the modern realities of the employment relationship, which includes a number of factors that enter into the hiring process besides base compensation—primarily benefits, federal and state taxes, global access to talent, and laws and regulations governing the hiring and termination processes. Thus, even proponents of FLSA expansion rarely use this as their rationale.

Restricts Workplace Flexibility The preference of today’s workforce for greater flexibility as to when and where they perform their work is universally acknowledged. Indeed, the current administration has encouraged employers to provide such flexibility through initiatives such as the recent White House Summit on Working Families. You recognize the value of such flexibility in your own life and have noted that many employees in the U.S., who are typically nonexempt, have no wiggle room in their work schedules. Yet any narrowing of the FLSA executive, administrative, and professional exemptions will likely inconvenience employees, reduce workplace flexibility and make it more difficult for employees to manage work/life balance.
It goes without saying that this desired flexibility is often possible only through the digital technology that was unavailable when the FLSA was enacted and the existing regulations were last re-written. Moreover, it is clear that the overwhelming majority of today's employees embrace the digital workplace. Thus, a recent Gallup poll showed that “full-time U.S. employees are upbeat about using their computers and mobile devices to stay connected to the workplace outside of their normal working hours. Nearly eight in ten (79%) workers view this as a somewhat or strongly positive development. . . . Nearly all workers say they have access to the Internet on at least one device, whether a smart-phone, laptop, desktop, or tablet, so it may be that they enjoy the convenience of easily checking in from home instead of putting in late hours at the office. They may also appreciate the freedom this technology offers them to meet family needs, attend school events, or make appointments during the day, knowing they can monitor email while out of the office or log on later to catch up with work if needed.”

Yet, the FLSA deters, and often prevents, an employer from providing this flexibility to nonexempt employees by requiring employers to track all "hours worked" (or portions of varying lengths thereof), which poses a challenge for employers if the employees wish to perform some or all of their duties away from the workplace. This can involve telecommuting, where some or all of the workday is spent by the employee away from the site at home or elsewhere. It may also involve the employee doing some work at home outside of normal working hours, which modern communications technology makes possible in today's digital workplace. In such cases, tracking the exact time spent working becomes an extremely difficult task. Even where an employer is aware of certain activities, it is not always possible for the employer to know how much time was spent engaged in the activity. For example, an employer may have a record of a time-stamped email that an employee sent, but it may not know how much time the employee spent drafting the email. Finally, even when nonexempt employees confine their work activities within normal working hours, they may occasionally check their smartphones outside of normal working hours for work-related emails, text messages, meeting invitations, etc. When they do, it raises the question as to whether that time is counted towards "hours worked," and some attorneys have even argued that they may also demarcate the beginning or ending of the workday, thus requiring time spent commuting to also be counted as time worked.

Because of these challenges, and the potential threat of litigation, many employers have taken steps to prevent their nonexempt employees from doing any work outside the workplace by denying them the employer-provided smartphones that exempt employees are given and denying access to their email accounts and other components of the company's information system.

Of course, these issues do not arise where an employee is eligible for one of the FLSA's executive, administrative or professional exemptions. Unfortunately, many employees that view themselves and others as an executive, administrative or professional employee (such as loan underwriters, HR recruiters, insurance fraud investigators, and mortgage loan officers) often do not fall clearly within the often vague contours of the regulatory language. Although sometimes their status is clear, other times it is arguable enough to support a misclassification lawsuit, with the accompanying costs of litigation and/or settlement. The number of such lawsuits has exploded over the past 20 years, increasing 514 percent from 1991 to 2012. However, in the case of either a settlement or a successful suit, the question of how many hours were worked outside the workplace becomes part of the back-pay award, with the employer having little or no record of those hours.
Why Many Employees Resent Being Converted From Exempt To Nonexempt Hourly Status

In view of these aforementioned realities, it should be no surprise that when employers are compelled to reclassify employees from exempt to non-exempt status, there is often bitter employee resentment. Employees realize, eventually if not at the outset, that it may mean little, if any, extra pay (possibly even less) accompanied by less flexibility in their scheduling and an inability to take advantage of the virtual workplace. Rather, the only change is how their pay is calculated.

Adding to the frustration, non-exempt status can limit employee participation in important professional development and training activities, particularly if they are at risk of capping-out the amount of hours they are allowed to work for cost reasons. Employees reclassified as non-exempt may feel deeply disappointed to lose out on the personal benefits of these initiatives, which will remain more feasible for their exempt colleagues to participate in. Moreover, a currently exempt employee who leads a team of other exempt employees assigned to complete a major project is very likely to resent being reclassified as non-exempt because of some regulatory change.

In addition, in many workplaces, being exempt is viewed, rightly or wrongly, as being part of the professional ranks which many employees aspire to achieve. This is particularly true for positions that appear to be similar from an employee’s point of view, but where it is difficult to determine the degree of discretion and independent judgment that separates exempt and nonexempt workers.

Force-Fitting the Outdated Regulations to Modern Occupations

As employers struggle to apply the 1938 law and its regulations to the modern workplace, their problems are exacerbated by the outdated “duties tests” under the various “white collar” exemptions. Perhaps even more difficult to manage are the large and growing number of occupations whose duties do not squarely fit within any of the exemptions, generating a litigation explosion that has been a veritable playground for the plaintiffs’ bar, and creates a drag on job creation. According to the Government Accountability Office (GAO), since 1991, the number of FLSA lawsuits filed has increased by 514 percent, from 1,327 in 1991 to 8,148 in 2012.18

Examples of difficulties employers face in determining who is exempt and who is nonexempt abound:

- **Entry-level Degreed Engineers and Accountants.** The FLSA regulations state that to be an exempt professional, an employee must perform “work requiring advanced knowledge in a field of science or learning” involving the “consistent exercise of discretion and judgment.” Often, as new graduates start their first jobs, how much discretion and judgment they exercise as they follow the highly complicated rules and principles of the profession and/or directions from those to whom they report, is quite subjective and extremely difficult to determine. At the same time, an employee that has obtained a sufficient level of training for purposes of the exemption could subsequently fail to adequately perform his or her responsibilities, and in effect, would not consistently exercise discretion and judgment. The quandary faced by the employer is determining at what point new engineers and accountants who, by every other standard—including lucrative starting salaries—would clearly be considered a professional, cross the threshold into the blurry FLSA definition of an exempt professional. The same is true with many other entry level positions that require a degree even to be considered for the opening.
• **Computer Employees.** The FLSA regulations include an exemption for “computer employees” but the definition is rooted in the technology of 1992, a time before many people had Internet access or email, let alone use of the sophisticated software technologies of today.¹⁹ Thus, many of today’s critical IT duties, such as information security, enterprise-wide database administration, systems integration and ensuring the overall integrity and continuity of IT systems and applications are not part of the exemption even though individuals performing these duties are clearly highly-skilled and well-paid computer employees. Even basic concepts like “debugging” and the Internet are not part of the current outdated FLSA language.

• **Inside Sales.** The outside sales exemption was written into the 1938 FLSA to account for traveling salespeople, whose time could not be accurately tracked and verified by employers, as opposed to employees who conduct sales from “inside” the company or in a “fixed office” location. The different treatment of inside and outside salespeople is artificial, outdated and unfair in today’s economy. Inside and outside salespeople, while performing the same function with similar metrics, are treated inequitably under the law. The reliance on a “fixed” office location for determining exemption status is outdated, given today’s work environment. In this day and age, inside salespeople “virtually” call on clients the same way outside salespeople do: by e-mail, tele/videoconference, smartphones, and laptops, none of which requires a fixed office location. In many cases, they are dealing with highly engineered products and services that require a significant amount of expertise and understanding when dealing directly with the customer to configure the product or design and implement the service to the customer’s needs. The compensation structure for inside and outside sales roles should equitably support pay for performance based on sales targets and achievement, and should not solely be based on the location from which work is performed or solely on the hours worked. Thus, the outside sales exemption needs to be broadened to reflect today’s workplace realities and available technology.²⁰

• **Determining Sufficient Credentials.** For professional employees to be exempt, the advanced knowledge required for the exemption must be “customarily acquired through a prolonged course of specialized intellectual instruction.” It is not clear what “customarily” means. As currently interpreted by some courts, an employer could have employees performing complicated engineering duties who would have to be paid and treated differently if they acquired their knowledge and expertise in different ways. In reality, the issue should be whether the knowledge has either been acquired or not; how it was acquired should be irrelevant. The illogic of the present interpretation can be seen in a recent Second Circuit Court of Appeals decision holding that an engineer with 20 years experience who was a member of the American Society of Mechanical Engineers and performed work that involved complicated technical expertise and responsibility was non-exempt because, although the employee had enrolled in some courses at various universities and had 20 years of work experience as an engineer, he did not have a college degree.
• **DOL’s Own Struggles** Particularly nettlesome is determining what level of “discretion and independent judgment” employees must have to qualify for the administrative exemption. Sometimes, not even the Department of Labor’s Wage and Hour Division (WHD) can make up its mind. For example, on September 8, 2006, the WHD determined that mortgage loan officers are bona fide administrative employees who are exempt under the FLSA. Yet, on March 24, 2010, WHD reversed itself and determined that they do not qualify for the exemption. Then in 2013, the U.S. Court of Appeals for the District of Columbia Circuit reinstated the 2006 Department of Labor guidance advising that mortgage loan officers are actually exempt from overtime requirements in the FLSA. If the WHD cannot consistently determine who is a bona fide administrative employee, how are employers supposed to figure it out without costly and unnecessary litigation? Meanwhile, the Department’s own inability to distinguish between who is and who is not exempt has been exposed by a grievance brought against the Department, involving the exempt status of more than 1,900 employees, that was ultimately settled with the awarding of back pay to a number of them. In addition to a large number of administrative employees, those reclassified as nonexempt included highly paid computer professionals, paralegals, litigation support specialists, and pension law specialists, as well as highly paid WHD compliance specialists.

**The Litigation Explosion** The problems in complying with the FLSA are exacerbated by the fact that the statute provides for enforcement not only by the Department of Labor but also by private action. As a result, the private bar has taken advantage of the law’s lack of clarity by pursuing highly lucrative class actions against employers who struggle to ascertain who is exempt and nonexempt. In many cases, these involve employees making salaries—sometimes in six figures—that the Department of Labor doesn’t focus on because they are not the vulnerable workers the FLSA was intended to protect. Moreover, the employer typically has a sound basis for assuming that its actions are legal, yet the lack of clarity in the law may add an element of doubt or court decisions may differ on whether or not these employees are exempt. Meanwhile, plaintiffs’ lawyers are rarely deterred in such instances, knowing that, absent total clarity under the law, which is a rarity, many employers will settle the cases to avoid the expenses and uncertainties of litigation.

According to the Government Accountability Office (GAO), over the last two decades, the number of FLSA lawsuits filed nationwide in federal district courts has increased significantly, with most of this increase occurring in the last 12 years. Since 1991, the number of FLSA lawsuits filed has increased by 514 percent, from 1,327 in 1991 to 8,148 in 2012, and this does not count the number of cases brought under state laws which often vary from the federal law. Moreover, not only has the number of FLSA lawsuits increased, but they also constitute a larger proportion of all federal civil lawsuits than they did in past years. As noted, companies often settle these cases, with a median settlement cost of $7.4 million for federal cases and $10 million for state cases.

Although DOL updated its regulations in 2004 in an attempt to clarify the exemptions, and provided guidance about the changes, stakeholders told the GAO there is still significant confusion among employers about which workers should be classified as exempt under these categories. The activity on the part of plaintiffs’ attorneys who capitalize on this lack of clarity has been a “significant contributing factor” to the increase in FLSA cases since 2001. In some states, specifically Florida, where nearly 30 percent of all FLSA lawsuits were filed from 1991 to
2012, plaintiffs’ attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods. In addition, ambiguity in applying the FLSA statute or regulations—particularly the exemption for executive, administrative, and professional workers—was cited as a factor underlying the increase in litigation by a number of people interviewed by the GAO. The problem is particularly severe in those states that have more restrictive exemptions under state laws, thus further adding to the difficulties facing large, multi-state employers seeking uniform national employee classifications. While there is no federal pre-emption of state law with regard to the FLSA, an update of the federal regulations by DOL could lead other states to update and clarify their rules in an effort to reduce unnecessary litigation.

**Impact of Potential Changes in Minimum Salary and Duties Tests for Exempt Status**

Because of the above concerns, employers are understandably alarmed about the possibility that the Department will respond to the President’s memorandum by dramatically increasing the minimum salary for one or more of the white collar exemptions while also establishing a minimum percentage of time that employees must spend performing exempt duties, which would substantially compound the difficulty of classifying the exempt status of employees above the new salary threshold. Confirming these concerns, the Department’s own website links to an Economic Policy Institute study that calls for increasing the salary level from $455 a week ($23,600 a year) to $970 a week ($50,440 a year).27

The result of such changes would be extremely damaging to many employers and their employees, particularly those in certain industries, such as retail and hospitality, not to mention small businesses where a substantial increase in costs could mean the difference between staying in business and closing their doors.

In the retail industry, for example, a likely direct impact of increasing the salary level for exempt classifications will be the reduction in managerial positions in retail establishments, thus depriving employees of promotional opportunities to salaried exempt positions. If an assistant manager of a retail store became nonexempt because her or his annual salary was $40,000 or less, it is foreseeable that the store owner will eliminate the assistant manager position and replace it with an hourly-paid position rather than absorb the costs of tracking and monitoring the time and duties of the assistant manager.

Separately, a rigid duties test based on a minimum percentage of time spent performing exempt duties would be exceedingly onerous and potentially unworkable. Many employees today perform a broad range of exempt and nonexempt tasks throughout the day and workweek due, in part, to the extraordinary technological advances since 1938. Some industries also have fluctuating and unpredictable periods of demand that would make a rigid duties test unworkable. For example, certain retail industries experience unanticipated spikes in demand due to weather and natural disasters that require salaried managers to assist hourly associates fill in gaps at the cash register, fill orders, or stock shelves. This can also be caused by unscheduled absences of employees due to illness, family needs or other causes. In such instances, a strict duties test would harm the business’s functionality and ability to serve its customers by tying the hands of managers who are not able to exceed an allowed percentage of time performing such non-exempt tasks.
Areas of Needed Reforms  Rather than taking an approach of simply expanding the coverage of the FLSA overtime requirements to more employees— and thus exacerbating the problems that we have outlined— we strongly encourage the Department to focus instead on revising and clarifying the regulations to provide greater clarity and consistency in a manner that reflects the modern workplace. While this is by no means an exclusive list, there are a number of areas in which this could be done.

1. Providing greater flexibility for nonexempt employees. As discussed above, for nonexempt employees to utilize the available flexibility of the digital workplace, the FLSA regulations must accommodate certain realities:

   - **Negligible amounts of time** – Although an employee who occasionally checks and perhaps quickly responds to messages on a mobile device or platform may technically be working, the activity is often sporadic and typically involves negligible periods of time. The current FLSA “statements of general policy or interpretation not directly related to regulations” seek to address this so-called “de minimis” time by citing court cases that are 59 or more years old and provide little meaningful guidance for today’s digital workplace. The Department’s interpretation states that an employer may disregard “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes . . .” The Department’s interpretation then cites a 1952 court case where amounts of time involving a dollar in pay per week should not be disregarded, and a 1955 case where “10 minutes a day is not de minimis.”

     **Solution:** Establish a clearly defined and realistic de minimis exception that recognizes the reality of technology as well as the fact that employees want to stay connected to their workplaces outside of their normal working hours.

   - **Commuting time** – If an employee spends more than a de minimis amount of time performing work away from the worksite prior to or after commuting, some plaintiffs’ attorneys argue this makes the commuting time compensable. Although there are no cases where this theory has been affirmed by a court or the Department of Labor, the law's silence has resulted in the allegation being included in several lawsuits.

     **Solution:** Clarify that time spent commuting is not compensable even if it occurs before or after work has been performed.

   - **Unauthorized work** – Even where an employer has specifically ordered an employee not to perform work outside working hours, the law requires that the time be counted and the employee paid if the employer “should have known” the employee was working overtime. Establishing this assumed knowledge could involve an innocuous phone call or email during off hours or even a failure of an employer to recognize that a certain task could not have been completed during normal working hours.

     **Solution:** Establish a safe harbor for employers who clearly communicate the requirement that work outside of normal working hours must be both authorized and recorded.
2. Providing greater clarity in the professional and administrative duties tests. The Department should build upon the work begun by the previous Administration to obtain better clarity in the duties tests for the 541 “white collar” exemptions. To some extent, this can be provided through specific examples given in the regulations. However, there are also needed clarifications that would have broader applicability.

- Clarification of the administrative exemption – According to the Department of Labor, “the administrative exemption is the most challenging of the Sec. 13(a)(1) exemptions to define and delimit, and the “discretion and independent judgment” requirement has become increasingly difficult to apply with uniformity in the 21st century workplace.”

  Even back in 1949, the Department recognized the standard was subjective and the difficulty of applying it consistently has increased with the passing decades. The Department has also noted the “production versus staff dichotomy” is difficult to apply uniformly in the 21st century workplace. Moreover, the requirements continue to generate significant confusion and litigation despite the clarifications made in 2004.

  Solution: In the absence of a clear bright-line compensation standard for the administrative exemption, the Department should work with all stakeholders to develop additional real-world examples of what types of employees meet the exemption and develop a consensus on how to clarify the rules to reduce litigation. This could include a review of how difficult it is to apply the “discretion and independent judgment with respect to matters of significance” requirement, how well the “production versus staff” dichotomy embedded in the administrative exemption operates in today’s service and sales economy, and what changes, if any, could be made to simplify the standard for employers. Such a recommended approach underscores our recommendation that the Department’s next step in this process should be an Advance Notice of Proposed Rulemaking (ANPRM).

- Clarification of the professional exemption – As noted above, the “discretion and independent judgment” requirement has become increasingly difficult to comply with in the 21st century workplace, and it is especially inconsistent with modern workforce practices as it applies to professional employees. It is also not clear when an employee, whose job qualifications requires a four-year college degree in a specific field of science or learning, is working in a “profession” or “occupation” where specialized academic training is a standard prerequisite for entrance into the profession, especially when the FLSA regulations allow for employees to meet the exemption through a combination of work experience and intellectual instruction and not necessarily through an entity that has been approved by an accrediting or certifying organization. Moreover, as the Department noted in 2004, “the areas in which the professional exemption may be available are expanding” but the Department has not provided any guidance since 2004 on what those “areas” might be.

  Solution: In the absence of a clear bright-line compensation standard for the professional exemption, similar to our recommendation regarding the administrative exemption, the Department should work with all stakeholders to identify “the areas in which the professional exemption may be available are expanding” as well as developing additional up-to-date examples of what types of employees meet the exemption and the computer employee exemption. This could include developing eligibility criteria that is
based on knowledge needed to perform the job duties, rather than any specific degree requirement that is consistent with the Department’s long-standing application of the exemption to employees who lack a four-year degree but have substantially the same knowledge level and perform substantially the same work as the degreed employees. As suggested above, an ANPRM could be very helpful in this effort.

3. Protecting employer attempts to comply with the law. The litigation eruption of the past twenty years has involved a number of occupations that have historically been treated as exempt (e.g., store managers, stock brokers, mortgage loan officers, and insurance claims adjusters) in addition to newer ones that are not adequately addressed in the regulations, or where there are splits in various circuit court decisions. Many if not most of these have also involved occupations where many employees expect and/or prefer exempt status. In the face of this growing litigation—and often as a response to a change in DOL or the courts' interpretation of the law—an employer may be advised by counsel to reclassify a group of employees from exempt to non-exempt. However, employers who have done this have found that it may backfire and produce the very litigation they were seeking to avoid when one or more employees seeks outside counsel on whether they should have been treated as nonexempt all along. Even where the answer is not clear, the plaintiffs' lawyer may seek to take advantage of the situation by filing a lawsuit seeking back pay for unpaid overtime. The existence of this threat deters many employers from reclassifying employees in response to a self-audit that has been conducted.

Under current law, most courts recognize only two valid ways by which individuals in the private sector can release or settle a FLSA claim: 1) a DOL-supervised settlement under 29 U.S.C. § 216(c), or 2) a court-approved stipulation of settlement. As part of a DOL-supervised settlement, the Wage and Hour Division may send an employer a Form WH-58 for each employee to whom the employer is offering back wages for the employee to sign as a release by the employee of future claims against the employer. Generally, in the absence of a DOL-supervised settlement, any release of FLSA claims an employer obtains from an employee is of no effect. Unfortunately, the Wage and Hour Division does not always send employers and employees a WH-58 release form. According to one report, “some investigators have said that they were no longer authorized to use the form or that the form was being revised.” Moreover, some Wage and Hour offices are still using an outdated version of Form WH-58, and there are conflicting court decisions on whether or not an employee has waived their right to bring a private suit if they sign the check for back wages but do not sign a Form WH-58.

A few recent court cases, however, allow private FLSA settlements without DOL or court supervision. In 2005, the Sixth Circuit Court of Appeals held private settlement agreements are not foreclosed by the FLSA claims and may be enforceable. More recently, the Fifth Circuit Court of Appeals held that a private settlement unapproved by either the DOL or federal district court can be enforceable under certain circumstances. Still, employers that settle FLSA claims without DOL or court approval do so at their own risk.

Solution: The Department should establish a streamlined new procedure whereby an employer may undertake a reclassification of its employees and, as part of the process, obtain the equivalent of a settlement agreement with the Department that forecloses a private lawsuit.
This is by no means a complete list of potential reforms that could fulfill the President’s directive that the FLSA regulations be “updated and modernized.” We would strongly encourage you to build upon the progress achieved by the previous administration and undertake a thorough re-examination of every aspect of those regulations, drawing upon the experience of the broad range of stakeholders affected by them. We believe this can only be successfully accomplished through an Advance Notice of Proposed Rulemaking that invites the public to provide the kind of commentary and recommendations contained in this letter. We would be happy to meet with you again to elaborate further on our ideas and concerns. Thank you for your consideration of our views on this important matter.

Sincerely,

Daniel V. Yager
President & General Counsel

Enclosure

c:  Dr. David Weil, Wage & Hour Administrator  
Brian Deese, Acting Director, Office of Management & Budget  
Members, Senate Health, Education, Labor and Pensions Committee  
Members, House Education and the Workforce Committee
1 Vaclav Smil, Made in the USA: The Rise and Retreat of American Manufacturing (Massachusetts: Massachusetts Institute of Technology, 2013).
3 Pub. Law No. 101-583.
4 Pub. Law No. 104-188.
11 Id.
13 29 USC 213(b)(27).
19 Senator Kay Hagen introduced bipartisan legislation (S. 1747) to update the computer employee exemption in the 112th Congress.
20 Over the last 10 years, legislation attempting to change the FLSA language non-exempt status for inside sales people was introduced and passed by the full House in the 105th, 106th and 107th Congresses.
23 Id.


26 Id.


28 29 CFR 785.47.

29 Id.

30 Under, 29 CFR 785.12, “The [hours worked] rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” Further, under 29 CFR 785.13, “In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”


34 See Pippins v. KPMG LLP, 2d Cir., No. 13-889, July 22, 2014. Accountants working as “audit associates” for an accounting firm fit within the learned professionals exemption.

35 However, recent court cases appear to allow private FLSA settlements without DOL or court supervision in certain circumstances.


37 See Bullington v. Fayette County School District, 2000 WL 1568726 (Ga. Ct. App. 2000); Heavenridge v. Ace-Tex Corp., 1993 WL 603201 (E.D. Mich. 1993). But see Walton v. United Consumers Club, Inc., 786 F.2d 303 (7th Cir. 1986) where the court held that the fact that the employee cashed a back-wage check as a result of a Wage-Hour audit did not, in itself, constitute a waiver of the right to bring suit. In that case, however, Wage-Hour did not give the employer or employee a Form WH-58 or other release form.


39 See Martin v. Spring Break ‘83 Productions, LLC., 688 F.3d 247 (5th Cir. 2012).