NELA Advocates for Employee Rights℠
National Employment Lawyers Association

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<u>Submitted via http://www.regulations.gov</u>

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Legislation, and Interpretation
Wage and Hour Division
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: National Employment Lawyers Association's Comments On NPRM Changing EAP Exemption Regulations, RIN 1235-AA11

Dear Ms. Ziegler:

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

NELA and its affiliates have a membership of over 4,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members counsel individuals, employees, and applicants on claims arising in the workplace. NELA members represent thousands of individuals in this country who are subjected to employer violations of the wage and hour laws, as well as unlawful employment discrimination. Further, NELA members are committed to advocating for a narrow interpretation of the exemptions under the Fair Labor Standards Act (FLSA) so as to reduce the number of workers who are exempt from the protection of the overtime rules. These workers comprise a disproportionate and growing share of the workforce, and are harmed by the erosion of the right to overtime pay. The interest of NELA in the proposed revisions to the FLSA regulations is to protect the rights of its members' clients by ensuring that the goals of the FLSA are fully realized.

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

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pleased overall with the Department's proposal to increase the standard salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee and to automatically update the salary levels on an annual basis (to ensure that qualifying salaries are regularly updated so that they will not again become historically outdated), NELA advocates a more robust increase to the re*quired salary level,* including using a higher threshold and indexing future increases to a fixed earning percentile. NELA also offers suggestions for additional enhancements and to respond to specific questions which the Department posed. NELA appreciates this opportunity to provide these comments.

I. INCREASE TO SALARY THRESHOLD AND AUTOMATIC COST OF LIVING ADJUSTMENT.

The Department's proposal to simplify and modernize the overtime salary thresholds is critical to the protection of middle-class workers' right to overtime protection under the Fair Labor Standards Act. Substantial increases are necessary to fully restore the thresholds' real values to previous levels and to accurately reflect the salaries of the "bona fide" executives and managers whom Congress intended to exclude from the FLSA's protections. *While NELA believes the Department's proposals do not go far enough to protect workers whose rights are central to the purposes of the FLSA, it applauds the move in the right direction. These changes will help ensure that regulatory delay no longer effectively excludes so many workers (disproportionately women and workers of color) from the overtime compensation that Congress intended to grant them.*

A. <u>The Standard Salary Threshold Is The "Most Effective" Check On The Validity Of White Collar Exemption Claims.</u>

In passing the FLSA, Congress sought to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The core elements of its solution were guarantees of a minimum wage and overtime compensation for hours worked in excess of a forty-hour week. 29 U.S.C. § 206-07. Overtime compensation is central to the Act's objectives because it reduces the likelihood that employers will subject employees to excessive workhours while also ensuring that those workers who endure long hours are compensated for the fact that this takes them away from the essential aspects of their lives beyond the workplace, such as caring for young children, assisting senior family members with essential comfort and support, meeting ongoing family responsibilities, caring for loved ones, coaching Little League, attending dance recitals, and/or volunteering in the community.

At the center of the Department's NPRM is the "EAP" exemption from FLSA protections for those "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Congress did not define these terms in the statute itself, but instead charged the Department with "delimiting" which employees fall under this provision. From the outset, the Department's regulations construed the exemption as intended only for a narrow set of employees at the top of the economic ladder who did not need protection because, as the bosses themselves, they were not subject to the low wages and long hours that FLSA remedies. This narrow construction not only made practical sense—it was, and still is, required, as "[i]t is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The EAP exemption, like any exemption from the FLSA, must be construed narrowly to preserve the statute's remedial purposes.

The reach of the "white collar" exemption is much more limited than its colloquial name implies. If narrowly construed, Section 13(a)(1) does not come close to excluding all or even most white collar workers from FLSA's protections. The DOL's 1940 Stein Report wholly rejected the premise "that all salaried white collar workers enjoy satisfactory working conditions." *See "Executive, Administrative, and Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition*," (Washington: U.S. Govt. Print. Off., 1940) [hereinafter Stein Report] at p.8. It presented evidence that many salaried workers worked long hours, did not receive paid vacations, and endured conditions not conducive to their health. Despite their "white collar" titles and salaries, these employees encountered labor conditions that, the Report found, were often "detrimental to health, efficiency, and general well-being." *Id.* Unlike true executives, these "white collar" workers needed, and were indeed entitled to, the protections that the FLSA provides. The salaried worker of today who earns $40,000 per year despite working sixty hours each week is clearly in this category. Certainly such an employee is not the bona fide executive that Congress sought to exclude from FLSA.

From the outset, the Department expressed concern that employers would improperly classify their employees to avoid paying them the overtime compensation they deserved. This would be easy if an employer-provided job title were the primary measure of an employee's executive, administrator, or professional status. In 1938, in its first regulations on the EAP exemption, the Department introduced the minimum salary threshold as a core answer to this concern. *See* 3 Fed. Reg. 2,518 (Oct. 20, 1938). Below the minimum salary threshold, an employee is entitled to FLSA protections regardless of his or her title or job duties. Over the nearly eight decades that the Department has construed the EAP exemption, it has always viewed the exemption as triggered not merely by what an employee does in a corporation but, more importantly, by what an employee's status implies about the compensation they receive. Compensation for bona fide executives, administrators, and professionals takes the form, for example, of "wages well above the minimum" and privileges making up for the lack of overtime pay, such as "authority over others, opportunity for advancement, paid vacation and sick leave, and security of tenure." *See* Report of the Minimum Wage Study Commission, vol. 4, (Washington: U.S. Govt. Print. Off., 1981) [hereinafter 1981 MWSC Report] at p.243. Managerial titles and salaried status by themselves do not remove the need for FLSA's protections unless *also* accompanied by considerably higher compensation and privileges.

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

With this understanding of the need for a salary threshold that simply and effectively delimits the EAP exemption so as to only include bona fide executives and managers, we turn to the merits of raising the current threshold and to the appropriate baseline for today’s workforce.

B. NELA Supports Raising The Standard Salary Threshold; But, To Fulfill Its Purpose, The Salary Threshold Should Be Higher Than The Department’s Current Proposal.

NELA strongly supports the Department’s proposal to increase the standard salary threshold. This change is necessary to protect workers who should be entitled to a minimum wage and to overtime protection yet, due to their nominal status as “white-collar” employees, fall out of the Act’s coverage. While NELA applauds the Department’s decision to substantially raise the salary, it maintains that the current proposal does not go far enough to remedy the problem. Under the current proposal, too many employees whom Congress intended to protect with the guarantee of a minimum wage and overtime will remain improperly exempted.

Today’s salary threshold falls far short of carrying out the purposes of the FLSA—it is way too low and leaves millions of workers who deserve overtime pay without that fundamental protection. A figure of $23,660 per year is plainly an outdated baseline for determining who is and who is not a bona fide executive in the modern economy. In 2014, a worker earning $24,000 was considered *under* the poverty line for a family of four and yet still *over* the “white collar” salary threshold. *See* 80 Fed. Reg. 38,516, 38,521 (July 6, 2015) (NPRM). Whether an employer required this employee to work fifty, sixty, or seventy hours per week, she would not automatically be entitled to overtime compensation or even the minimum wage for that time. The Department’s 1958 Kantor Report characterized the salary threshold as an “index of the status that sets off the bona fide executive from the working squad-leader.” *Report and Recommendations on Proposed Revisions or Regulations, Part 541, Defining the Terms “Executive,” Administrative,” “Professional,” “Local Retailing Capacity,” [and] “Outside Salesman”* (Washington: U.S. Govt. Print. Off., 1958) [hereinafter Kantor Report] at p.4. The current threshold is so far below the modern equivalent of such a line as to be meaningless in practice. Many of today’s salaried workers earning more than this threshold still clearly lack the pay, privileges, and protections that the regulations interpreting Section 13(a)(1) have historically attributed to those exempted.

The proposed change would raise the salary threshold to the 40th percentile of weekly earnings. This translates to $49,452 per year using the first quarter of 2015. *See* "Deciles of Usual Weekly Earnings of Non-hourly Full-Time Workers by Selected Characteristics, 1st Quarter 2015," BLS, www.bls.gov/cps/research_nonhourly_earnings_2015q1.htm (last modified Apr. 8, 2015). The Department predicts that, by the time the final rule is announced in 2016, this 40th percentile will increase to $50,440 per year. 80 Fed. Reg. 38,516, 38,517 n.1 (July 6, 2015) (NPRM).

NELA recommends that the Department adopt a threshold reflecting the 50th earnings percentile of full-time salaried workers rather than the proposed 40th percentile standard. In the first quarter of 2015, the median salary for full-time workers was $57,876. *See* "Deciles of Usual Weekly Earnings of Non-hourly Full-Time Workers by Selected Characteristics, 1st Quarter 2015," BLS, www.bls.gov/cps/research_nonhourly_earnings_2015q1.htm (last modified Apr. 8, 2015). Under the short test salary threshold that the Ford administration established in 1975, 62 percent of full-time salaried workers were eligible for overtime protection. Certainly, the Department's proposal using the 40th percentile is a welcome improvement from the current figure, which places a mere 8 percent of full-time salaried workers under the threshold. Yet the proposal would still exclude from overtime protection a significant number of likely non-exempt employees at the middle of the income ladder. The median salary is useful because it is a conservative estimate of the relative "status" that the EAP exemption embodies. A threshold based on the median would create the clearest and simplest dividing line between the top-half and the bottom-half of salaried workers, reflecting a low estimate of what it means to be a high-level "white collar" employee.

Basing the salary threshold on the 50th percentile would more effectively guarantee that non-exempt employees receive the minimum wage and overtime protections Congress intended to grant them under the FLSA. The proposed threshold is lower than the salaries of roughly 41 percent of salaried workers who fail the duties test, according to the Department's calculations. *See* 80 Fed. Reg. 38,516, 38,560 (July 6, 2015) (NPRM). Only 25 percent of employees who would likely pass the duties test earn less than the proposed threshold. The threshold's failure to capture 41percent of workers who should have the right to overtime based on the nature of their work shows that it is not high enough. A better and fairer way to resolve this problem is to aim for a threshold where the number of non-exempt employees earning salaries above the threshold equals the number of otherwise exempt employees earning less than the threshold. The Department calculated this number and concluded that a threshold of roughly the 50th percentile of full-time salaried workers is required to meet this objective. *Id.* Thus, the median is a fitting threshold.

A salary threshold based on the median full-time salary is conservative from the perspective of how this figure relates to the median wage of *all* full-time American workers as well. The short test threshold from 1975 was 1.57 times the median wage of all full-time wage and salary workers at that time. Using the same ratio today, based on wage data from the first quarter of 2015, would result in a salary threshold of $65,965 per year. *See* BLS Press Release, "Usual Weekly Earnings of Wage and Salary Workers, First Quarter 2015," (Apr. 21, 2015) available at: http://www.bls.gov/news.release/archives/wkyeng_04212015.pdf (based on median national weekly earnings of $808 for full-time wage and salary workers). Thus, using the median salary of roughly $57,876 per year would be a conservative measure.

Increases in cost of living also show that the 50th earnings percentile is a more appropriate benchmark for the standard salary threshold. If the Ford administration's 1975 short test salary threshold were adjusted for 2013 dollars, it would result in a salary level of $1,083 per week. This is just over the 50th percentile of weekly earnings for all full-time salaried workers today. *See* 80 Fed. Reg. 38,516, 38,533 (July 6, 2015) (NPRM). Using the median salary as a guideline thus helps the threshold to keep pace with economic growth in more ways than one, indicating the reasonableness of this measure.

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

C. NELA Supports Raising The Highly Compensated Employee Exemption Threshold. To Fulfill Its Purpose, The HCE Exemption Threshold Should Be Set At A Fixed Earnings Percentile Equal To The Bush Administration's Final HCE Threshold.

NELA also strongly supports raising the HCE compensation level. A substantial increase is required to maintain the real value of the HCE salary threshold and to ensure that the threshold does not exclude non-exempt employees from the overtime rights that they have under FLSA.

When the Department created the so-called "highly compensated employee" (HCE) exemption in 2004, it set the qualifying compensation level at $100,000. This was far higher than the $65,000 proposal in the Department's NPRM. The change from the NPRM to the final rule reflected the Department's realization that, in creating an HCE exemption, it needed to be careful to avoid excluding workers who should be entitled to the FLSA's protections based on their duties in the workplace. It noted that "the highly compensated earnings level should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections." 69 Fed. Reg. 22,122, 22,174 (Apr. 23, 2004) (2004 final rule). This same caution should guide today's HCE level.

A substantial increase from the current HCE figure is necessary to reflect the purpose of this test. With respect to the 2004 HCE threshold, the Bush administration stressed that those earning above the measure were employees "at the very top of today's economic ladder." *Id*. To maintain consistency with this approach, an HCE compensation level of $150,000 is more appropriate than the current proposal. In 2004, 6.3 percent of full-time salaried workers earned a salary higher than the HCE compensation level of $100,000. *See* 80 Fed. Reg. 38,516, 38,562 (July 6, 2015) (NPRM). Today, 17 percent of full-time salaried workers make more than this amount. *Id.* Under the Department's current proposal of $122,148, ten percent of full-time salaried workers will be over the HCE threshold. *Id.* In order to maintain the Bush administration's 93.7 percentile figure, the Department would need to increase the HCE compensation level to $150,000 per year. *Id*. This is the proper approach if the exemption truly is going to exclude only those at the very top of the ladder.

In setting the HCE compensation level, it is imperative that virtually no employees who would fail the duties test, and thus otherwise be protected by the FLSA, will earn more than the threshold. This requires conservatively setting the level so that relatively few salaried employees overall earn more than the chosen amount. In 2004, the Bush administration stated that it had chosen the $100,000 figure because "virtually every salaried 'white collar' employee with a total annual compensation of $100,000 per year would satisfy any duties test." 69 Fed. Reg. 22,122, 22,174 (Apr. 23, 2004) (2004 final rule). The Department has not shown that this is true for the newly proposed HCE compensation level. It is difficult to know what percentage of non-exempt employees earn over the threshold without individually applying the duties test to those employees. Assuming, however, that the proportions of non-exempt employees in each fixed earnings percentile has remained constant since 2004 and assuming that the Bush administration's analysis at that time was correct, the best way to ensure that virtually no employees who would fail the duties test will earn more than the proposed HCE threshold is to tie the threshold to the same fixed earnings percentile. This means tracing the earnings percentile figure from 2004 of 93.7 to today, resulting in a $150,000 per year threshold.

The HCE level must truly reflect what it means to be a *highly compensated* employee in today's economy. In drawing this line, it is appropriate to use the same fixed earnings percentile chosen in 2004. This percentile draws a line beyond which it is very unlikely that an employee would qualify for FLSA protections under the duties test. Choosing a lower figure introduces a substantial risk of exempting some employees from overtime protection who, based on their duties in the workplace, should be entitled to that protection. Such a result would not be consistent with the FLSA or with the Department's prior treatment of the EAP exemption.

D. <u>NELA Supports Indexing Both Salary Thresholds, Which Is Essential To Maintaining The Real Value Of These Thresholds In Future Years.</u>

NELA fully endorses the proposal to index both the standard and HCE compensation levels. These much-needed automatic adjustments are critical to preserving the real value of both salary measures, which are prone to substantial diminution over time.

The prior history of the EAP exemption shows the tremendous cost to workers when the Department does not index the salary thresholds. Inevitably, inflation causes the real value of any fixed threshold to decline over time. For example, right after the Department promulgated the 1975 regulations, the real value of the short test salary threshold of $250 was worth roughly

$1,109 per week in 2015 dollars, or $57,668 per year. Yet in 2003, before the 2004 increases, the same $250 figure was worth only about $324 per week in 2015 dollars, or $16,860 per year. *See* CPI Inflation Calculator, BLS, available at: www.bls.gov/data/inflation_calculator.htm (adjusting dollar amounts from prior years based on CPI). These real-value fluctuations are the result of political maneuvering and administrative delay, which make updates to the thresholds infrequent. Yet hard-working Americans bear the cost of this inaction. Workers earning just below a new fixed threshold soon see that figure fall below their salary—eliminating their right to overtime even as the real value of their salary stays entirely constant. To subject these workers to such arbitrary fluctuations unfairly deprives them of their right to overtime protection.

Fortunately, there is a fix to this variation, and it is contained in the Department's indexing proposal. Automatically adjusting the salary thresholds will ensure that that workers whose livelihoods depend on whether they receive overtime for their 50, 60, or 70 hour weeks will see these thresholds keep pace with economic changes—no longer subjecting workers to figures devised nearly three decades earlier (as occurred between the 1975 and 2004 updates). Nine states currently increase their minimum wage automatically, showing that indexing is a practical alternative to the current scheme. Indexing saves administrative resources by ensuring that the Department does not expend considerable time, money, and energy to calculate new thresholds each time it updates based on economic change. With indexing, the Department can simply and effectively comply now *and* in future years with its duty to properly delimit the EAP exemption.

The Department requested comments on whether it should index the salary thresholds to fixed earnings percentiles or to changes in the CPI-U. There are good justifications for both approaches. As the NPRM notes, an index that tracks fixed earnings percentiles ensures that the share of workers who fall under the EAP exemption remains constant over time, while a CPI-U-based index ensures that the purchasing power associated with those whose salaries fall under the EAP thresholds remains constant. *See* 80 Fed. Reg. 38,516, 38,587 (July 6, 2015) (NPRM). Both measures are important indicators of the appropriate limits of the EAP exemption. For the reasons outlined below, NELA contends that indexing the thresholds to fixed earnings percentiles is the soundest approach.

As an initial matter, indexing based on fixed earnings percentiles is most consistent with the Department's express explanations for the proposed salary thresholds. The NPRM sets the thresholds at the 40th and 90th percentiles of full-time salaried workers. If the appropriate salary threshold for *today* is based on the percentage of the full-time salaried workforce earning below the threshold, then it follows logically that this would be the basis for the most appropriate salary threshold at *future* points in time. Although NELA contends that these chosen percentiles should both be higher, we maintain that, whatever percentiles the Department ultimately adopts, indexing these figures to fixed earnings percentiles is the fairest way to maintain consistency in workers' FLSA eligibility in light of inevitable economic change.

Indexing based on fixed earnings percentiles also reflects the fact that the EAP exemption is, in many respects, premised on an employee's relative position in the workplace. As the 1958 Kantor Report noted, "[t]he terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions." Kantor Report at p.4. While it may be difficult to measure precisely the percentage Congress intended to exclude from the FLSA's protection through the EAP exemption, the aim should be to keep the chosen dividing line constant over time.

It is undeniable that, without indexing, the real values of the thresholds set today will decline substantially over time. It is also clear that it is likely to be many years—even decades, given historical trends—before the Department decides to adjust fixed salary thresholds again. In light of these well-established facts, indexing represents the only simple and accurate means of preserving the real value of both the standard and HCE thresholds over time.

E. Adjusting The Salary Threshold And Indexing The Amounts To Fixed Earning Percentiles Is A Needed Change.

NELA applauds the Department's work in developing much-needed adjustments to the EAP exemption salary thresholds and creating a method to preserve these thresholds' real value over time. We urge the Department to reevaluate its chosen thresholds in light of the fact that the figures do not adequately constrain the reach of the EAP exemption to only those bona fide high-level employees for whom it was intended. *Upward adjustment is absolutely necessary in order for the Department's proposals to reach the full breadth of the hard-working, middle-class employees who work long hours and yet are improperly denied their right to overtime compensation.*

II. WHILE NELA IS IN OVERALL AGREEMENT WITH THE DEPARTMENT'S PROPOSAL TO REFORM THE SECTION 541 WHITE COLLAR EXEMPTIONS BY MEANS OF ADDRESSING THE HISTORICALLY LOW SALARY LEVEL TEST, THE DEPARTMENT SHOULD TAKE THIS OPPORTUNITY TO STRENGTHEN THE DUTIES TESTS FOR THE WHITE COLLAR (EAP) EXEMPTIONS.

Following the 2004 regulatory process, the low salary level test adopted in 2004 has resulted in increasing rather than decreasing litigation of white collar exemption misclassification issues. That is because with the salary level test set so low, employers continued to designate low wage employees as exempt executives or exempt administrative employees where their salary levels could not otherwise support any reasonable finding that these low wage workers were "bona fide" executives or administrators. With a salary level test restored to its historical moorings, there should be far fewer disputes over purported executives or administrators who are earning poverty level wages. NELA's proposed salary level test should obviate a lot of senseless litigation over the duties tests. This will conserve the Department's enforcement resources and reduce the workload of our federal court system.

The Department's NPRM, however, seeks input on a number of issues related to the duties tests, albeit without any specific proposed regulations in this regard. NELA takes this opportunity to comment in response to the Department's questions and point out how the duties tests can and should be strengthened to better carry out the fundamental policies and legislative purposes underlying the FLSA.

A. <u>What, If Any, Changes Should Be Made To The Duties Tests?</u>

NELA has several areas of concerns with the duties tests as they emerged from the 2004 rule making process. First, employees who do not spend a minimum level of their workweek engaged in bona fide exempt duties should not be allowed to qualify for any of the EAP exemptions. Second, the Department should adopt the state of California's 50% quantitative model for the EAP exemptions, along with other clarifications of the duties test for the executive exemption that would more fully carry out the goals of the FLSA. Third, the regulatory requirements for discretion and judgment are not expressed in identical language as to both the professional and administrative exemptions. NELA believes that the Department should clarify that there is a single uniform discretion and independent judgment standard that is equally mandated for all three exemptions. Fourth, the Department should clarify that the "concurrent duties" regulation is not an invitation to misclassify non-exempt employees as exempt. Where employees are working the bulk of their time on non-exempt duties, even though they may simultaneously be performing some exempt work, they should not be subject to a white collar exemption (see below).

All of these changes or clarifications can be accomplished in the rule making process as it should not be a change in the law but merely a clarification that the tests are the same across the exemptions. It is also possible for these clarifications to be accomplished in sub-regulatory guidance.

B. <u>Should Employees Be Required To Spend A Minimum Amount Of Time Performing Work That Is Their Primary Duty In Order To Qualify For Exemption? If So, What Should That Minimum Be?</u>

Courts have mistakenly found that employees who spend only a small portion of their work time on exempt duties may nonetheless have exempt work as their primary duty. *Soehnle v. Hess Corp.*, 399 F.App'x. 749 (3d Cir. 2010) (gas station manager exempt not withstanding she spent 85% of her time on non-managerial duties); *Baldwin v. TrailerInns, Inc.*, 266 F.3d 1104, 1113-4 (9th Cir. 2001) (exempt but "vast majority of their work week spent on manual labor"); *Sappington v. Styleline Furniture*, 2007 WL 3355838 (N.D. Miss. Nov. 8, 2007) (exempt but worked 75% of time on non-exempt tasks). The Section 541 regulations should be revised to prevent this injustice. NELA believes the intent of the regulations, as embodied by the rule of thumb test that the primary duty is the work an employee does the majority of his/her time, should not allow an employee who spends 70-80% or more of his/her work time on non-exempt duties to be found as having exempt work as the primary duty. Therefore, a qualitative clarification should be considered to make clear that where the employee spends only a small proportion of his/her time solely on exempt work, exempt work cannot be found to be the primary duty. Similarly, the Department should consider a minimum quantitative threshold, such as the prior 20% test. NELA's position is that where an employee spends 50% of her time on non-exempt that are not exempt, that employee should categorically be excluded from the definition of an exempt EAP employee. Thus, an employee who works a vast majority of his/her time in non-exempt work cannot have exempt work as the primary duty.

C. Should The Department Look To The State Of California's Law (Requiring That 50% Of An Employee's Time Be Spent Exclusively On Work That Is The Employee's Primary Duty) As A Model? Is Some Other Threshold That Is Less Than 50% Of An Employee's Time Worked A Better Indicator Of The Realities Of The Workplace Today?

NELA supports the adoption of California's 50% quantitative model for all of the EAP exemptions, along with other clarifications of the duties test for the executive exemption that would more fully carry out the goals of the Fair Labor Standards Act. California's 50% quantitative model has been used successfully in that state for many years. Practitioners have found this standard to be protective of the restrictive nature of exemptions from the general rule of overtime for workers. A 50% rule should result in consistent and predictable determinations for the white collar exemptions.

The 50% standard can be objectively measured. Once the work duties of an employee are categorized as exempt or non-exempt, an employer (or the employee himself) need only track the amount of time each duty is performed for a representative period. This does not require an expensive time-motion study. Employees are not strangers to tracking time and once an employer conducts the initial analysis, it does not need to do so again until there is some significant change in the employee's job duties.

The 50% standard ensures the exemptions apply only to those who are truly performing exempt work. The white collar classifications are exemptions to the general rule that workers should be paid overtime. As such, they should be carefully granted. A 50% rule would require that those who are called "managers" truly spend their time managing. It would prevent an employer from taking advantage of an employee by giving him a slightly higher salary, a couple of seemingly exempt duties, and then working him 60 to 80 hours in a week. NELA practitioners have seen this practice abused by employers.

The bright-line rule NELA proposes would also decrease the amount of litigation and litigation cost. A rule that is simple to apply would result in greater compliance and the areas of argument between employees and employers would be smaller under such a regime. Moreover, the bright-line test eliminates the uncertainty of whether a court will find an employee's "primary duty" to be exempt or non-exempt work.

D. The Duties Test For The Executive Exemption Should Be Clarified To Better Carry Out The Underlying Purposes Of The Fair Labor Standards Act.

NELA wishes to clarify that the 50% rule should be one component of a multi-pronged duties test—each prong must be satisfied to establish the executive exemption. NELA urges the adoption of the following cumulative requirements being retained and/or incorporated into the duties test for the executive exemption under the FLSA:

1. To qualify as an exempt executive under the FLSA, the employee must have management of the enterprise as the primary duty (current requirement);

2. To qualify as an exempt executive under the FLSA, the employee must spend more than 50% of her work time on bona fide executive duties (discussed above);

3. To qualify as an exempt executive under the FLSA, the employee must customarily and regularly exercise discretion and independent judgement (similar to, but, more clearly protective of the requirement pertaining to the administrative exemption and long established for the executive exemption under California law);

4. To qualify as an exempt executive under the FLSA, the employee must supervise at least two full time employees or their equivalent (current requirement); and

5. To qualify as an exempt executive under the FLSA, the employee must exercise hiring or firing authority or exercise substantial input into such decisions (a current requirement).

Again, NELA urges that the foregoing be established as cumulative requirements so that if the employer cannot carry the burden on any one prong, the employee cannot qualify as an executive exempted from the FLSA's overtime protections. This approach will best ensure that those employees who are exempted for the FLSA's overtime protections under the executive exemption are limited to those whom Congress intended to exempt.

E. Does The Single Standard Duties Test For Each Exemption Category Appropriately Distinguish Between Exempt And Non-Exempt Employees? Should The Department Reconsider Our Decision To Eliminate The Long/Short Duties Tests Structure?

NELA does not support the return to the long/short duties tests structure. Stakeholders have been operating under a uniform standard test approach by regulation since 2004 (now eleven years). Inflation, however, had so eroded the salary level requirement for the long test, that effectively there had only been a single test (the short test) for years prior to that. In addition, having two tests resulted in inefficient litigation as to which test applied to which employees for which periods of time. On balance, that ship has sailed and it is best to proceed with a standard duties test supported by a realistic and fully indexed salary level test.

F. <u>**Is The Concurrent Duties Regulation For Executive Employees (Allowing The Performance Of Both Exempt And Non-exempt Duties Concurrently) Working Appropriately Or Does It Need To Be Modified To Avoid Sweeping Non-exempt Employees Into The Exemption? Alternatively, Should There Be A Limitation On The Amount Of Non-exempt Work? To What Extent Are Exempt Lower-Level Executive Employees Performing Non-exempt Work?**</u>

The reported cases suggest that it really has been a problem that low level "executives" have been spending the bulk of their time doing non-exempt work. *See Soehnle*, *Baldwin*, and *Sappington*, above. It is anticipated that the Department's new more realistic salary level test (along with indexing) should cure much of this problem in the future. A qualitative regulation or a percentage minimum threshold, however, should be considered for setting a floor for non-exempt work by purported exempt employees.

G. <u>**NELA Urges That The Department Reaffirm The Continued Vitality Of The Administrative-Production Dichotomy In Construing The Administrative Exemption.**</u>

The "production versus staff" dichotomy test has long been codified as 29 C.F.R. § 541.205(a) and has been applied by the courts to ensure that workers deserving of overtime protection are not misclassified as exempt administrators. The courts, applying that dichotomy, have distinguished between "administrative" employees, who are "running the business itself or determining its overall course or policies" from the production workers engaged in the "day-to-day handling of the business affairs." *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th 2002); *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) *cert. denied* 498 U.S. 1086 (1991); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1231 (5th Cir. 1990) (distinguishing between "those employees whose primary duties are administering the business affairs of the enterprise" ("administrators") from those whose "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market" ("production workers")). *See also Reich v. American Int'l Adjustment Company, Inc.*, 902 F.Supp. 321 (D. Conn. 1994) (insurance auto damage appraisers, who inspect vehicles, determine the extent of necessary repair, estimate repair cost, and negotiate with body shops regarding the price of repairs are not exempt administrators.); *Gusdonovich v. Business Information Co.*, 705 F.Supp. 262 (W.D. Pa. 1985) (insurance claim investigators not exempt because they perform routine production work); *Reich v. New York*, 3 F.3d 581 (2nd Cir. 1993) *cert. denied* 510 U.S. 1163 (state police investigators who conduct investigations of serious felonies, are not administrators since they perform the production work that the employer is set up to provide). The Department's recognition of the continued vitality of the dichotomy in the newly promulgated regulations would buttress a well-established tool used by the courts in appropriate cases to determine whether employees were truly exempt administrators. NELA urges the Department to adopt a regulation that explicitly recognizes that "administrative" employees are those who are "running the business itself [that is, the business of the employer—not the business of the employer's customer] or determining its overall course or policies" rather than production workers engaged in the "day-to-day handling of the business affairs."

H. Additional Questions Raised By The NPRM.

The Department has also solicited input on the question of whether to add to the regulations examples of additional occupations to provide guidance in administering the white collar exemptions. On balance, NELA opposes this approach. There are already numerous examples of occupations in the existing regulations and it is unclear whether this has been aid to enforcement. For example, the 2004 regulations included as an example: "employees in the financial services industry." Section 541.203(b). The Department subsequently felt compelled to issue an Opinion Letter on the job title anyway (FLSA 2006-31, Sept. 8, 2006), which it later withdrew to provide further contrary guidance in the form of an Administrator's Interpretation. Admin. Interpretation No. 2010-1 (Mar. 24, 2010). This too then became the subject of extended litigation. *Perez v. Mortgage Bankers' Ass'n., Inc.*, 135 S. Ct. 1199 (2015). Furthermore, occupational examples have historically been hazardous for the Department as industries and jobs change over the years. Much of the criticism of the pre-2004 regulations referred to outdated job titles. In today's rapidly changing workplace, it would seem inevitable that further "new" examples could become just as outdated as previous regulatory examples such as linotype operators, machine men, and straw bosses (prior Sections 541.118(c), 541.115(c)(2)). Finally, any such new examples would likely be exceedingly contentious and possibly not worth the time and effort to be expended by the Department.

The Department has also sought input as to the computer related occupations. NELA agrees that the courts have reached consensus that the help desk genre of jobs should be non-exempt under the current law. *Martin v. Indiana Michigan Power Co.*, 381 F.3d 571 (6th Cir. 2004); *Hunter v. Sprint Corp.*, 453 F.Supp.2d 44 (D.D.C. 2006); *Turner v. Human Genome*, 292 F.Supp.2d 738 (D. Md. 2003). Therefore, a regulatory statement on this would be non-controversial but perhaps unnecessary. NELA does not endorse further regulatory tinkering with the current definitions or examples at this time. This sector of the economy continues to see rapid changes and any attempt to reify examples (such as the proposed "information technology specialist") is likely to be less rather than more helpful at this time.

III. NELA ENCOURAGES THE DEPARTMENT TO CONTINUE NOT INCLUDING NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS IN CALCULATING THE STANDARD TEST SALARY REQUIREMENT.

The Department invited comment on this issue citing employer stakeholder interests for inclusion of nondiscretionary bonuses and incentive payments in order to contribute to their employees' "ownership mindset." This justification misleads and fails to support inclusion because these types of bonuses are not "executive" in nature. Instead, they are merely promises of deferred pay to encourage employees to work more "steadily, rapidly, or efficiently," as recognized by the Department in its current regulations. These types of bonuses have no bearing on whether an employee should be excluded from overtime requirements and its inclusion harms workers by incentivizing deferred compensation and lowering the already too-low salary threshold.

A bonus is nondiscretionary if the employer contracts, agrees, or promises to pay it. DOL regulations provide several examples, including: bonuses that are announced to employees to induce them to work more steadily, rapidly, or efficiently; bonuses to remain with the employer; attendance bonuses; individual or group production bonuses; and bonuses for quality and accuracy of work. Such bonuses are intended to incentivize workers of all types to perform their duties well; but, do not afford them any benefits of ownership. NELA members have represented many categories of employees who receive varying sorts of nondiscretionary bonuses, including those in middle management and lower level employees, including a wide array of employees in retail, grocery, health and service industries. These employees are not afforded the benefits of ownership, but, they absolutely rely on their salaries to meet their monthly expenses. Given the number and variety of employees who receive nondiscretionary bonuses and incentive payments, making such unpredictable bonuses a way for employers to meet the salary threshold for exemption from overtime is illogical and unfair to workers who must rely on predictable income to pay for their families' necessary expenses.

Including nondiscretionary bonuses and incentive payments to meet the salary threshold runs contrary to the stated purpose of the salary basis test, which is to make sure exempt employees are guaranteed a minimum level of income that is dependable and predictable to meet their families' monthly expenses before they are exempted from the protections of the overtime provisions of the FLSA. If nondiscretionary bonuses could be included in the salary threshold, the de facto result would be an even lower threshold than is reasonable for today's workforce, as outlined in Section I of these comments.

A goal of the Department's proposed revisions is to make the overtime exemptions easier to understand and implement. That goal would also be undermined by allowing nondiscretionary income, no matter how small the percentage, to satisfy the salary threshold. Business interests recognize that determining if bonuses are nondiscretionary or discretionary, as well as how much must be paid, is difficult and involves a "very fact intensive analysis." *See*, http://www.shrm.org/hrdisciplines/compensation/articles/pages/nondiscretionary-bonuses-overtime.aspx. Adding this component to the threshold inquiry would only make the calculation more confusing and spur additional transaction costs to what should be a straightforward computation. Putting the salary basis test at issue on a weekly or monthly basis will lead to increased monitoring and compliance costs for employers, as well as higher monitoring costs for the Department, and increased litigation over whether the salary basis test has been satisfied.

Changing the salary threshold calculation to include nondiscretionary bonuses would also create a perverse incentive to employers to move towards implementing more deferred compensation pay structures. The balance of power in employment relationships recognizes that most employees have little to no bargaining power when it comes to negotiating compensation structures. By incentivizing deferred compensation, the Department is placing a heavy burden on most working class citizens. And given the fact that today's workers leave and change jobs frequently throughout the calendar year, more workers subject to deferred compensation means more lost compensation for workers who need it most.

For these reasons, NELA opposes including nondiscretionary bonuses to the salary requirement.

IV. NELA COMMENTS ON USE OF FLUCTUATING WORK-WEEK CALCULATION IN MISCLASSIFICATION CASES.

On July 6, 2015, the Department of Labor Wage and Hour Division promulgated proposed rules regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer employees ("Proposed Rules"). The Proposed Rules and commentary, however, are presently silent as to how damages for unpaid overtime hours are to be calculated in the event employees are classified as exempt under the Executive, Administrative, Professional, Outside Sales, and Computer exemptions but found to be non-exempt due to failure to meet the salary or duties tests under these regulations. Employers often assert that the appropriate method for calculating damages for an employee misclassified as exempt is to use the fluctuating work-week (FWW) method of calculating overtime compensation found in 29 C.F.R. § 778.114, while the misclassified employees maintain that they are entitled to what their full rate of pay would have been absent a violation. Courts have reached conflicting conclusions, confusing the damage calculation, often to the benefit of the employer even though the requirements of the FWW cannot be met in a misclassification case, and when improperly applied (as has been frequently done) significantly reduce the damages recoverable by a misclassified employee. In order to protect the rights of those who are misclassified and to deter further improper classification, the Department should clarify in the Final Rules, or in other ways the Department deems appropriate, that the FWW cannot be used to calculate damages when an employee is denied overtime due to misclassification. A position by the Department on this issue is appropriate in the promulgation of the Final Rules as it aligns with the Departments efforts "to ensure that the FLSA's intended overtime protections are fully implemented" and that the outcome "fully reflect[s] the purpose of the exemption[s]."

A. <u>The History Of The FWW Calculation.</u>

The FWW comes into play in misclassification cases where the employee was misclassified exempt and was paid a salary with no overtime compensation. If the employee wins on the exemption issue and is owed overtime damages, the employer will likely argue that the proper calculation for calculating overtime damages is the FWW, which calculates an employee's regular rate of pay by dividing the weekly salary by the total number of hours he or she worked (rather than by 40) and only pays the employee an additional half-rate for any hours worked over 40 (rather than time and a half). The FWW calculation, if permitted, largely reduces a plaintiff's overtime damages by approximately two-thirds.

The FWW is often said to have origins in the U.S. Supreme Court's decision *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), which was decided only a few years after the FLSA was enacted. In *Missel,* the plaintiff was a rate clerk for a trucking company. He had a contract with his employer to be paid a fixed weekly amount for all his hours worked which fluctuated, but was not paid overtime. The employer made an argument tantamount to that the regular rate, as a default, should be the minimum wage and therefore it had already compensated the plaintiff for any minimum and overtime wages due. The Supreme Court disagreed stating that "[i]mplication cannot mend a contract so deficient on complying with the law" … and determined that the regular rate in this situation was to be paid by dividing the plaintiff's fixed weekly amount by all his hours worked. *Id*. at 581.

In 1968, the Department issued a bulletin interpreting this section of the Act to address the payment of overtime to salaried employees "who do not customarily work a regular schedule of hours." 29 C.F.R. § 778.114(c). The bulletin indicated that it was issued in connection with two Supreme Court cases that had addressed payment of overtime to employees who had fluctuating hours from week-to-week, and who wished to receive a predictable, flat rate of pay: *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942) and *Walling v. A.H. Belo Corp*., 316 U.S. 624 (1942). *See O'Neill v. Mermaid Touring, Inc*., 968 F.Supp.2d 572, 583-84 (S.D.N.Y. 2013). The Department's interpretative bulletin, 29 C.F.R. § 778.114, sets forth requirements that must be satisfied in order for an employer to utilize the FWW method of calculating overtime pay. According to 29 C.F.R. § 778.114, the FWW may only be used if: (1) the employee's hours fluctuate from week to week, (2) the employee receives a fixed weekly salary that remains the same regardless of the number of hours worked per week; (3) the fixed salary is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employee receives at least 50 percent of his regular hourly pay for all overtime hours worked; and (5) the employer and the employee have a clear mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek.

B. NELA Supports Clarification To Articulate That The FWW Is Not An Appropriate Means For Calculating Damages In A Misclassification Claim.

NELA asserts that clarification of the appropriate damage calculation is necessary to adequately protect the rights of employees. Conflicting case law regarding use of the FWW in misclassification claims results in employees being denied appropriate overtime damages in multiple regions of the country. As the United States District Court, District of Arizona explained:

> Application of the FWW in a misclassification case gives rise to a "perverse incentive" for employers, because the employee's hourly "regular rate" decreases with each additional hour worked. In fact, the difference between the FWW method and the traditional time-and-a-half method can result in an employee being paid seventy-one percent less for overtime over a given year, and under the FWW method, the effective overtime hourly rate of an employee working sixty-one hours or more is less than the non-overtime hourly rate of an employee who worked no more than forty hours per week.

Blotzer v. L-3 Communs. Corp., 2012 U.S. Dist. LEXIS 173126, *38 (D. Ariz. Dec. 5, 2012)(citations omitted). Thus, in order to ensure employees receive all benefits bestowed upon them by the FLSA, the Department must clarify that the FWW articulated in 29 C.F.R. § 778.114 and the approach used in *Missel* is not an appropriate method for calculating damages when an employee has been misclassified as a salaried-exempt employee pursuant to the Executive, Administrative, Professional, Outside Sales, or Computer employee exemptions.

1. Court Opinions Support Clarification That Reliance On 29 C.F.R. § 778.114 Is Improper To Calculate Damages In Misclassification Cases.

Numerous courts have addressed whether the FWW, as set forth in 29 C.F.R. § 778.114, can be retroactively applied to calculate damages in an FLSA misclassification case; they have determined that it cannot. *See Snodgrass v. Bob Evans Farms, LLC,* 2015 U.S. Dist. LEXIS 33621(S.D. Ohio Mar. 18, 2015)(collecting cases); *Urnikis-Negro v. American Family Property Services*, 616 F.3d 665 (7th Cir. 2010) (collecting cases). In *Snodgrass*, the court succinctly explained "[t]he requirements of § 778.114 can never be satisfied in a misclassification case, however, because (1) there are no contemporaneous payments of overtime, and (2) there is no clear mutual understanding." 2015 U.S. Dist. LEXIS 33621 at *26; *see also West v. Verizon Services Corp*., 2011 U.S. Dist. LEXIS 5952, *30-31 (M.D. Fla. Jan. 21, 2011); *Russell v. Wells Fargo & Co*., 672 F.Supp.2d 1008, 1013-15 (N.D. Cal. 2009); *Scott v. OTS Inc*., 2006 U.S. Dist. LEXIS 15014, *35-40 (N.D. Ga. March 31, 2006); *Rainey v. American Forest and Paper Assoc.*, 26 F.Supp.2d, 100-01 (D.D.C. 1998). In fact "the FWW methodology set forth in the DOL bulletin was never intended to be applied retroactively in a case where an employee has been misclassified as exempt." *O'Neill v. Mermaid Touring, Inc.*, 968 F.Supp.2d 572, 586 (S.D.N.Y. 2013). The reasoning for rejecting the use of a FWW in misclassification cases under both 29 C.F.R. § 778.114 and *Missel* was precisely presented by the court in *Ransom v. M. Patel Enters., Inc.*, 825 F.Supp.2d 799, 809 n.11 (W.D. Tex. 2011) (overruled by *Ransom v. M. Patel Enters*., 734 F.3d 377, 387 (5th Cir. 2013)).

The fundamental assumption underpinning the FWW is that it is fair to use it to calculate overtime pay because the employee consented to the payment scheme. But in the context of an FLSA misclassification suit when consent is inferred from the employee's conduct, that conduct will always, by definition, have been based on the false assumption that he was not entitled to overtime compensation. The job will have been advertised as a salaried position. The employee, if he raised the issue, will have been told that the salary is all he will receive, regardless of how many hours he works. That is the very nature of a salaried, exempt position. When it turns out that the employer is wrong, and it is learned that the FLSA required the employer to pay the employee an overtime premium, the notion that the employee's conduct *before* he knew this is evidence that the employee somehow consented to a calculation method for the overtime pay *that no one even knew was due,* is perverse. If the FWW requires consent in some fashion, the employee's actions before he knew he was due overtime pay just cannot logically be the basis of that consent.

Despite this well-reasoned logic, the Fifth Circuit reversed the lower court's ruling in *Ransom* relying in part upon its prior decision in *Blackmon v. Brookshire Grocery Co*., 835 F.2d 1135 (5th Cir. 1988), which relied upon 29 C.F.R. § 778.114 in determining that the FWW method is appropriate in misclassification cases to calculate overtime damages using a half-rate. Other courts including the First and Tenth Circuits in *Clemonts v. Serco, Inc*., 530 F.3d 1224 (10th Cir. 2008) and *Valerio v. Putnam Assocs*., 173 F.3d 35 39-40 (1st Cir. 1999) have similarly relied on 29 C.F.R. § 778.114 to apply the FWW method in misclassification cases. These cases, however, have been criticized for failing to provide any meaningful analysis on this disputed legal issue. *See Perkins v. Southern New Eng. Tel. Co*., 2011 U.S. Dist. LEXIS 109882 (D. Conn. Sept. 27, 2011) (stating same); *Russell*, 672 F.Supp.2d at 1013-15 (distinguishing *Clements v. Serco, Inc*. and *Valerio v. Putnam Associates* as these decisions exclusively relied on non-misclassification cases for their holdings); *In re Texas EZPawn Fair Labor Stds. Act Litig*., 633 F.Supp.2d 395, 406 (W.D. Tex. 2008) (finding *Blackmon* "fundamentally flawed").

Given this conflicting case law, clarification from the Department that 29 C.F.R. § 778.114 is "forward-looking" and only describes how employers and employees may structure an agreement for future compensation and cannot be applied retroactively to misclassification claims is essential to protecting the rights of employees across the county.

2. Reliance On *Missel* Is Improper To Calculate Damages In Misclassification Cases.

The U.S. Court of Appeals for the Fourth, Fifth, and Seventh Circuits have relied on *Missel* to obtain the same result that can be reached by applying 29 C.F.R. § 778.114 retroactively while ignoring the fact that no overtime compensation is typically paid in a misclassification case. *See Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351 (4th Cir. 2011); *Urnikis-Negro v. American Family Property Services*, 616 F.3d 665 (7th Cir. 2010); *See generally Black v. Settlepou, P.C., 732 F.3d 492, 498* (5th Cir. 2013). For example, in *Urnikis-Negro*, the court determined that while 29 C.F.R. § 778.114(a) could not be used to calculate damages in a misclassification case, because "it is not a remedial measure that specifies how damages are to be calculated when a court finds that an employer has breached its statutory obligation [to pay overtime,]" the court instead relied on *Missel*, 316 U.S. 572.

This application of *Missel*, however, is inappropriate. The court in *Snodgrass* explicitly rejected the application of *Missel* to misclassification cases for four reasons. First, as the court noted, "*Missel* is not directly on point[;] *Missel* is not a misclassification case, and it does not expressly authorize the use of the FWW half-time method in a misclassification case." 2015 U.S. Dist. LEXIS 33621 at *33 (*citing Wallace v. Countrywide Home Loans*, 2013 U.S. Dist. LEXIS 69215, 2013 WL 1944458, at *7). As with 29 C.F.R. § 778.114, "*Missel*'s 'holding that parties can agree to an employee being paid a fixed rate for all hours worked if certain conditions are met, cannot logically extend to misclassification cases because no such agreement is reached in a misclassification case." *Id.* at *34. Second, the court reasoned that reaching an agreement that the salary is intended to cover all hours worked with no mention of overtime pay, "would mean that an employer and an employee could mutually agree to depart from the standard, default FLSA arrangement of a forty-hour work week with time-and-a-half overtime, simply with an understanding that a salary is intended to cover all hours worked and with no mention at all of overtime payment." *Id.* at 34 (*quoting Wallace* 2013 U.S. Dist. LEXIS 69215 at *7). It is well established that an individual cannot waive his or her rights under the FLSA. *See Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act"). Third, the application of *Missel* to misclassification claims in which an employee was paid a fixed salary and worked varied hours would improperly result in the FWW applying to all claims. *Id.* at *35-36. Fourth, and most importantly, the court in *Snodgrass* explained:

> [T]o allow defendant employers to utilize *Missel* in such a way goes against the remedial purpose of the FLSA. *McCoy v. N. Slope Borough*, 2013 U.S. Dist. LEXIS 121797, *19 (D. Alaska Aug. 26, 2013) ("the FWW method should not be applied in a misclassification case, particularly in light of the FLSA's remedial purpose.") '[A]ssessing damages using the fluctuating workweek method provides a perverse incentive to employers to misclassify workers as exempt, and a windfall in damages to an employer who has been found liable for misclassifying employees under the FLSA.' *Perkins*, 2011 U.S. Dist. LEXIS 109882, 2011 WL 4460248 at *4 n. 5; see also, *Ransom*, 825 F.Supp.2d at 810 n. 11 ("The significance of the employee's lack of knowledge of nonexempt status cannot be overstated. The fundamental assumption underpinning the FWW is that it is fair to use it to calculate overtime pay because the employee consented to the payment scheme. But in the context of an FLSA misclassification suit when consent is inferred from the employee's conduct, that conduct will always, by definition, have been based on the false assumption that he was not entitled to overtime compensation.").

Id. at *36-37. The court further articulated:

> Utilizing *Missel* as authority to retroactively apply the FWW method creates a lower threshold requirement for the retroactive application of the FWW method. This produces a perverse incentive to employers. For instance, an employer attempting to pay employees using the FWW method cannot avail itself of the 50% overtime calculation unless it meets all the requirements of § 778.114; but if that same employer misclassifies its employees as exempt and pays them a salary with no overtime, that employer can avail itself of the 50% overtime calculation even though it does not meet the requirements of § 778.114 (and that's assuming the misclassified employee finds out he is misclassified and files a law suit). In short, utilizing *Missel* as authority for retroactive application of the FWW method creates a loophole where employers can circumvent the requirements of § 778.114. This incentivizes employers to break the law and misclassify employees as exempt.

Id. at *37-38(citations omitted).

Other courts have reached similar conclusions. *See e.g. Costello v. Home Depot USA, Inc*., 944 F.Supp.2d 199, 208 (D. Conn. 2013) ("[Defendant's] reading of *Missel* and the FLSA plainly run counter to the policy implications of that case and the statute itself. Indeed, 'assessing damages using the fluctuating workweek method provides a perverse incentive to employers to misclassify workers as exempt . . . .'"); *Zulewski v. Hershey Co*., 2013 U.S. Dist. LEXIS 23448, *15-16 (N.D. Cal. Feb. 20, 2013) ("[T]he retroactive application of the FWW method in the misclassification context does not square with *Missel*, because *Missel* requires an agreement between the parties that the fixed weekly salary was compensation for all straight time. . . such an agreement is not present in misclassification cases"). In *Costello*, the court reached the same conclusion articulated in *Snodgrass* that applying *Missel* retroactively would produce an illegal result: "an employer and an employee could mutually agree to depart from the standard, default FLSA arrangement of a forty-hour work week with time-and-a-half overtime, simply with an understanding that a salary is intended to cover all hours worked and with no mention at all of overtime payment." 944 F.Supp.2d at 207.

NELA advocates that the Department follow the well-reasoned rulings in *Snodgrass*, *Costello*, and *Zulewski* in rejecting the application of *Missel* to misclassification claims and issuing clarification as part of the Final Rules that the FWW cannot be used to calculate damages in a misclassification claim.

C. NELA's Suggestion To Clarify That The FWW Cannot Be Used Retroactively Is Consistent With The Department's Efforts To End Misclassification.

NELA applauds the efforts that the Department has taken to raise awareness of misclassification and to protect those employees who have been misclassified. NELA urges the Department to ensure that employees who have been improperly classified as exempt receive all wages owed to them by clarifying in the Final Rules that the FWW is an improper means of calculating damages when the employee was misclassified and that misclassified employees are entitled to damages equal to what their rate of pay would have been absent a violation by the employer (time and one-half the employee's hourly rate for every hour worked over 40 in a work week).

V. NELA URGES THE DEPARTMENT TO RESTORE ITS PROTECTIONS AGAINST IMPROPER DEDUCTIONS THAT PRE-DATED THE 2004 CHANGES TO THE OVERTIME REGULATIONS.

NELA urges the Department to restore the pre-2004 safe harbor provisions to the regulations. No employer should be allowed access to the "window of correction" unless the employer meets a burden of establishing that any deductions made were "inadvertent," that all deductions made were reimbursed as soon as they came to the employer's attention, and that the employer has revised all of its rules, codes, policies, practices, and procedures which leave no doubt that as a practical matter the affected employee will not be subject to such deductions in the future. *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2001).

The 2004 regulation adopted an extremely broad "safe harbor" provision, which too frequently allow an employer to make an improper deduction without losing the exemption if it is retroactively corrected upon complaint. *See* Section 541.603. These changes set out in the 2004 regulations departed from the Department's historical position and went way too far in loosening the standards applicable to protecting the salary basis.

Moreover, through the 2004 regulation, the Department seemed to limit the loss of the exempt status to work units that are making the improper deductions. In many instances, however, the improper deductions are companywide. Thus, the revised interpretations should make it clear that if there is a companywide policy or practice of making such improper deductions, then the exempt status is lost for all employees, regardless of location, classification, and so forth. While this may be subsumed by the example in Section 541.603(b), the example seems to have a limiting effect that could be ameliorated by adding language allowing liability on a companywide basis where the practice or policy could reasonably be construed to be companywide.

NELA urges that the changes to the improper deduction regulations adopted in 2004 be rescinded and replaced by the Department's regulations pertaining to improper deductions that better served the purposes of the FLSA until August 23, 2004.

VI. CONCLUSION.

NELA supports adoption of the proposed FLSA § 541 regulations with the suggested changes to particular provisions described above.

Respectfully submitted,

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