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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235-AA39

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department) is updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. Significant revisions include increasing the standard salary level, increasing the highly compensated employee total annual compensation threshold, and adding to the regulations a mechanism that will allow for the timely and efficient updating of the salary and compensation thresholds, including an initial update on July 1, 2024, to reflect earnings growth. The Department is not finalizing in this rule its proposal to apply the standard salary level to the U.S. territories subject to the Federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry.

DATES: The effective date for this final rule is July 1, 2024. Sections 541.600(a)(2) and 541.601(a)(2) are applicable beginning January 1, 2025.

Disclaimer: This final rule has been approved by the Office of Management and Budget's Office of Information and Regulatory Affairs and has been submitted to the Office of the Federal Register (OFR) for publication. It is currently pending placement on public inspection at the OFR and publication in the *Federal Register*. This version of the final rule may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the *Federal Register* is the official version.

FOR FURTHER INFORMATION CONTACT: Daniel Navarrete, Acting Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at https://www.dol.gov/agencies/whd/contact/local-offices for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION

I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay. Section 13(a)(1) of the FLSA, which was included in the original Act in 1938, exempts from the minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity[.]"[1] The exemption is commonly referred to as the "white-collar" or executive, administrative, or professional (EAP) exemption. The statute

[1] 29 U.S.C. 213(a)(1).

expressly gives the Secretary of Labor (Secretary) authority to define and delimit the terms of the exemption. Since 1940, the regulations implementing the EAP exemption have generally required that each of the following three tests must be met: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test). The employer bears the burden of establishing the applicability of the exemption.[2] Job titles and job descriptions do not determine EAP exemption status, nor does merely paying an employee a salary.

Consistent with its broad authority under the Act, in this final rule the Department is setting compensation thresholds for the standard test and the highly compensated employee test that will work effectively with the respective duties tests to better identify who is employed in a bona fide EAP capacity for purposes of determining exemption status under the Act. Specifically, the Department is setting the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,128 per week or $58,656 annually for a full-year worker)[3] and the highly compensated employee total annual

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[2] *See, e.g.*, *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966); *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 547-48 (1947).

[3] In determining earnings percentiles in its part 541 rulemakings since 2004, the Department has consistently looked at nonhourly earnings for full-time workers from the Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data collected by the U.S. Bureau of Labor Statistics (BLS). As explained in section VII.B.5.i, the Department considers data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers, although for simplicity the Department uses the terms

compensation threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($151,164). These compensation thresholds are firmly grounded in the authority that the FLSA grants to the Secretary to define and delimit the EAP exemption, a power the Secretary has exercised for 85 years.

The increase in the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region better fulfills the Department's obligation under the statute to define and delimit who is employed in a bona fide EAP capacity. Upon reflection, the Department has determined that its rulemakings over the past 20 years, since the Department simplified the test for the EAP exemption in 2004 by replacing the historic two-test system for determining exemption status with the single standard test, have vacillated between two distinct approaches: One used in rules in 2004[4] and 2019,[5] that exempted lower-paid workers who historically had been entitled to overtime because they did not meet the more detailed duties requirements of the test that was in place from 1949 to 2004; and one used in a rule in 2016,[6] that restored overtime protection to lower-paid white-collar workers who performed significant amounts of nonexempt work but also removed from the exemption other lower-paid workers who historically were exempt because they met the prior more detailed

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salaried and nonhourly interchangeably in this rule. The Department relied on CPS MORG data for calendar year 2022 to develop the NPRM, including to determine the proposed salary level. The Department is using the most recent full-year data available for this final rule, which is CPS MORG data for calendar year 2023. The new standard salary level of $1,128 per week is $12 to $30 less than the Department estimated in the NPRM. 88 FR 62152, 62152–53 n.3 (Sept. 8, 2023).

[4] 69 FR 22122 (April 23, 2004).

[5] 84 FR 51230 (Sept. 27, 2019).

[6] 81 FR 32391 (May 23, 2016).

duties test, an approach that received unfavorable treatment in litigation.[7] Having grappled with these different approaches to setting the standard salary level, this final rule retains the simplified standard test, the benefits of which were recognized in the Department's 2004, 2016, and 2019 rulemakings,[8] while, through a revised methodology, fully restoring the salary level's screening function and accounting for the switch from a two-test to a one-test system for defining the EAP exemption, and also separately updating the standard salary level to account for earnings growth since the 2019 rule.

The new standard salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity. By setting a salary level above what the methodology used in 2004 and 2019 would produce using current data, the new standard salary level will ensure that, consistent with the Department's historical approach to the exemption, fewer lower-paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting the salary level below what the methodology used in 2016 would produce using current data, the new standard salary level will allow employers to continue to use the exemption for many lower-paid white-collar employees who were made exempt under the 2004 standard duties test. The combined result will be a more effective test for determining who is employed in a bona fide EAP capacity. The applicability date of the new standard salary level will be January 1, 2025. The Department is not finalizing its proposal to apply the standard salary level to the U.S.

[7] The Department never enforced the 2016 rule because it was invalidated by the U.S. District Court for the Eastern District of Texas. *See Nevada v. U.S. Department of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017).
[8] *See* 84 FR 51243–45; 81 FR 32414, 32444–45; 69 FR 22126–28.

territories subject to the federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry.[9]

The Department is also increasing the earnings threshold for the highly compensated employee (HCE) exemption, which was added to the regulations in 2004 and applies to certain highly compensated employees and combines a much higher annual compensation requirement with a minimal duties test. The HCE test's primary purpose is to serve as a streamlined alternative for very highly compensated employees because a very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis.[10] The Department is increasing the HCE total annual compensation threshold to the annualized weekly earnings amount of the 85th percentile of full-time salaried workers nationally ($151,164). The new HCE threshold is high enough to reserve the test for those employees who are "at the very top of [the] economic ladder"[11] and will guard against the unintended exemption of workers who are not bona fide EAP employees, including those in high-income regions and industries. The applicability date of the new HCE total annual compensation threshold will be January 1, 2025.

In each of its part 541 rulemakings since 2004, the Department recognized the need to regularly update the earnings thresholds to ensure that they remain effective in helping

[9] The Department proposed in sections IV.B.1 and B.2 of the NPRM to apply the updated standard salary level to the four U.S. territories that are subject to the federal minimum wage—Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI)—and to update the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level. The Department will address these aspects of its proposal in a future final rule.
[10] *See* 69 FR 22172–73.
[11] *Id.* at 22174.

differentiate between exempt and nonexempt employees. As the Department observed in these rulemakings, even a well-calibrated salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over time.[12] Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees.

To address this problem, in the 2004 and 2019 rules the Department expressed its commitment to regularly updating the salary levels.[13] In the 2016 rule, it included a regulatory provision to automatically update the salary levels.[14] Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for updating the salary levels to reflect current earnings data, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status. This rule establishes a new updating mechanism. The initial update to the standard salary level and the HCE total annual compensation threshold will take place on July 1, 2024, and will use the methodologies in place at that time (*i.e.*, the 2019 rule methodologies), resulting in a $844 per week standard salary level and a $132,964 HCE total annual compensation threshold. Future updates to the standard salary level and HCE total annual compensation threshold with current earnings data will begin 3 years after the date of the initial update (July 1, 2027), and every 3 years thereafter, using the methodologies in place at the time of the updates. The Department anticipates that, by the time

[12] 84 FR 51250–51; 81 FR 32430; *see also* 69 FR 22164.
[13] 69 FR 22171; 84 FR 51251–52.
[14] 81 FR 32430.

the first triennial update under the updating mechanism occurs, assuming the Department has not engaged in further rulemaking, the new methodologies for the standard salary level and HCE total annual compensation requirement established by this final rule will have become effective and the triennial update will employ these new methodologies. The new updating mechanism will allow for the timely, predictable, and efficient updating of the earnings thresholds.

The Department estimates that in Year 1, approximately 1 million employees who earn at least $684 per week but less than $844 per week will be impacted by the initial update applying current wage data to the standard salary level methodology from the 2019 rule, and approximately 3 million employees who earn at least $844 per week but less than the new standard salary level of $1,128 per week will be impacted by the subsequent application of the new standard salary level. *See* Table 25. As explained in section V.B.4.ii, for 1.8 million of the affected employees (including the 1 million impacted by the initial update), this rule will restore overtime protections that they would have been entitled to under every rule prior to the 2019 rule. The Department also estimates that 292,900 employees who are currently exempt under the HCE test, but do not meet the standard test for exemption, will be affected by the proposed increase in the HCE total annual compensation level. Absent an employer increasing these employees' pay to at or above the new HCE level, the exemption status of these employees will turn on the standard duties test (which these employees do not meet) rather than the minimal duties test that applies to employees earning at or above the HCE threshold. The economic analysis quantifies the direct costs resulting from this rule: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimates that total annualized direct employer costs over the first 10 years will be $803 million with a 7 percent discount rate.

This rule will also give employees higher earnings in the form of transfers of income from employers to employees. The Department estimates annualized transfers will be $1.5 billion, with a 7 percent discount rate.

II. Background

A. The FLSA

The FLSA generally requires covered employers to pay employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked and overtime premium pay of at least one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek.[15] However, section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), provides an exemption from both minimum wage and overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of [an] outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act] . . .)." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman," but rather directs the Secretary to define those terms through rulemaking. Pursuant to Congress's grant of rulemaking authority, since 1938 the Department has issued regulations at 29 CFR part 541 to define and delimit the scope of the section 13(a)(1) exemption.[16] Because Congress explicitly gave the Secretary authority to define and delimit the specific terms of the exemption, the regulations so issued have the binding effect of law.[17]

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[15] *See* 29 U.S.C. 206(a), 207(a).
[16] *See Helix Energy Solutions Group, Inc. v. Hewitt*, 143 S.Ct. 677, 682 (2023) ("Under [section 13(a)(1)], the Secretary sets out a standard for determining when an employee is a 'bona fide executive.'").
[17] *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The exemption for executive, administrative, or professional employees was included in the original FLSA legislation passed in 1938.[18] It was modeled after similar provisions contained in the earlier National Industrial Recovery Act of 1933 and state law precedents.[19] As the Department has explained in prior rules, the EAP exemption is premised on two policy considerations. First, the type of work exempt employees perform is difficult to standardize to any time frame and cannot be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[20] Second, exempt workers typically earn salaries well above the minimum wage and are presumed to enjoy other privileges to compensate them for their long hours of work. These include, for example, above-average fringe benefits and better opportunities for advancement, setting them apart from nonexempt workers entitled to overtime pay.[21]

Section 13(a)(1) exempts covered EAP employees from both the FLSA's minimum wage and overtime requirements. However, because of their long hours of work, its most significant impact is its exemption of these employees from the Act's overtime protections, as discussed in section VII.C.4. An employer may employ such exempt employees for any number of hours in the workweek without paying an overtime premium. Some state laws have stricter standards to be exempt from state minimum wage and overtime protections than those which exist under

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[18] *See* Fair Labor Standards Act of 1938, Pub. L. 75-718, 13(a)(1), 52 Stat. 1060, 1067 (June 25, 1938).
[19] *See* National Industrial Recovery Act, Pub. L. 73-67, ch. 90, title II, 206(2), 48 Stat 195, 204-5 (June 16, 1933).
[20] *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).
[21] *See id*.

federal law, such as higher salary levels or more stringent duties tests. The FLSA does not preempt any such stricter state standards.[22] If a state establishes a higher standard than the provisions of the FLSA, the higher standard applies in that state.

B. Regulatory History

The Department's part 541 regulations have consistently looked to the duties performed by the employee and the salary paid by the employer in determining whether an individual is employed in a bona fide executive, administrative, or professional capacity. Since 1940, the Department's implementing regulations have generally required each of the following three prongs to be satisfied for the exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test).

1. The Part 541 Regulations from 1938 to 2004

The Department's part 541 regulations have always included earnings criteria. From the first Part 541 regulations, there has been "wide agreement" that the amount paid to an employee is "a valuable and easily applied index to the 'bona fide' character of the employment for which [the] exemption is claimed[.]"[23] Because EAP employees "are denied the protection of the [A]ct[,]" they are "assumed [to] enjoy compensatory privileges" which distinguish them from

[22] *See* 29 U.S.C. 218(a).

[23] "Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer [Harold Stein] at Hearings Preliminary to Redefinition (Oct. 10, 1940) (Stein Report) at 19.

nonexempt employees, including substantially higher pay.[24] Additionally, the Department has long recognized that the salary level test is a useful criterion for helping identify bona fide EAP employees and provides a practical guide for employers and employees, thus tending to reduce litigation and ensure that nonexempt employees receive the overtime protection to which they are entitled.[25] These benefits accrue to employees and employers alike, which is why, despite disagreement over the appropriate magnitude of the part 541 earnings thresholds, an "overwhelming majority" of stakeholders have supported the retention of such thresholds in prior part 541 rulemakings.[26]

The Department issued the first version of the part 541 regulations in October 1938.[27] The Department's initial regulations included a $30 per week compensation requirement for executive and administrative employees. It also included a duties test that prohibited employers from claiming the EAP exemption for employees who performed "[a] substantial amount of work of the same nature as that performed by nonexempt employees of the employer."[28]

The Department issued the first update to its part 541 regulations in October 1940,[29] following extensive public hearings.[30] Among other changes, the 1940 update newly applied the

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[24] *Id.*; *see* Report of the Minimum Wage Study Commission, Volume IV, p. 236 ("Higher base pay, greater fringe benefits, improved promotion potential and greater job security have traditionally been considered as normal compensatory benefits received by EAP employees, which set them apart from non-EAP employees.").
[25] *See* 84 FR 51237; *see also* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (Weiss Report) at 8.
[26] 84 FR 51235; *see also* Stein Report at 5, 19; Weiss Report at 9.
[27] 3 FR 2518 (Oct. 20, 1938).
[28] *Id.*
[29] 5 FR 4077 (Oct. 15, 1940).
[30] *See* Stein Report.

salary level requirement to professional employees; added the salary basis requirement to the tests for executive, administrative, and professional employees; and introduced a 20 percent cap on the amount of nonexempt work that executive and professional employees could perform each workweek, replacing language which prohibited the performance of a "substantial amount" of nonexempt work.[31]

The Department conducted further hearings on the part 541 regulations in 1947[32] and issued revised regulations in December 1949.[33] The 1949 rulemaking updated the salary levels set in 1940 and introduced a second, less stringent duties test for higher paid executive, administrative, and professional employees.[34] Thus, beginning in 1949, the part 541 regulations contained two tests for the EAP exemption. These tests became known as the "long" test and the "short" test. The long test paired a lower earnings threshold with a more rigorous duties test that generally limited the performance of nonexempt work to no more than 20 percent of an employee's hours worked in a workweek. The short test paired a higher salary level and a less rigorous duties test, with no specified limit on the performance of nonexempt work. From 1958 until 2004, the regulations in place generally set the long test salary level at a level designed to exclude from exemption approximately the lowest-paid 10 percent of salaried white-collar employees who performed EAP duties in lower-wage areas and industries and set the short test salary level significantly higher.[35] The salary and duties components of each test complemented

[31] 5 FR 4077.
[32] *See* Weiss Report.
[33] *See* 14 FR 7705 (Dec. 24, 1949).
[34] *Id*. at 7706.
[35] *See* Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Assistant Administrator, Office of Regulations

each other, and the two tests worked in combination to determine whether an individual was employed in a bona fide EAP capacity. Lower-paid employees who met the long test salary level but did not meet the higher short test salary level were subject to the long duties test which ensured that these employees were employed in an EAP capacity by limiting the amount of time they could spend on nonexempt work. Employees who met the higher short test salary level were considered to be more likely to meet the requirements of the long duties test and thus were subject to a short-cut duties test for determining exemption status.

Additional changes to the regulations, including salary level updates, were made in 1954,[36] 1958,[37] 1961,[38] 1963,[39] 1967,[40] 1970,[41] 1973,[42] and 1975.[43] The Department revised the part 541 regulations twice in 1992 but did not update the salary thresholds at that time.[44] None of these updates changed the basic structure of the long and short tests.

The Department described the salary levels adopted in the 1975 rule as "interim rates," intended to "be in effect for an interim period pending the completion of a study [of worker

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and Research, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (Kantor Report) at 6-7. Under the two-test system, the ratio of the short test salary level to the long test salary levels ranged from approximately 130 percent to 180 percent. *See* 81 FR 32403.

[36] 19 FR 4405 (July 17, 1954).
[37] 23 FR 8962 (Nov. 18, 1958).
[38] 26 FR 8635 (Sept. 15, 1961).
[39] 28 FR 9505 (Aug. 30, 1963).
[40] 32 FR 7823 (May 30, 1967).
[41] 35 FR 883 (Jan. 22, 1970).
[42] 38 FR 11390 (May 7, 1973).
[43] 40 FR 7091 (Feb. 19, 1975).
[44] The Department first created a limited exception from the salary basis test for public employees. 57 FR 37677 (Aug. 19, 1992). The Department also implemented a 1990 law requiring it to promulgate regulations permitting employees in certain computer-related occupations to qualify as exempt under section 13(a)(1) of the FLSA. 57 FR 46744 (Oct. 9, 1992); *see* Pub. L. 101-583, sec. 2, 104 Stat. 2871 (Nov. 15, 1990).

earnings] by the Bureau of Labor Statistics . . . in 1975."[45] However, those salary levels remained in effect until 2004. The utility of the salary levels in helping to define the EAP exemption decreased as wages rose during this period. In 1991, the federal minimum wage rose to $4.25 per hour,[46] which for a 40-hour workweek exceeded the lower long test salary level of $155 per week for executive and administrative employees and equaled the long test salary level of $170 per week for professional employees. In 1997, the federal minimum wage rose to $5.15 per hour,[47] which for a 40-hour workweek not only exceeded the long test salary levels, but also was close to the higher short test salary level of $250 per week.

2. Part 541 Regulations from 2004 to 2019

The Department published a final rule in April 2004 (the 2004 rule)[48] that updated the part 541 salary levels for the first time since 1975 and made several significant changes to the regulations. Most significantly, the Department eliminated the separate long and short tests and replaced them with a single standard test. The Department set the standard salary level at $455 per week, which was equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally. The Department paired the new standard salary level test with a new standard duties test for executive, administrative, and professional employees, respectively, which was substantially equivalent to the short duties test used in the two-test system.[49]

[45] 40 FR 7091.
[46] *See* Pub. L. 101-157, sec. 2, 103 Stat. 938 (Nov. 17, 1989).
[47] *See* Pub. L. 104-188, sec. 2104(b), 110 Stat 1755 (Aug. 20, 1996).
[48] 69 FR 22122.
[49] *See id.* at 22192–93 (acknowledging "de minimis differences in the standard duties tests compared to the . . . short duties tests").

In the 2004 rule, the Department acknowledged that the switch to the single standard test for exemption was a significant change in the regulatory structure,[50] and noted that the shift to setting the salary level based on "the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent" of EAP employees was made, in part, "because of the proposed change from the 'short' and 'long' test structure[.]"[51] The Department asserted that elimination of the long duties test was warranted because "the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the 'long' duties test, will gain stronger protections under the increased minimum salary level which . . . guarantees overtime protection for all employees earning less than $455 per week[.]"[52] The Department acknowledged, however, that the new standard salary level was comparable to the lower long test salary level used in the two-test system (*i.e.*, if the Department's long test salary level methodology had been applied to contemporaneous data).[53] Thus, employees who would have been subject to the long duties test with its limit on the amount of time spent on nonexempt work if the two-test system had been updated were subject to the equivalent of the short duties test under the new standard test. For example, under the 2004 rule's standard test, an employee

[50] *See id.* at 22126–28.
[51] *Id.* at 22167.
[52] *Id.* at 22126.
[53] *Id.* at 22171. The Department last set the long and short test salary levels in 1975. Throughout this preamble, when the Department refers to the relationship of salary levels set in this rule and the 2004, 2016, and 2019 rules to equivalent long or short test salary levels, it is referring to salary levels based on contemporaneous (at the relevant point in time) data that, in the case of the long test salary level, would exclude the lowest-paid 10 percent of exempt EAP employees in low-wage industries and areas and, in the case of the short test salary level, would be 149 percent of a contemporaneous long test salary level. The short test salary ratio of 149 percent is the simple average of the 15 historical ratios of the short test salary level to the long test salary level. *See* 81 FR 32467 & n.149.

who earned just over the rule's standard salary threshold of $455 in weekly salary, and who met the standard duties test, was exempt even if they would not have met the previous long duties test because they spent more than 20 percent of their time performing nonexempt work. If the Department had instead retained the two-test system and updated the long test salary level to $455, that same employee would have been nonexempt because they would have been subject to the long test's more rigorous duties analysis due to their lower salary.

In the 2004 rule, the Department also created a new test for exemption for certain highly compensated employees.[54] The HCE test paired a minimal duties requirement—customarily and regularly performing at least one of the exempt duties or responsibilities of an EAP employee—with a high total annual compensation requirement of $100,000, a threshold that exceeded the annual earnings of approximately 93.7 percent of salaried workers nationwide.[55] The Department also ended the use of special salary levels for Puerto Rico and the U.S. Virgin Islands, as they had become subject to the federal minimum wage since the Department last updated the part 541 salary levels in 1975, and set a special salary level only for American Samoa, which remained not subject to the federal minimum wage.[56] The Department also expressed its intent "in the future to update the salary levels on a more regular basis, as it did prior to 1975."[57]

In May 2016, the Department issued a final rule (the 2016 rule) that retained the single-test system introduced in 2004 but increased the standard salary level and provided for regular updating. Specifically, the 2016 rule (1) increased the standard salary level from the 2004 salary

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[54] 69 FR 22172.
[55] *See id.* at 22169 (Table 3).
[56] *Id.* at 22172.
[57] *Id.* at 22171.

level of $455 to $913 per week, the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South);[58] (2) increased the HCE test total annual compensation amount from $100,000 to $134,004 per year;[59] (3) increased the special salary level for EAP workers in American Samoa;[60] (4) allowed employers, for the first time, to credit nondiscretionary bonuses, incentive payments, and commissions paid at least quarterly towards up to 10 percent of the standard salary level;[61] and (5) added a mechanism to automatically update the part 541 earnings thresholds every 3 years.[62] The Department did not change any of the standard duties test criteria in the 2016 rule,[63] opting instead to adopt a standard salary level set at the low end of the historical range of short test salary levels used in the pre-2004 two-test system.[64] The 2016 rule was scheduled to take effect on December 1, 2016.

On November 22, 2016, the U.S. District Court for the Eastern District of Texas issued an order preliminarily enjoining the Department from implementing and enforcing the 2016 rule.[65] On August 31, 2017, the district court granted summary judgment to the plaintiff challengers, holding that the 2016 rule's salary level exceeded the Department's authority and invalidating the rule.[66] On October 30, 2017, the Department of Justice appealed to the U.S. Court of Appeals for the Fifth Circuit, which subsequently granted the Department's motion to

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[58] 81 FR 32404–05.
[59] *Id*. at 32428.
[60] *Id*. at 32422.
[61] *See id*. at 32425–26.
[62] *See id*. at 32430.
[63] *Id*. at 32444.
[64] In the 2016 rule, the Department estimated the historical range of short test salary levels as from $889 to $1,231 (based on contemporaneous earnings data). *Id.* at 32405.
[65] *See Nevada v. U.S. Department of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
[66] *See Nevada*, 275 F.Supp.3d 795.

hold that appeal in abeyance while the Department undertook further rulemaking. Following an NPRM published on March 22, 2019,[67] the Department published a final rule on September 27, 2019 (the 2019 rule),[68] which formally rescinded and replaced the 2016 rule.

The 2019 rule (1) raised the standard salary level from the 2004 salary level of $455 to $684 per week, the equivalent of the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and/or in the retail industry nationally; (2) increased the HCE total annual compensation threshold from $100,000 to $107,432, the equivalent of the 80th percentile of annual earnings of full-time salaried workers nationwide; (3) allowed employers to credit nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10 percent of the standard salary level; and (4) established special salary levels for all U.S. territories.[69] The 2019 rule did not make changes to the standard duties test.[70] While using the same methodology used in the 2004 rule to set the salary threshold, the Department did not assert that this methodology constituted the outer limit for defining and delimiting the salary threshold. Rather, the Department reasoned the 2004 methodology was well-established, reasonable, would minimize uncertainty and potential legal challenge, and would address the concerns of the district court that the 2016 rule over-emphasized the salary level.[71] The Department acknowledged that the new standard salary level

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[67] *See* 84 FR 10900 (March 22, 2019).
[68] *See* 84 FR 51230.
[69] The Department established special salary levels of $455 per week for Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI (effectively continuing the 2004 salary level); it also maintained the 2004 rule's $380 per week special salary level for employees in American Samoa. *Id*. at 51246.
[70] *See id.* at 51241–43.
[71] *See id.* at 51242.

was, unlike the salary level set in the 2004 rule, below the long test salary level used in the pre-2004 two-test system.[72] As in its 2004 rule, the Department "reaffirm[ed] its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking."[73] The 2019 rule took effect on January 1, 2020.[74]

C. Overview of Existing Regulatory Requirements

The part 541 regulations contain specific criteria that define each category of exemption provided for in section 13(a)(1) for bona fide executive, administrative, professional, and outside sales employees, as well as teachers and academic administrative personnel. The regulations also define exempt computer employees under sections 13(a)(1) and 13(a)(17). The employer bears the burden of establishing the applicability of any exemption.[75] Job titles and job descriptions do not determine exemption status, nor does merely paying an employee a salary rather than an hourly rate.

As previously indicated, to satisfy the EAP exemption, employees must meet certain tests regarding their job duties[76] and generally must be paid on a salary basis at least the amount

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[72] *Id.* at 51244.
[73] *Id.* at 51251.
[74] A lawsuit challenging the 2019 rule was filed in August 2022. The district court upheld the rule and an appeal of that decision was pending at the time the Department issued this final rule. *See Mayfield v. U.S. Department of Labor*, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023), *appeal docketed*, No. 23-50724 (5th Cir. Oct. 11, 2023).
[75] *See, e.g., Idaho Sheet Metal Works*, 383 U.S. at 209; *Walling*, 330 U.S. at 547–48.
[76] For a description of the duties that are required to be performed under the EAP exemption, *see* §§ 541.100 (executive employees); 541.200 (administrative employees); 541.300, 541.303–.304 (teachers and professional employees); 541.400 (computer employees); 541.500 (outside sales employees).

specified in the regulations.[77] Some employees, such as doctors, lawyers, teachers, and outside sales employees, are not subject to salary tests.[78] Others, such as academic administrative personnel and computer employees, are subject to special, contingent earning thresholds.[79] The standard salary level for the EAP exemption is currently $684 per week (equivalent to $35,568 per year), and the total annual compensation level for highly compensated employees under the HCE test is currently $107,432.[80] A special salary level of $455 per week currently applies to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI;[81] a special salary level of $380 per week applies to employees in American Samoa;[82] and employers can pay a special weekly "base rate" of $1,043 per week to employees in the motion picture producing industry.[83] Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard or special salary levels.[84]

Under the HCE test, employees who currently receive at least $107,432 in total annual compensation are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive,

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[77] Alternatively, administrative and professional employees may be paid on a fee basis for a single job regardless of the time required for its completion as long as the hourly rate for work performed (*i.e.*, the fee payment divided by the number of hours worked) would total at least the weekly amount specified in the regulation if the employee worked 40 hours. *See* § 541.605.
[78] *See* §§ 541.303(d); 541.304(d); 541.500(c); 541.600(e). Such employees are also not subject to a fee basis test.
[79] *See* § 541.600(c)–(d).
[80] *See* §§ 541.600(a); 541.601(a)(1).
[81] *See* §§ 541.100; 541.200; 541.300.
[82] *See* §§ 541.100; 541.200; 541.300.
[83] *See* § 541.709.
[84] § 541.602(a)(3).

administrative, or professional employee identified in the standard tests for exemption.[85] The HCE test applies only to employees whose primary duty includes performing office or non-manual work.[86] Employees considered exempt under the HCE test must currently receive at least the $684 per week standard salary portion of their pay on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments.[87]

D. The Department's Proposal

On September 8, 2023, consistent with its statutory authority to define and delimit the EAP exemption, the Department published a Notice of Proposed Rulemaking (NPRM) to revise the part 541 regulations.[88] The Department proposed to increase the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), equivalent to $1,059 per week based on earnings data used in the NPRM.[89] The Department also proposed to apply this updated standard salary level to the four U.S. territories that are subject to the federal minimum wage—Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI—and to update the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level.[90] The Department

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[85] § 541.601.
[86] § 541.601(d).
[87] *See* § 541.601(b)(1); *see also* 84 FR 51249.
[88] *See* 88 FR 62152.
[89] The Department noted that the final rule would use the most recent earnings data available to set the standard salary level, which would change the dollar amount of the resulting threshold. *See* 88 FR 62152-53 n. 3.
[90] In this final rule the Department is not finalizing its proposal in section IV.B.1 and B.2 of the NPRM to apply the standard salary level to the U.S. territories subject to the federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry. The Department will address these aspects of its proposal in a future final rule. While the Department is not finalizing its proposal, it is making nonsubstantive changes in provisions addressing the territories as a result of other changes in this final rule.

additionally proposed raising the HCE test's total annual compensation requirement to the annual equivalent of the 85th percentile of weekly earnings of full-time salaried workers nationally, equivalent to $143,988 per year based on earnings data used in the NPRM. Finally, the Department proposed a new mechanism to update the standard salary level and the HCE total annual compensation threshold every 3 years to ensure that they remain effective tests for exemption.

The public comment period for the NPRM concluded on November 7, 2023. The Department received approximately 33,300 comments in response to the NPRM during the 60-day comment period.[91] Comments came from a diverse array of stakeholders, including employees, employers, trade associations, small business owners, labor unions, advocacy groups, nonprofit organizations, law firms, academics, educational organizations and representatives, religious organizations, economists, members of Congress, state and local government officials, tribal representatives, and other interested members of the public. All timely received comments may be viewed on the https://www.regulations.gov website, docket ID WHD-2023-0001.

Commenter views on the merits of the NPRM varied widely. Some of the comments the Department received were general statements of support or opposition, while many others addressed the Department's proposal in considerable detail. As with previous part 541 rulemakings, a majority of the total comments came from comment campaigns using similar or identical template language. Such campaign comments expressed support or opposition to the proposed salary level, and sometimes addressed other issues including applying the salary level

[91] In regulations.gov, the number of comments received is listed as 33,310 and the number of posted comments is 26,280. This difference is because one commenter, WorkMoney, attached thousands of comments to their one submission.

to teachers,[92] and concerns from nonprofit agencies. However, the Department also received thousands of unique comments. Significant issues raised in the comments are discussed in this final rule. Comments germane to the need for this rulemaking are discussed in section III, comments about the NPRM's proposals are discussed in section V, and comments about the potential costs, benefits, and other impacts of this rulemaking are discussed in section VII. The Department has carefully considered the timely submitted comments about the Department's proposal.

The Department received a number of comments on topics that are beyond the scope of this rulemaking. A significant number of commenters (including a large comment campaign) urged the Department to newly apply the part 541 salary criteria to teachers. The Department did not solicit comment about the exemption criteria for teachers in the NPRM and, as many commenters on this issue recognized, addressing this issue would require a separate rulemaking. Other topics outside the scope of this rulemaking include, for example, a request that the Department extend the right to overtime pay to medical residents, create exemptions from the salary level test, allow employers to credit the value of board and lodging towards the salary level, clarify issues related to the fluctuating workweek method of calculating overtime pay, or create a "safe harbor" provision for restaurant franchisors. The Department is not addressing these issues in its final rule.

Several stakeholders such as Catholic Charities USA and the National Council of Nonprofits expressed concern about funding and reimbursement rates to meet potential new

[92] As noted above, teachers are among the employees for whom there is no salary level requirement under the part 541 regulations. *See* § 541.303(d).

overtime expenses. The Department appreciates the concerns conveyed in these comments and the challenges of adjusting public funding. As discussed in section V.B.4.iv, however, the Department's EAP regulations have never had special rules for nonprofit or charitable organizations and employees of these organizations are subject to the EAP exemption if they satisfy the same salary level, salary basis, and duties tests as other employees.

III. Need for Rulemaking

The goal of this rulemaking is to set effective earnings thresholds to help define and delimit the FLSA's EAP exemption. To achieve this goal, the Department is not only updating the single standard salary level to account for earnings growth since the 2019 rule, but also to build on the lessons learned in its most recent rulemakings to more effectively define and delimit employees employed in a bona fide EAP capacity. To this end, the Department is finalizing its proposed changes to the standard salary level and the HCE test's total annual compensation requirement methodologies. Additionally, to maintain the effectiveness of these tests, the Department is finalizing an updating mechanism that will update these earnings thresholds to reflect current wage data, initially on July 1, 2024 and every 3 years thereafter. The Department's response to commenter feedback on the specific proposals included in the NPRM is provided in section V. This section explains the need for the Department to update the part 541 earnings thresholds and addresses commenter feedback on whether the earnings thresholds established in the 2019 rule should be increased.

As the Department explained in the NPRM, there is a need for the Department to update the salary level to fully restore the salary level's screening function and to account for the shift to a one-test system in the 2004 rule, which broadened the exemption by placing the entire burden of this shift on employees who historically were entitled to the FLSA's overtime protection because they performed substantial amounts of nonexempt work and earned between the long and short test salary levels, but became exempt because they passed the more lenient standard duties test. Since switching from a two-test to a one-test system for defining and delimiting the EAP exemption in 2004, the Department has followed different approaches to set the standard salary level. In 2004, the Department used a methodology that produced a salary level amount that was equivalent to the lower long test salary level under the two-test system.[93] This approach continued to perform the historical screening function of the long salary test—providing overtime protection to employees who earned less than the long test salary level. But it broadened the exemption to include employees earning between the long and short test salary levels who historically had not met the long duties test (and therefore were not considered bona fide EAP employees) and now became exempt if they met the less rigorous standard duties test.[94] The Department followed this same methodology to set the standard salary level in 2019, but applying the 2004 rule's methodology to contemporaneous data in 2019 resulted in a salary level that was lower than what would have been the equivalent of the long test salary level and thus did not fulfill the historical screening function for low-paid employees.[95] This broadened the EAP exemption even further by, for the first time, exempting a group of white-collar employees earning below the equivalent of the long test salary level.

[93] *See* 69 FR 22168–69.
[94] *Id.* at 22214.
[95] *See* 84 FR 51260 (Table 4) (showing that the salary level derived from the Department's long test methodology would have been $724 per week rather than the finalized $684 per week amount).

To address the concern that the 2004 rule did not provide overtime compensation for lower-salaried white-collar employees performing large amounts of nonexempt work, in 2016 the Department set the standard salary level using a methodology that produced a salary at the low end of the historical range of short test salary levels.[96] This approach restored overtime protection to lower-salaried white-collar employees who performed substantial amounts of nonexempt work, but it also made nonexempt some employees paid below the new salary level who performed only a limited amount of nonexempt work and would have been exempt under the long duties test.[97] In the challenge to the 2016 rule, the district court expressed concern that the 2016 rule conferred overtime eligibility based on salary level alone to a substantial number of employees who would otherwise be exempt.[98]

As explained in greater detail in section V.B, setting the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,128 per week, $58,656 annually), which is below the midpoint between the long and short tests, will work effectively with the standard duties test to better define and delimit the EAP exemption, in part by more effectively accounting for the switch from a two-test to a one-test system, and will reasonably distribute the impact of the shift by ensuring overtime protection for some lower-salaried employees without excluding from exemption too many white-collar employees solely based on their salary level.[99] The new standard salary level will also account for earnings growth since the 2019 rule and fully restore the historical screening function of the

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[96] 81 FR 32405.
[97] *See* 84 FR 10908; 84 FR 51242.
[98] *See Nevada*, 275 F.Supp.3d. at 806.
[99] *See* section V.A.3.

salary level test. At the same time, the duties test will continue to determine exemption status for a large majority of all salaried white-collar employees subject to the part 541 regulations.

As the Department has explained,[100] earnings thresholds in the part 541 regulations gradually lose their effectiveness as the salaries paid to nonexempt employees rise over time. These impacts grow in the absence of increases to the salary threshold that keep pace with wage growth. Moreover, the longer it takes for the Department to implement such increases, the larger the increases must be to restore earning thresholds to maintain their effectiveness. More than 4 years have passed since the 2019 final rule established the current earnings thresholds. In the intervening years, salaried workers in the U.S. economy have experienced a rapid growth in their nominal wages, such that the current $684 per week salary level now corresponds to approximately the 12th percentile of earnings of full-time salaried workers in the lowest-wage Census Region and retail nationally. The longer the Department waits to update these earnings thresholds, the less effective they become in helping define and delimit the EAP exemption. For example, applying the 2019 standard salary level methodology to current earnings data will result in a new threshold of $844 per week—a 23 percent ($160 per week) increase over the current $684 salary level. Earnings for full-time wage and salary workers nationally have increased even more rapidly, rising by 24 percent during this period.[101]

The Department is also increasing the HCE total annual compensation threshold to the annualized weekly earnings amount of the 85th percentile of full-time salaried workers

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[100] *See, e.g.*, 84 FR 51250–51.
[101] Estimate based on the change in median usual weekly earnings of full-time wage and salary workers from Q3 2019 to Q4 2023. BLS, Median usual weekly earnings of full-time wage and salary workers by sex, quarterly averages, seasonally adjusted. https://www.bls.gov/news.release/wkyeng.t01.htm.

nationally ($151,164). Similar to the standard salary level, nominal wage growth among higher-wage workers has eroded the effectiveness of the HCE threshold; data shows that the $107,432 threshold now corresponds to the 70th percentile of annual earnings of full-time salaried workers nationwide. Reapplying the 2019 methodology (annualized weekly earnings of the 80th percentile of full-time salaried workers nationally) to current earnings data would result in a threshold of $132,964 per year—a 24 percent increase over the current threshold of $107,432. Increasing the HCE test's total annual compensation threshold equivalent to the 85th percentile of salaried worker earnings nationwide will result in an HCE threshold reserved for employees at the top of today's economic ladder and, unlike a lower threshold, not risk the unintended exemption of large numbers of employees in high-wage regions.

Finally, the Department is adopting a mechanism to regularly update the thresholds for earnings growth, which will ensure that the thresholds continue to work effectively to help identify EAP employees. As noted above, the history of the part 541 regulations shows multiple, significant gaps during which the salary levels were not updated and their effectiveness in helping to define the EAP exemption decreased as wages increased. While the Department has generally increased its part 541 earnings thresholds every 5 to 9 years in the 37 years between 1938 and 1975, more recent decades have included long periods without raising the salary level, resulting in significant erosion of the real value of the threshold levels followed by unpredictable increases. Routine updates of the earnings thresholds to reflect wage growth will bring certainty and stability to employers and employees alike.

The Department received many comments addressing the adequacy of the current salary and compensation thresholds set in the 2019 rule and the need for this rulemaking. Generally, employees and affiliated commenters, including labor unions, worker advocacy groups, plaintiff-side law firms, and others, supported the rulemaking as an overdue effort to restore FLSA protections that have eroded in recent decades, though a number of commenters urged the Department to adopt higher threshold increases than those proposed in the NPRM. By contrast, most employers and affiliated stakeholders opposed the main aspects of the proposal, with many urging the Department to withdraw the NPRM altogether. Some employers supported the proposal, or stated that they would support, or not oppose, some change to the current thresholds.

Many commenters agreed with the Department's assessment that the current salary level is too low.[102] *See, e.g.*, Coalition of Gender Justice and Civil Rights Organizations; Coalition of State Attorneys General; Economic Policy Institute (EPI); Schuck Law LLC; Texas RioGrande Legal Aid; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers). Several commenters asserted that the current standard salary level "fails to provide a true incentive for employers to balance the additional hours they ask of their workers with the costs of . . . overtime pay[,]" which they stated in turn undermines the FLSA's policy goals of providing "extra pay for extra work . . . [and] spreading employment." *See, e.g.*, Center for Law and Social Policy (CLASP); Caring Across Generations; Family Values @ Work; Jobs to Move America; North Carolina Justice Center; Workplace Justice Project. Opining that the standard salary level "has been increased too infrequently – and by too little[,]" Business for a Fair Minimum Wage asserted that the "current outdated overtime threshold is ripe for abuse and fosters unfair pay, worker burnout, poorer

[102] Commenter views on the adequacy of the current HCE threshold are addressed in section V.C.

health and safety, and increased employee turnover." American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) asserted that the $684 per week salary level is "so low that it risks becoming irrelevant[.]"

Finally, some supportive commenters provided reasons why, in their opinion, this rulemaking is timely. A joint comment submitted by 10 Democratic members of the House of Representatives asserted that "[o]vertime standards are long overdue for a meaningful update." *See also* AFL-CIO (asserting that setting the salary level below the long test level in the 2019 rule "led to the faster irrelevance of the current level"). The Coalition of State AGs commented that "[r]egardless of whether [the $684 per week standard salary] level was appropriate in 2019, economic trends in the intervening years have rendered that level obsolete . . . [as] $684 in January 2020 has the same buying power as $816.90 in September 2023." Sanford Heisler Sharp LLP (Sanford Heisler Sharp) invoked "the explosion of remote work since 2020" as support for the rulemaking, asserting that the significant increase in telework since 2020 has meant that employers are "no longer constrained by the practical limitation of the worker leaving the workplace."

Many employer trade associations that were neutral or opposed to the NPRM's specific proposals for increasing the compensation levels expressed openness or support for a rulemaking to change the existing part 541 earnings thresholds. *See, e.g.*, Alliance for Chemical Distribution; Growmark Comment Campaign (GROWMARK); National Cotton Ginners Association; National Golf Course Owners Association. Reporting on the results of a survey taken of its members, Society for Human Resource Management (SHRM) stated that its members "support a reasonable increase to the rule's minimum salary threshold . . . as only 4% of the total number of respondents indicated that they would not support any increase." Independent Sector remarked that "a healthy and equitable nonprofit workforce requires an increase in the salary threshold beyond $35,568." *See also* North Carolina Center for Nonprofits ("The Center recognizes that a higher salary level threshold would benefit people served by nonprofits and many nonprofit employees, and we encourage the Department to move forward with a final rule that increases the [current] salary level threshold[.]"). National Association of Convenience Stores commented that it "acknowledges that the minimum salary level should be revisited occasionally, and it support[s] USDOL's approach in 2019 of doing so approximately every four years[.]" *See also* Retail Industry Leaders Association (RILA) ("We recognize that the DOL committed itself in 2019 to engage in more regular reviews of the salary threshold level for the [EAP] exemptions and that the DOL now is following up on that commitment.").

Other employer stakeholders disputed the need for this rulemaking. Many of these commenters, including the American Bus Association, Americans for Prosperity Foundation, Construction Industry Round Table, and National Restaurant Association, asserted that increases to the part 541 earnings thresholds were unnecessary at this time because the last update took effect on January 1, 2020. A number of commenters stated that prior salary level updates have occurred less frequently. *See, e.g.,* National Association of Manufacturers (NAM) (never less than 5 years); National Demolition Association (on average every 9 to 10 years); National Association of Wholesale Distributors (NAW) (historically 7 to 9 years). National Retail Federation (NRF) commented that "[t]here has been no increase of the federal minimum wage since 2019, and therefore, there is no need to adjust the minimum salary threshold." NRF further asserted that there was no need to increase the part 541 earnings thresholds because "market forces have already increased the compensation of lower-level exempt employees" since 2019, echoing the sentiment from several individual employers that markets should determine employee wages rather than government regulation. *See also, e.g.*, Casa Del Mar Beachfront Suites (opposing changes to the regulations and stating that the wages it pays "are based on free enterprise and competitive business plans"); Individual Small Business Commenter (asking the Department to "let the market take care of the situation"). Numerous commenters also asserted that the Department should refrain from amending the part 541 regulations at this time due to current conditions in specific industries or the broader economy. *See, e.g.*, Asian American Hotel Owners Association, Inc.; American Hotel and Lodging Association (AHLA); College and University Professional Association for Human Resources (CUPA-HR); Food Marketing Institute (FMI); Indiana Chamber of Commerce; National Association of Home Builders (NAHB).

Finally, a small number of commenters opposed this rulemaking on the grounds that the Department lacks the legal authority to use any salary criteria to define and delimit the EAP exemption. *See, e.g.*, America First Policy Institute (AFPI); National Federation of Independent Business (NFIB); Pacific Legal Foundation.[103] However, the overwhelming majority of commenters did not oppose the use of salary criteria in the part 541 regulations or address the Department's authority, and a number of employer representatives expressed general support for the use of earnings thresholds. *See, e.g.*, AHLA ("[M]oving to a duties-only test would undoubtedly result in a more rigid duties test . . . [and] likely result in excessive burdens on the hospitality industry, including new and onerous recordkeeping requirements and increased

[103] *See* discussion in section V.A.

litigation costs."); National Restaurant Association ("[S]alary levels save investigators and employers time by giving them a quick, short-hand test[.]"); Transportation Intermediaries Association ("Implementing a duties-only test without considering salary would be overly complex[.]"). This sentiment is consistent with stakeholder feedback provided in earlier part 541 rulemakings.[104]

Having reviewed the comments received, the Department remains of the view that the earnings criteria in the part 541 regulations must be increased and disagrees with commenters that urged the Department to withdraw its proposal. In addition to updating the salary level to account for wage growth since 2019, an update is needed in part because the current standard salary level is too low to fully perform its screening role, as it is now significantly below the contemporary equivalent of the historical long test salary level ($942 per week).[105] Moreover, as the Department explained in the NPRM, there is a need for the Department to update the salary level to account for the shift to a one-test system in the 2004 rule, which broadened the exemption by placing the entire burden of this shift on employees who historically were entitled to the FLSA's overtime protection because they performed substantial amounts of nonexempt work and earned between the long and short test salary levels, but are now exempt because they pass the more lenient standard duties test. This effect would continue to grow over time in the absence of an increase to the current $684 per week standard salary level.

The Department disagrees with the criticism from some commenters that this rulemaking is premature due to the relative recency of the 2019 rule. In that rule, the Department

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[104] *See supra* note 23.
[105] *See* sections V.B. and VII.C.8.

"reaffirm[ed] its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future" than it has in the past, noting that "long periods without updates . . . diminish the usefulness of the salary level test and cause future increases to be larger and more challenging for businesses to absorb."[106] Notably, the Department initially proposed in the 2019 NPRM to codify a commitment to update the part 541 earnings thresholds on a quadrennial basis (*i.e.*, once every 4 years) through notice and comment rulemaking.[107] While that proposed commitment was not adopted in the 2019 final rule, the Department reaffirmed the importance of, and its commitment to, regular updates in its 2019 final rule. The Department's 2019 final rule in no way suggested that increases to the part 541 earnings thresholds should occur only after some longer period of time.

Relatedly, the fact that employee salaries have grown substantially since 2019 underscores the need for this rulemaking. Commenter assertions to the contrary, including that the federal minimum wage has not increased since the salary level was last updated, misunderstand the purpose of the part 541 earnings thresholds, which are intended to assist in the identification of EAP employees based on the wages employees presently receive.[108] To the extent that employers have already been providing raises to exempt EAP workers since January 1, 2020 (the effective date of the 2019 final rule), as some commenters contended, those increases should be appropriately reflected in the earnings thresholds to ensure their effectiveness.

[106] 84 FR 51251–52.
[107] 84 FR 10914–15.
[108] The Department "is not authorized to set wages or salaries for executive, administrative, and professional employees . . . [and] improving the conditions of such employees is not the objective of the [part 541] regulations." Weiss Report at 11.

The Department is sensitive to commenter concerns about the potential impact of this rulemaking on affected employers. However, as discussed in greater detail in the regulatory impact analysis in section VII, the costs of this rule, while significant, are a necessary byproduct of ensuring a salary level that works effectively with the duties tests both now and in the future.

IV. Effective Date

The Department proposed that all aspects of the proposed rule would become effective 60 days after publication of the final rule. This proposed effective date was consistent with the 60 days mandated for a "major rule" under the Congressional Review Act and exceeded the 30-day minimum required under the Administrative Procedure Act (APA).[109] The Department recognized that the 60-day proposed effective date was shorter than the effective dates for the 2004, 2016, and 2019 rules, which were between approximately 90 and 180 days. The Department stated that a 60-day effective date was appropriate, however, in part because employers and employees are familiar with the procedures in the current regulations from the 2019 rulemaking and changed economic circumstances have caused a strong need to update the standard salary level. The Department also sought comments on whether to apply different effective dates to different provisions of the proposed rule. The Department is finalizing an effective date of July 1, 2024. The change to the standard salary level methodology and the change to the HCE total annual compensation methodology will have a delayed applicability date of January 1, 2025.[110] Accordingly, the standard salary level and HCE total annual compensation requirement will increase at the initial update on the effective date July 1, 2024 (to

[109] *See* 5 U.S.C. 801(a)(3)(A); 5 U.S.C. 553(d).
[110] The January 1, 2025 applicability date is six months after the effective date of the rule.

$844 and $132,964, respectively), again on the applicability date for the new methodologies on January 1, 2025 (to $1,128 and $151,164, respectively), and then every 3 years after the initial update on July 1 (using the methodology in effect at the time of each update).

The Department specifically asked for comments on whether the effective date for the increase of the standard salary level should be 60 days after publication as proposed or instead if the increase should be made effective at a later date, such as 6 months or 1 year after publication of the final rule. If the effective date were longer than 60 days, the Department sought comments on "whether it should initially adjust the salary level to reflect recent wage growth (for example, making an initial adjustment for wage growth 60 days after publication of a final rule and having the final rule standard salary level be effective 6 months or a year after publication)."[111] Were it to follow such an approach, the Department sought comments on the methodology it should use for an initial update, specifically "whether to implement an initial update to the standard salary level, effective 60 days after publication of a final rule, that uses the current salary level methodology (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region and retail nationally) and applies it to the most recent data available[.]"[112]

[111] 88 FR 62180.

[112] *Id.* Commenters generally did not address the Department's suggestion that a delay in the effective date for the proposed standard salary level increase be combined with an initial update to the existing salary level to reflect wage growth. An individual commenter acknowledged the Department's suggestion but "defer[ed] to the economists and statisticians to comment as to whether, if the effective date is later than 60 days, the Department should initially adjust the salary level to reflect recent wage growth, and if so, the methodology for doing so." *See also* Ho-Chunk, Inc., a subsidiary of the Winnebago Tribe of Nebraska.

The Department did not specifically request comment on delaying the effective date of the proposed HCE compensation threshold beyond 60 days or on making an initial update using current data and the existing HCE compensation methodology if it were to delay the effective date of the new total annual compensation threshold. The Department stated that it believed a 60-day effective date was appropriate for the proposed increase to the HCE compensation threshold because only a relatively small number of employees earning between the current and proposed HCE compensation thresholds would not meet the standard duties test and be affected by the proposed change. The Department sought comment on the proposed effective date for the HCE compensation threshold.

Lastly, the Department proposed that the first automatic update to the new compensation levels be effective 3 years after the proposed 60-day effective date. The Department sought comments on whether the date for the first automatic update should be adjusted if it were to make an initial adjustment to any of the compensation levels.

Many commenters that objected to the proposed rule also objected to the proposed 60-day effective date should the Department go forward with a final rule. Commenters addressed their comments to the single 60-day effective date and generally did not suggest different effective dates for different provisions. Several commenters suggested effective dates between 90 and 180 days, which the NPRM noted was the range for recent rules. *See, e.g.*, HR Policy Association (minimum of 90 days); International Foodservice Distributors Association (IFDA) (minimum of 90 days); American Society of Travel Advisors (ASTA) (90 to 180 days); RILA (at least 120 days); NAIS/NBOA (at least 120 days). Several commenters suggested a 180-day effective date. *See, e.g.*, AASA/AESA/ASBO; CUPA-HR; LeadingAge; NRF. The National

Council of Young Men's Christian Associations of the United States of America (YMCA) suggested an effective date of at least 6 to 9 months. The United States Chamber of Commerce (Chamber), National Association of Convenience Stores, and NAFCU suggested an effective date of 12 months. Commenters including the U.S. Small Business Administration Office of Advocacy (SBA Advocacy), National Automobile Dealers Association, and Partnership to Protect Workplace Opportunity (PPWO) suggested an effective date of 12 to 18 months. Commenters including Seyfarth Shaw LLP (Seyfarth Shaw) and Credit Union National Association (CUNA) suggested an effective date of 150 days to align with the proposed notice period for future update amounts. A number of commenters suggested tying the effective date to the beginning of the next calendar year (January 1, 2025). *See, e.g.*, Seyfarth Shaw; SHRM; RILA; YMCA. Some commenters suggested a longer time period between the publication and effective date of the final rule for specific industries or types of employers. *See*, e.g., Boy Scouts of America (requesting at least 12 months of lead time for nonprofit employers); Small Business Majority (180 days for small businesses with fewer than 50 employees). A few commenters linked the need for a longer effective date with what they asserted was uncertainty as to the final salary amount caused by the Department's projections in footnote 3 of the NPRM, with NRF asserting that "[t]he brevity of the implementation period is particularly problematic given the Department's . . . lack of clarity about the dollar value of the proposed threshold." *See also* HR Policy Association; RILA.

Several commenters suggested phasing in any increase in the salary level, often in addition to an initial extension of the proposed effective date. Commenters advocating for a phase-in suggested a range of steps or timeframes. *See, e.g.*, ASTA (not less than 3 years);

Chamber (3 years in even or incrementally larger steps); North Carolina Center for Nonprofits ("multiple years"); National Council of Nonprofits (two or more steps); PPWO (a period of years), Safe Journeys (6 years); Washington Farm Labor Association ("multi-year"); YMCA (proportional increases over 5 years).

Most commenters supporting the Department's proposal did not specifically address the effective date for the Department's proposed changes. Commenters including American Federation of Teachers (AFT), National Partnership for Women & Families (National Partnership), and National Women's Law Center (NWLC) urged the Department to finalize the rule "without delay." American Federation of State, County, and Municipal Employees (AFSCME) specifically supported the 60-day effective date as proposed. A number of commenters in the home and community-based health services sector, that were generally supportive of the Department's intent but expressed concerns with its proposal, advocated for a longer effective date. ANCOR suggested a 2-year delayed effective date followed by a 3-to-5-year phase-in of the new salary level. *See also* Advancing States (18-month to 2-year effective date); National Association of State Directors of Developmental Disabilities Services (NASDDDS) (18- to 24-month effective date for providers of services to individuals with intellectual and developmental disabilities); United Cerebral Palsy (phase-in or transition period for the Department to work with the Centers for Medicare and Medicaid Services and the Administration for Community Living to minimize impact on access to services). BrightSpring Health Services urged the Department to delay the effective date for 2 years and to consider an enforcement delay for the sector as it did in 2016.

As discussed below, the Department believes it is important to update the standard salary level in part to account for substantial earnings growth since the Department last updated the salary level in the 2019 rule. It has been more than 4 years since the Department updated the salary level, and economic conditions have changed significantly since then as evidenced by the salary increase that would result by applying current data to the 2019 salary level methodology ($844 per week, an increase of $160 per week over the existing salary level). These economic conditions have also impacted employees subject to the HCE exemption. Applying current data to the 2019 HCE compensation methodology would result in an annual compensation threshold of $132,964 (an increase of $25,551 over the existing compensation threshold).

At the same time, the Department is also mindful of the desire expressed by multiple commenters to extend the effective date of the new standard salary and annual compensation methodologies from the proposed 60-day period to 6-to-12 months (or more). A longer effective date for the new standard salary level and HCE compensation methodologies would provide employers with more time to make adjustments after they are informed of the exact levels of the thresholds set in this final rule.

After considering the comments, the Department has determined that the final rule will be effective on July 1, 2024, but the new standard salary level methodology and the new HCE total annual compensation methodology will not be applicable until January 1, 2025. The Department is setting the effective date on July 1, 2024 rather than a set number of days after publication in the Federal Register because it will further administrability for employers to have the effective date coincide with the first of a month and some employers' budget years also begin on that date.[113] While the rule will be effective on July 1, 2024, the Department is extending by an additional 6 months the time for employers to comply with the new standard salary level methodology and the HCE total annual compensation methodology. Accordingly, the applicability date for § 541.600(a)(2), which sets out the new standard salary level of the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region, and § 541.601(a)(2), which sets out the new HCE total annual compensation level of the annualized earnings amount of the 85th percentile of full-time nonhourly workers nationally, will be January 1, 2025. The Department decided to delay application of the new HCE total annual compensation methodology so that the new methodologies for both the standard salary level and the HCE compensation level take effect at the same time. The delayed applicability date will allow employers 6 additional months beyond the proposed 60-day effective date in which to evaluate employees who will be affected by the new standard salary level methodology and the new HCE compensation level methodology and make any adjustments.

New § 541.607, Regular updates to amounts of salary and compensation required, will be applicable on the effective date July 1, 2024. Because the current standard salary and HCE annual compensation levels have not been updated in more than 4 years, and economic conditions have changed markedly during that time, the first update will occur on that same date (§ 541.607(a)). Subsequent updates will occur every 3 years after this date starting on July 1, 2027 (§ 541.607(b)). As discussed in section V.A, regular updating of the standard salary and HCE annual compensation levels to reflect current wage data is imperative to ensure that they continue to work effectively in combination with the duties tests in defining bona fide EAP

[113] Future updates will occur every three years on July 1.

employees. In light of the approximately 8-month delay in applicability of the new standard salary and HCE total compensation methodologies, the initial update will use the current methodologies from the 2019 rule, which result in a salary level of $844 per week and an HCE total annual compensation threshold of $132,964. Accordingly, the requirement that an exempt employee be compensated on a salary basis at a salary level of at least $844 per week, set forth in § 541.600(a)(1), and that an employee receive total annual compensation of at least $132,964 per year to qualify for the HCE exemption, set forth in § 541.601(a)(1), will apply on July 1, 2024. The Department believes that this date for the initial update is appropriate because it will use methodologies that employers are familiar with. Subsequent triennial updates will apply the most recent four quarters of data to the standard salary and HCE total annual compensation levels in effect at the time of the updates. The Department anticipates that at the time of the first triennial update, the salary and compensation methodologies that are in effect will be the methodologies described in §§ 541.600(a)(2) and 541.601(a)(2) of this final rule. The Department notes that the standard salary and HCE compensation levels need to be updated regularly based on up-to-date earnings data to ensure that they continue to function effectively regardless of the methodology used to set the levels.

Except for the specific provisions discussed in this section that will become applicable on January 1, 2025, all other provisions of this final rule will be applicable on the effective date on July 1, 2024.

V. Discussion of Final Regulatory Revisions

Consistent with its statutory duty to define and delimit the EAP exemption, the Department is making several changes to the earnings thresholds provided in the part 541 regulations. As explained in greater detail below, the Department is setting the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). The Department additionally is raising the HCE test's total annual compensation requirement to the annualized equivalent of the 85th percentile of weekly earnings of full-time salaried workers nationally. Finally, the Department is adopting a new mechanism to update the standard salary level and the HCE total annual compensation threshold, initially on July 1, 2024 and every 3 years thereafter to ensure that they remain effective tests for exemption. The Department is not making substantive changes to any provisions related to the salary basis or job duties tests.

The primary changes to the existing regulations are in §§ 541.5, 541.600, 541.601, and newly added § 541.607. In addition, the Department is making conforming changes throughout part 541 to update references to the applicable salary level requirements.[114] The discussion below begins with the new updating provision (§ 541.607), which will make an initial update to the salary and compensation thresholds on July 1, 2024, followed by discussion of changes to the standard salary level methodology (§ 541.600(a)(2)) and HCE total annual compensation

[114] The Department is also revising §§ 541.100, 541.200, and 541.300 to reflect that an executive, administrative, or professional employee must be compensated on a salary or fee basis at not less than the level set forth in § 541.600 (rather than referencing a specific salary level amount). Similarly, it is revising § 541.204 and § 541.400 to reflect that an employee employed in a bona fide administrative capacity and a computer employee may qualify for the section 13(a)(1) exemption if they are compensated on a salary or fee basis at not less than the level set forth in § 541.600 (rather than referencing a specific salary level amount). The Department is also updating cross-references to § 541.600(a) in §§ 541.602 and 541.605 to reference § 541.600(a)-(c). Finally, the Department is revising § 541.604, which explains the circumstances under which an employer may provide an exempt employee with additional compensation without violating the salary basis requirement, and § 541.605, which sets forth the conditions under which an administrative or professional employee may be compensated on a fee basis, with examples that reflect the new standard salary level amount of $1,128 per week.

threshold methodology (§ 541.601(a)(2)), which will become applicable on January 1, 2025. As noted in these sections, the Department intends for the changes in this final rule to be severable. Severability is addressed more fully at the end of the discussion of final revisions with a discussion of the new severability provision (§ 541.5).

A. Updating the Standard Salary Level and Total Annual Compensation Threshold

As the Department stated in the NPRM, it has long recognized the need to regularly update the earnings thresholds to ensure that they remain useful in helping differentiate between exempt and nonexempt white-collar employees. In each of its part 541 rulemakings since 2004, the Department has observed that a salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over time.[115] Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide executive, administrative, and professional employees. This problem was most clearly illustrated by the stagnant salary levels in the regulations from 1975 to 2004, during which period increases in the federal minimum wage meant that by 1991, earnings of a worker paid the federal minimum wage exceeded the long test salary level for a 40-hour workweek and came close to equaling the short test salary level.[116]

The Department proposed in the NPRM a mechanism to regularly update the earnings thresholds to maintain their effectiveness. In a new § 541.607(a)(1) and (b)(1), the Department proposed to update the standard salary level and the HCE total annual compensation requirement every 3 years to reflect current earnings data. The Department proposed in § 541.607(a)(2) and

[115] 84 FR 51250–51; 81 FR 32430; 69 FR 22164. *See also*, 88 FR 62176.
[116] *See* section II.B.1.

(b)(2) to make the triennial updates using the methodologies proposed to set the thresholds in the NPRM—*i.e.*, the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (currently the South) for the standard salary level and the annualized weekly earnings of the 85th percentile of full-time nonhourly workers nationally for the HCE total annual compensation requirement.[117] The NPRM also outlined in proposed § 541.607(c) the manner in which the Department would publish advance notice of the updated thresholds and included a pause mechanism in proposed § 541.607(d) that could be triggered to delay a scheduled update under certain circumstances.

The Department proposed to make the first update under its proposed updating mechanism 3 years after the effective date of the final rule. The effective date of the final rule was in turn proposed to be 60 days after publication and to apply to all aspects of the proposed rule, including the proposed methodologies for the standard salary level and the HCE total annual compensation threshold. As discussed in section IV, the Department specifically sought comments on whether the effective date for the proposed change to the standard salary level methodology (to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region) should be 60 days after publication as proposed or if the change should be made effective at some later date, such as 6 months or 1 year after publication of the

[117] Observing that the proposed special salary level for American Samoa and the base rate for the motion picture industry are set in relation to the standard salary level, the Department also proposed that those earnings thresholds reset at the time the standard salary level was updated. The Department is not finalizing its proposal to apply the standard salary level to the U.S. territories subject to the federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry. *See supra* note 9. Therefore, the updating mechanism finalized in this rule will not apply to the special salary levels at this time.

final rule.[118] If the effective date were longer than 60 days, the Department sought comments on "whether it should initially adjust the salary level to reflect recent wage growth (for example, making an initial adjustment for wage growth 60 days after publication of a final rule and having the final rule standard salary level be effective 6 months or a year after publication)."[119] The Department also sought comments on what methodology to use for the initial update, were it to follow such an approach. In particular, the Department invited comments on "whether to implement an initial update to the standard salary level, effective 60 days after publication of a final rule, that uses the current salary level methodology (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region and retail nationally) and applies it to the most recent data available ($822 per week based on current data)."[120]

The Department received numerous comments on its proposed updating mechanism. Many organizations representing employee interests as well as some employers generally supported the updating mechanism, while most organizations representing employer interests opposed it. Many of the commenters opposing the proposed updating mechanism asserted that the Department lacked the authority to institute such a mechanism. After considering the comments received, the Department is finalizing the updating mechanism, with some modifications as discussed below, to keep the salary and compensation thresholds up to date with current data and maintain their effectiveness.

The first update under new § 541.607 will occur on July 1, 2024. As discussed in section IV, the new standard salary level and HCE total annual compensation threshold methodologies

[118] 88 FR 62180
[119] *Id.*
[120] *Id.*

will not be applicable until January 1, 2025 (a total of approximately 8 months after publication of this final rule). Accordingly, § 541.607(a) establishes an initial update on July 1, 2024 to the standard salary level and the HCE total annual compensation threshold using the methodologies in place at that time (*i.e.*, the 2019 rule methodologies), which results in a $844 per week standard salary level and a $132,964 HCE total annual compensation threshold. Section 541.607(b) further establishes future updates to the standard salary level and HCE total annual compensation threshold with current earnings data beginning 3 years after the date of the initial update, and every 3 years thereafter, using the methodologies in place at the time of the updates. The Department anticipates that by the time the first triennial update under the updating mechanism occurs on July 1, 2027, assuming the Department has not engaged in further rulemaking, the new methodologies for the standard salary level and HCE total annual compensation requirement established by this final rule will be effective and the triennial update would employ these new methodologies. In response to commenter concerns, the Department is also adding clarifying language from the NPRM preamble to the final regulatory text of the delay provision.

1. The Department's Authority to Adopt a Salary Level Test

The updating mechanism in new § 541.607 will maintain the effectiveness of the salary and compensation thresholds set in §§ 541.600 and 541.601 by adjusting them regularly to reflect current economic data. At the outset, a small number of commenters contended the Department lacked authority under section 13(a)(1) to even include a salary level test in the regulations, advocating for the Department to withdraw this rulemaking. *See, e.g.*, AFPI; Job Creators Network Foundation; NFIB; Pacific Legal Foundation. These commenters asserted that the express terms of section 13(a)(1) do not permit the Department to include any compensation-based requirements.

The Department maintains its longstanding position that the Secretary's express authority to "define[]" and "delimit[]" the terms of the EAP exemption includes the authority to use a salary level test as one criterion for identifying employees who are employed in a "bona fide executive, administrative, or professional capacity." The Department has used a salary level test since the first part 541 regulations in 1938. From the FLSA's earliest days, stakeholders have generally favored the use of a salary test,[121] and the Department's authority to use a salary test has been repeatedly upheld,[122] including recently in *Mayfield v. U.S. Dept. of Labor*.[123] Despite numerous amendments to the FLSA over the past 85 years, Congress has not restricted the Department's use of the salary level tests in the regulations. Significant regulatory changes involving the salary requirements since 1938 include adding a separate salary level for professional employees in 1940, adopting a two-test system with separate short and long test salary levels in 1949, and creating a single standard salary level test and establishing a new HCE

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[121] *See* Stein Report at 5, 19. As discussed in section V.B.4.i, the vast majority of employer commenters in this rulemaking, whether favoring no increase or a smaller increase, presumed the salary level test's continued existence and utility, with some, such as the National Restaurant Association, expressly referencing their support for the 2019 rule's salary level increase. Many commenters acknowledged the salary level's longstanding function of screening obviously nonexempt employees from the exemption. *See* section V.B.4.ii. Other commenters that opposed the proposal nonetheless cited benefits of having a salary level test, including helping to ensure that the EAP exemption is not abused, *see, e.g.*, AASA/AESA/ASBO, Bellevue University, and "sav[ing] investigators and employers time by giving them a quick, short-hand test[.]" *See* National Restaurant Association.

[122] *See, e.g.*, *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966); *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944); *Walling v. Yeakley*, 140 F.2d 830, 832–33 (10th Cir. 1944).

[123] 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023), *appeal docketed*, No. 23-50724 (5th Cir. Oct. 11, 2023).

exemption test in 2004. These changes were all made through regulations issued pursuant to the Secretary's authority to define and delimit the exemption. Despite having amended the FLSA numerous times over the years, Congress has not amended section 13(a)(1) to alter these regulatory compensation requirements.

The FLSA gives the Secretary power to "define[]" and "delimit[]" the terms "bona fide executive, administrative, or professional capacity" through regulation. Congress thus "provided that employees should be exempt who fell within certain general classifications"—those employed in a bona fide executive, administrative, or professional capacity—and authorized the Secretary "to define and delimit those classifications by reasonable and rational specific criteria."[124] Therefore, the Department "is responsible not only for determining which employees are entitled to the exemption, but also for drawing the line beyond which the exemption is not applicable."[125]

2. Initial Update to the Standard Salary Level and Total Annual Compensation Threshold to Reflect the Change in Earnings Since the 2019 Rule

The Department received many comments regarding its proposed regulatory mechanism for updating the standard salary level and the HCE total annual compensation requirement to maintain their effectiveness. While commenters disagreed on how and when the salary and total annual compensation thresholds should be updated, commenters generally did not dispute that the earnings thresholds need to be periodically updated to reflect current economic conditions.

[124] *Walling*, 140 F.2d at 831-32; *see Ellis v. J.R.'s Country Stores, Inc.,* 779 F.3d 1184, 1199 (10th Cir. 2015) (approvingly quoting *Walling*); *see also Auer v. Robins,* 519 U.S. 452, 456 (1997) ("The FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees.").

[125] Stein Report at 2.

Many commenters that opposed the proposed updating mechanism nonetheless agreed that the thresholds in the regulations need to be periodically updated. *See, e.g.*, ASTA; FMI; SBA Advocacy; SHRM; TechServe Alliance; World Floor Covering Association (WFCA).

In the context of addressing the Department's proposed standard salary level methodology, several commenters generally expressed support for—or in opposing the salary level suggested in the alternative—an increase to the salary level using the 2019 methodology. *See, e.g.*, Bellevue University; Center for Workplace Compliance (CWC); RILA; YMCA. CWC noted that the 2019 methodology is well-established and already familiar to employees and employers, and Bellevue University similarly stated that this methodology "has been previously field-tested on the U.S. economy[.]" As noted in section IV, commenters generally did not address applying the 2019 methodology through the updating mechanism.

The Department remains convinced that effective salary and compensation thresholds must use up-to-date earnings data. This position is long-standing. When the Department updated its salary level tests in 1949, for example, it explained that the "relative ineffectiveness of these tests in recent years is the result of changed economic conditions rather than any inherent weakness in the tests[,]" and that the "increase in wage rates and salary levels gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees."[126] The principle that effective tests for exemption must use up-to-date earnings data remains as true today as it was 75 years ago.

The Department's need to update the standard salary level and HCE total annual compensation requirement for current data in this rulemaking is distinct from its decision to

[126] Weiss Report at 8.

establish new methodologies for setting those thresholds. The current salary and compensation levels have been in place for more than 4 years and need to be updated to reflect current wage data to maintain their effectiveness.[127] Since the Department's last rulemaking in 2019, there has been significant change in salaried worker earnings.[128] The $684 standard salary level is far below what constitutes the 20th percentile of weekly earnings of full-time salaried workers in the South and/or in the retail industry nationally using current data, which greatly undermines the utility of the threshold as a means of helping distinguish exempt from nonexempt employees. The same is true for the HCE total annual compensation threshold. Updating the existing thresholds to reflect current earnings data is consistent with the intent the Department has expressed repeatedly in its past part 541 rulemakings, including in the 2019 rule, to periodically update the thresholds.

For these reasons, the Department is revising final § 541.607(a) to provide for an initial update to the standard salary level and HCE total annual compensation requirement with current earnings data on July 1, 2024. Specifically, the standard salary level will be updated to the 20th percentile of weekly earnings of full-time salaried workers in the South and/or in the retail industry nationally using the most recent data, resulting in a standard salary level of $844 per week. The HCE total annual compensation threshold will be updated to the 80th percentile of full-time salaried worker earnings nationwide using the most recent data, resulting in an annual compensation threshold of $132,964. The Department believes that the July 1, 2024 effective date provides sufficient time for employers to adjust to this initial update because the

[127] The standard salary level and HCE total annual compensation threshold in the 2019 rule were set using pooled data for July 2016 to June 2019, adjusted to reflect 2018/2019. 84 FR 51250.
[128] *See* section VII.

methodology used for the initial update to the standard salary level has been used since 2004 and is familiar to the regulated community. The size of the initial increase to the standard salary level, which is $160 per week, is also less (in nominal terms) than the $229 per week change that resulted from the 2019 rule.[129]

The initial update on July 1, 2024 and the change in the standard salary level and HCE total annual compensation methodologies on January 1, 2025 will result in two increases in the compensation thresholds within a 12-month period. The Department recognizes that for some employers both changes to the compensation thresholds may occur in the same budget year. Because both the amount of the initial update and the subsequent increase to the thresholds are set forth in this final rule, some employers may choose to make a single adjustment at the first date that encompasses both the initial update and the impending change to the standard salary level and the HCE total annual compensation threshold.[130]

The Department intends for the initial update of the standard salary level and the HCE total annual compensation requirement, using current earnings data applied to the 2019 rule methodologies, to be severable from future triennial updates to the thresholds under § 541.607(b), as well as from the revision to the methodologies for the standard salary level and the HCE total annual compensation threshold discussed in section V.B and section V.C. In implementing the initial update, the Department intends to account for changes in earnings since

[129] Consistent with the 2019 rule, the Department used pooled data for the most recent 3 years (2021, 2022, 2023), adjusting them to reflect 2023, for the initial updates to both the standard salary level and HCE total annual compensation threshold. *See* 84 FR 51250.
[130] Although the Department's approach is not a phase-in, the effect of increasing the salary level twice in 8 months is, from a timing perspective, not altogether different from the request from some commenters to phase in the salary level in more than one step. *See, e.g.*, Argentum & ASHA; Associated General Contractors; SBA Advocacy.

the 2019 rule. In changing the methodology for the standard salary level, the Department further intends to fully restore the salary level's historic screening function and account for the shift in the 2004 rule from a two-test to a one-test system for defining and delimiting the EAP exemption.[131] Lastly, in changing the methodology for the HCE total annual compensation threshold, the Department intends to ensure the HCE threshold's role as a streamlined alternative for those employees most likely to meet the standard duties test by excluding all but those employees "at the very top of [the] economic ladder[.]"[132] These are independent objectives of this rulemaking and the provisions implementing them can each stand alone. Therefore, the Department intends for the initial update to remain in force even if the methodologies for the standard salary level and/or the HCE total annual compensation threshold established by this final rule are stayed or do not take effect. Similarly, the Department intends for the initial update to remain in effect even if future triennial updates under § 541.607(b) are stayed or do not take effect.

The initial update will take effect approximately 60 days after the publication of the final rule, immediately coming out of this notice and comment rulemaking. As such, the notice procedures set forth in § 541.607(b)(3) will not apply. As discussed below, future triennial updates will be preceded by advance publication of a notice of the updated salary level and HCE total annual compensation threshold in the Federal Register. For the initial update, this final rule provides notice of the updated salary and compensation levels.[133]

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[131] *See* section V.B.
[132] *See* section V.C.
[133] The NPRM included updating the 2019 rule standard salary level and HCE annual compensation threshold using 2022 data as a regulatory alternative, stating that applying the

3. Future Triennial Updates to Keep the Standard Salary Level and Total Annual Compensation Threshold Up to Date

As the Department previously explained, the earnings thresholds are only an effective indicator of exempt status if they are kept up to date. Left unchanged, the thresholds become substantially less effective in helping identify exempt EAP employees as wages for workers increase over time. To that end, the Department proposed to triennially update the standard salary level and HCE total annual compensation threshold by applying the most recent earnings data to the methodologies set forth in proposed § 541.600(a)(1) and § 541.601(a)(1), while any change to the methodologies used to set the standard salary level and HCE annual compensation threshold would be effectuated through future rulemaking.

The Department received many comments on its proposed triennial updating mechanism for keeping the thresholds up to date in the future, which are addressed below. The comments were sharply divided on this aspect of the NPRM. After considering the comments received, the Department concludes that establishing a mechanism for resetting the standard salary level and HCE total annual compensation requirement based on current earnings data, and on a regular 3-year schedule, will ensure that the thresholds remain effective into the future and thus better serve to help define and delimit the EAP exemption.

i. The Department's Authority to Update the Standard Salary Level and Total Annual Compensation Threshold with Current Data in the Future

The Department received many comments regarding its authority to update the earnings thresholds through the proposed triennial updating mechanism. A majority of the commenters

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methodologies would result in a standard salary level of $822 per week and a HCE annual compensation threshold of $125,268. *See* 88 FR 62218.

opposing the updating mechanism challenged the Department's authority to adopt such a provision. Most commenters that supported the updating mechanism did not specifically discuss the Department's authority to institute such a mechanism. As to commenters supporting the proposed triennial updating mechanism that addressed the issue, they supported the Department's authority.

Commenters favoring automatic updating, such as AFL-CIO and EPI, agreed with the Department that just as the Department has authority to set salary thresholds for the EAP exemption, it also has authority to provide for regular updates to ensure the thresholds do not erode over time. Some supportive commenters further emphasized that future updates would make no change to the standard (*i.e.*, methodology) by which the Department implements the FLSA, but rather merely ensure that the standard accounts for current economic conditions. *See, e.g.*, Administrative Law Professors; Democracy Forward Foundation; EPI. The Administrative Law Professors similarly asserted that automatic adjustments to the earnings thresholds fall within the Secretary's authority to define and delimit "what it means to function in a 'bona fide executive, administrative, or professional capacity[.]'" Observing that even a so-called "static" salary threshold expressed in "non-indexed dollar terms" is constantly changing as a matter of economic value, the Administrative Law Professors asserted that "if a non-indexed salary threshold is lawful, as nobody seriously questions, so too is a standard pegged to income percentile." The Administrative Law Professors observed "it is arguably more rational" for the Department to "proffer a regulation that expressly accounts for the inevitably dynamic nature of every salary threshold . . . rather than to permit arbitrarily fluid macroeconomic conditions to dictate the threshold's true economic worth."

On the other hand, many commenters opposing the proposed updating mechanism asserted that the Department lacks statutory authority to update the thresholds in this manner. Some of these commenters contended that since the FLSA does not expressly authorize the Department to index the earnings thresholds unlike, for example, the Social Security Act or the Patient Protection and Affordable Care Act, it follows that the FLSA does not authorize the Department to automatically update the thresholds.[134] *See, e.g.*, CUPA-HR; International Dairy Foods Association (IDFA); PPWO; RILA; Seyfarth Shaw. Several commenters pointed out that Congress did not provide for automatic updating of any of the earnings requirements under the FLSA, such as the minimum wage under section 6, the tip credit wage under section 3(m), or the hourly wage for exempt computer employees under section 13(a)(17). *See, e.g.*, AFPI; FMI. Commenters including National Restaurant Association and PPWO further asserted that Congress never amended the FLSA to grant the Department explicit authority to index the salary level despite knowing that the Department has updated the salary level on an irregular schedule.

As the Department stated in the NPRM, the Department's authority to update the salary level tests for the EAP exemption by regularly resetting them based on existing methodologies is

[134] In contrast, the Administrative Law Professors highlighted that "[a]utomatic updating is a common feature of regulations pegged to monetary values, even when the relevant authorizing statutes make no specific reference to indexing or automatic adjustment." Some of the examples cited by the Administrative Law Professors to illustrate this point include: 79 FR 63317 (2014) (establishing automatic inflationary adjustments to the minimum amount set by the regulation to define "adverse credit history"); 76 FR 23110 (2011) (establishing automatic adjustments to the amount of "Denied Boarding Compensation" airlines must pay affected passengers); 88 FR 35150 (2023) (adopting once-every-five year inflation adjustments to the revenue threshold for defining a "small business"); and *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144 (7th Cir. 1982), cert. denied, 103 S. Ct. 210 (1982) (upholding a rule promulgated by the Copyright Royalty Tribunal establishing a $50 compulsory royalty fee to be paid by jukebox operators, and which would be subject to future inflationary adjustments).

grounded in section 13(a)(1), which expressly gives the Secretary broad authority to define and delimit the scope of the exemption. Using this broad authority, the Department established the first salary level tests by regulation in 1938. Despite numerous amendments to the FLSA over the past 85 years, Congress has not restricted the Department's use of the salary level tests. As just discussed, significant changes involving the salary requirements made through regulations issued pursuant to the Secretary's authority to define and delimit the exemption include adding a separate salary level for professional employees in 1940, adopting the two-test system in 1949, and switching to the single standard test and adding the new HCE test in 2004. Despite having amended the FLSA numerous times over the years, Congress has not amended section 13(a)(1) to alter these regulatory salary requirements.

Unlike the statutes some of the commenters referenced explicitly providing for indexing, or the statutory FLSA wage rates—*i.e.*, the minimum wage under section 6, the tip credit wage under section 3(m), or the hourly wage for exempt computer employees under section 13(a)(17)—the part 541 earnings thresholds are established in the regulations. Therefore, it is not surprising that the FLSA contains no specific reference to the indexing or automatic adjustments of these thresholds. The Department agrees with the Administrative Law Professors and other commenters that stated that the Department has the authority to establish a mechanism to automatically adjust the earnings thresholds to ensure their continued effectiveness, using a process established through notice and comment rulemaking, just as it has the authority to initially set them. The Department believes the updating mechanism in this final rule fulfills its statutory obligation to define and delimit the EAP exemptions by preventing the thresholds from becoming obsolete and providing predictability and clarity for the regulated community.

Many of the commenters opposed to the updating mechanism also asserted that automatically updating the earnings thresholds would violate the APA's rulemaking requirements expressly incorporated by reference in section 13(a)(1). *See, e.g.*, AFPI; FMI; National Club Association; and Wage and Hour Defense Institute. These and other commenters claimed that the Department cannot lawfully update the salary level without engaging in notice and comment rulemaking for each update. *See, e.g.*, AASA/AESA/ASBO; Competitive Enterprise Institute; CWC; RILA. IFDA, for example, asserted that notice and comment rulemaking needs to precede each future update so that stakeholders have the opportunity to comment on and adequately prepare for any changes that will affect them. AHLA commented that the proposal to update the thresholds triennially without a preceding opportunity for comment is "drastic and troublesome" and that "notice and comment will help ensure that the knowledge, expertise, and vital input of interested stakeholders will be considered before moving forward with increases."

Relatedly, AFPI, NRF, and SBA Advocacy asserted that automatic updating would violate the directive under section 13(a)(1) that the Department define and delimit the EAP exemption "from time to time" by regulations. NRF, for example, noted that Congress asked the Department to revisit the EAP exemptions from time to time "expecting the Department to use its deep knowledge of the U.S. economy in general, and labor market in particular, to establish appropriate parameters for the exemptions" and contended that by implementing automatic updates the Department evades that decision-making process. AFPI similarly asserted that the "directive, 'from time to time,' does not allow the Department to set it and forget it."

The Department disagrees with the assertion that triennial updates using the compensation methodologies adopted in the regulations improperly bypass the APA's—and section 13(a)(1) by reference—requirements for notice and comment rulemaking. The Department is adopting an updating mechanism in this rulemaking after publishing a notice of the proposed rule and providing opportunity for stakeholders to comment in accordance with the APA's notice and comment requirements. The Department has received and considered numerous comments on the proposed updating mechanism. Future updates under the triennial updating mechanism would simply reset the thresholds by applying current data to a standard already established by notice and comment regulation, providing clarity for the regulated community as to future changes in the thresholds. Therefore, the Department disagrees with commenters that claimed that notice and comment rulemaking must precede each future update made through the updating mechanism even where the methodology for setting the compensation levels and the mechanism for updating those levels would remain unchanged.[135] The updating mechanism will not alter the Department's ability to engage in future rulemaking to change the updating mechanism or any other aspect of the part 541 regulations at any point.

The Department also disagrees with commenters that claimed section 13(a)(1)'s "time to time" language precludes the Department from adopting an updating mechanism. The updating

[135] Some commenters, such as Independent Electrical Contractors, RILA, and U-Haul, further asserted that automatic updates improperly bypass the requirements of the Regulatory Flexibility Act ("RFA") and executive orders requiring the Department to undertake a detailed economic and cost analysis. The Department disagrees. Pursuant to the RFA, the Department has included in this final rule as well as in the NPRM detailed estimates for the future costs of updates under the updating mechanism. *See* section VII and VIII; 88 FR 62224. Similarly, as relevant here, Executive Order 13563 directs agencies to take certain steps when promulgating regulations, including using the "best available techniques to quantify anticipated present and future benefits and costs as accurately as possible" and adopting regulations "through a process that involves public participation." 76 FR 3821 (Jan. 18, 2011). The current rulemaking fully satisfies all aspects of Executive Order 13563. *See* section VII; 88 FR 62182. The RFA and Executive Order 13563 do not require notice and comment rulemaking to precede future triennial updates made through the updating mechanism established in this rulemaking.

mechanism would only ensure the standard salary level and total annual compensation threshold remain at the percentiles established through rulemaking. This does not preclude the Department from engaging in future rulemaking "from time to time" if it determines that there is a need to change the underlying methodologies for setting the standard salary level or HCE total annual compensation threshold, the updating mechanism, or any other substantive change to part 541, as the Department did, for instance, in 1940, 1949, 1958 1975, 2004, 2016, and 2019.

Many commenters opposing the updating mechanism referenced the Department's prior statements to further support their assertion that the Department lacks authority to implement automatic updating. In particular, commenters pointed to the Department's decision not to institute an automatic updating mechanism in the 2004 rule and its statement that "the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases." *See, e.g.*, NAM; NFIB; SBA Advocacy. Others, like PPWO, further asserted that automatic updates are contrary to the Department's statement in the 2004 rule that "[t]he salary levels should be adjusted when wage survey data and other policy concerns support such a change."

As stated in the NPRM, the Department's decision not to institute an automatic updating mechanism in the 2004 and 2019 rulemakings in no way suggests that it lacks the authority to do so. In its 2004 rule, the Department stated that it found nothing in the legislative or regulatory history that would support indexing or automatic increases.[136] As the Department elaborated in its 2016 rulemaking, there was likewise no such authority prohibiting automatic updating.[137] The

[136] 69 FR 22171.
[137] *See* 81 FR 32432–33 (noting that "instituting an automatic updating mechanism . . . is an appropriate modernization and within the Department's authority.").

2004 rule did not discuss the Department's statutory authority to promulgate an updating mechanism through notice and comment rulemaking or explore in detail whether automatic updates to the salary levels posed a viable solution to problems created by lapses between rulemakings. As the Department explained in the 2016 rule, the Department's reference in the 2004 rule to automatic updating simply reflected the Department's conclusion at that time that an inflation-based updating mechanism, such as one based on changes in the prices of consumer goods, that unduly impacts low-wage regions and industries, would be inappropriate. Such concerns are not implicated here, where the mechanism will update the salary level to keep it at the same percentile of earnings of full-time salaried workers. As for concerns that the salary level should be updated only when wage data warrants it, the updating mechanism does just that—as the earnings thresholds will change only to the extent earnings data in the relevant data sets have changed, whether upward or downward as conditions dictate.

Similarly, the Department declined to adopt automatic updating in the 2019 rule because it "believe[d] that it is important to preserve the Department's flexibility to adapt to different types of circumstances,"[138] and not because it lacked authority to do so. While the Department decided not to institute an updating mechanism in its 2019 rule, it never said that it lacked the statutory authority to do so. Upon further consideration, the Department concludes that the best way to ensure the standard salary level and HCE total compensation threshold remain up to date is a triennial updating mechanism that maintains the Department's flexibility to adapt to different circumstances and change course as necessary.

[138] 84 FR 51252.

ii. Rationale for Continuing to Update the Standard Salary Level and Total Annual Compensation Threshold with Current Data in the Future

The Department explained in the NPRM that its proposed updating mechanism would allow for regular and more predictable updates to the earnings thresholds, which would benefit both employers and employees and would better fulfill the Department's statutory duty to define and delimit the EAP exemption by preventing the erosion of those levels over time. The Department noted that its regulatory history, marked in many instances by lengthy gaps between rulemakings, underscored the difficulty with updating the earnings thresholds as quickly and regularly as necessary to keep pace with changing employee earnings and to maintain the full effectiveness of the thresholds. Through the proposed updating mechanism, the Department explained it would be able to timely and efficiently update the standard salary level and the HCE total annual compensation requirement by using the same methodologies as initially proposed and adopted through notice and comment rulemaking to set the thresholds. The Department noted that updating the thresholds in this manner would prevent the more drastic and unpredictable increases associated with less frequent updates and ensure that future salary level increases occur at a known interval and in more gradual increments. The Department received many comments on the rationale for implementing the proposed triennial updating mechanism.

Several organizations representing employee interests as well as a handful of employers agreed with the Department that an updating mechanism would ensure the thresholds keep pace with wages and retain their usefulness. *See, e.g.*, Coalition of Gender Justice and Civil Rights Organizations; National Partnership; National Education Association (NEA); National Employment Lawyers Association (NELA); National Employment Law Project (NELP); Uncommon Goods; W.S. Badger Company. Nichols Kaster, PLLP (Nichols Kaster) noted the updating mechanism protects the thresholds from becoming outdated and irrelevant, although it believed that annual updates would better reflect the economy. NELA commented that "indexing represents the only simple and accurate" way to preserve the real value of the standard salary level and the HCE total compensation threshold through time, although they contended that the proposed methodologies should be higher earnings percentiles.

Many commenters supportive of the updating mechanism also asserted that regular updates would provide greater predictability for employers and employees alike. *See, e.g.*, AFL-CIO; Center for WorkLife Law at University of California Law and Partner Organizations (Family Caregiving Coalition); Justice at Work; NEA. Small Business Majority expressed support for the proposed updating mechanism noting that smaller, predictable increases that are known well in advance—as opposed to "large and sudden" increases—would allow small business owners to be better prepared for any staffing or compensation changes they need to make. Nineteen Democratic Senators commented that an updating mechanism is the most effective way to provide consistency and stability for both workers and businesses. *See also, e.g.*, EPI; Washington State Department of Labor and Industries. CLASP similarly noted the proposed updating provision would enable employers to know exactly what to expect and when to expect it.

In contrast, many organizations representing employer interests disagreed with the Department's rationale for the proposed updating mechanism. Several of these commenters criticized the Department for stating that the updating mechanism is a more "viable and efficient" means of updating the thresholds by asserting that the Department is trying to avoid its obligation to engage in notice and comment rulemaking simply because such rulemaking is resource-intensive. *See, e.g.*, IDFA; National Restaurant Association; PPWO. The Chamber similarly commented that the Department's history of long gaps in rulemaking is not an adequate justification for adopting what it characterized as "a historically unprecedented change."

Commenters including AHLA, FMI, the National Beer Wholesalers Association, and Seyfarth Shaw, asserted automatic updating would lead to uncertainty that would pose administrative and compliance burdens on employers. Some commenters, such as HR Policy Association and PPWO, asserted the proposed mechanism would make it difficult to ascertain exactly what the threshold will be every 3 years. Other commenters, including CUPA-HR, FMI, IDFA, and SHRM, asserted triennial updates would have a significant financial impact on employers as they would need to account for the cost of salaries or potential overtime as well as the cost of conducting reclassification analysis and implementing the necessary changes every 3 years. Some nonprofit organizations and providers of home and community-based health services expressed concern that future updates would be difficult for the nonprofit sector because of their funding sources. *See, e.g.*, Allegheny Children's Initiative; ANCOR.

Some commenters opposing the updating mechanism claimed automatic updates would hinder the Department from considering economic circumstances when making updates. Ten Republican Senators asserted automatic updates "blind the administration to critical considerations about the state of the economy and the workforce, including the unemployment rate, inflation, job vacancies, or whether employers are in a position to adjust to the increases without shedding jobs." Some commenters, including Illinois College, ISSA, and the Society of Independent Gasoline Marketers of America, expressed concern that the proposed mechanism could lead to updates happening at a time of economic downturn or a recession and could further exacerbate those economic conditions. Others expressed concern that the updating mechanism would hinder future rulemaking to change the earnings thresholds. *See, e.g.*, Chamber; National Association of Convenience Stores.

The Department continues to believe that the updating mechanism will ensure the earnings thresholds keep pace with changes in earnings and remain useful in the future in helping to delineate EAP employees from non-EAP employees. Whereas a fixed salary level threshold becomes less effective over time as the data used to set it grows outdated, a fixed methodology remains relevant if applied to contemporaneous data. The Department agrees with the commenters that stated that the updating mechanism's triennial updates would provide greater certainty and predictability for the regulated community. Unlike irregular updates to the earnings thresholds, which may result in drastic changes to the thresholds, regular updates on a pre-determined interval and using an established methodology will produce more predictable and incremental changes. For this reason, the Department disagrees with the assertion by some commenters that regular updates will lead to unpredictable adjustments and ongoing uncertainty. The Department also disagrees with commenters like HR Policy Association that claimed the proposed mechanism will make it difficult to ascertain what exactly the threshold will be every 3 years. Through the updating mechanism, the Department will reset the standard salary level and total annual compensation threshold using the most recent, publicly available, U.S. Bureau of Labor Statistics (BLS) data on earnings for salaried workers. Therefore, stakeholders will be able to track where the thresholds would fall on a quarterly basis by looking at the BLS data[139] and can estimate the changes in the thresholds even before the Department publishes the notice with

[139] *See* https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.

the adjusted thresholds in the Federal Register. The Department believes that, compared to the irregular updates of the past, stakeholders will be better positioned to anticipate and prepare for future updates under the updating mechanism.

Moreover, the Department does not agree with the assertion that routine updates would lead to undue increases at a time of economic downturn or recession. If anything, the Department's new updating mechanism will ensure that the thresholds match the earnings data as they exist at the time of the update, whether by increasing or decreasing the earnings thresholds as warranted by the data. As discussed below, the Department's decision to deviate from the 2016 rule by adopting a mechanism for pausing future updates further guards against such concerns. Similarly, nothing about the updating mechanism precludes the Department from revisiting the standard salary level and HCE total annual compensation methodologies in the future when conditions warrant. Having considered the comments received, the Department remains convinced that an updating mechanism providing for regular updates on a triennial basis is the best means of ensuring that the salary and compensation tests continue to provide an effective means, in tandem with the duties tests, to distinguish between EAP and non-EAP employees.

iii. Specific Features of the Updating Mechanism

The Department received many comments regarding the various aspects of the proposed updating mechanism, including the updating frequency, methodology, notice period, and pause mechanism. The Department proposed in § 541.607(a) and (b) to update the earnings thresholds every 3 years by using the same methodology used in the regulations to set the thresholds. Specifically, proposed § 541.607(a)(2) and (b)(2) stated that the methodologies for setting the standard salary level and HCE annual compensation threshold in the NPRM would be used for future updates.

Many commenters that supported the proposed updating mechanism expressed a preference for more frequent updates. *See, e.g.*, Coalition of State AGs; Jobs to Move America; NEA; NELP. Commenters including AFL-CIO, National Partnership, and Nichols Kaster asserted annual updates, compared to triennial updates, offered better predictability and would ensure that the salary threshold keeps pace with the changes in wages. EPI similarly observed that annual updates would ensure that the salary threshold more closely adheres to the chosen percentile "rather than slipping further and further behind in between triennial updates[.]"

Most commenters that opposed updating did not separately comment on the updating frequency, but some addressed it in the context of discussing the impact of the updating mechanism on employers. Many of these commenters claimed triennial updates would impose substantial financial and compliance burdens on employers as they would need to engage in reclassification analysis and implement necessary changes to adjust to the updated thresholds every 3 years. *See, e.g.*, ABC; CUPA-HR; HR Policy Association; NAM. Most of the commenters opposing the updating mechanism did not suggest an alternative updating frequency. Notwithstanding their objection to automatic updating, however, a few commenters, including AHLA, ASTA, WFCA, and YMCA, suggested a longer updating frequency ranging from 4 to 6 years.

The Department agrees with the commenters that stated annual updates would keep the salary level more up to date given that employee earnings are constantly changing. However, as stated in the NPRM, the Department is also mindful of the potential burden that possible changes to the tests for exemption on an annual basis would impose on employers, including costs associated with evaluating the exemption status of employees on an annual basis. Conversely, the Department is not convinced by commenter claims that triennial updates would impose an undue financial and compliance burden on employers. Many of these commenters did not address the fact that the alternative to automatic updating is not a permanent fixed earnings threshold, but instead larger changes to the threshold that could occur during irregular future updates. Since the updating mechanism will change the thresholds regularly and incrementally, and based on actual earnings of salaried workers, the Department predicts that employers will be in a better position to be able to adjust to the changes resulting from triennial updates. The Department remains persuaded that triennial updates are frequent enough to ensure that the part 541 earnings thresholds are kept up to date—and continue to serve the purpose of helping to identify exempt employees—while not being overly burdensome for employers. The final rule, therefore, adopts an updating frequency of 3 years as proposed.

The comments regarding the method through which the Department's proposed updating mechanism would reset the salary and compensation thresholds were also divided. Commenters favoring routine updates also supported the proposal to update the thresholds using the fixed percentile approach—to keep the thresholds at the same percentile of earnings of full-time salaried worker as established by the regulations. NELA, for example, asserted that updating the thresholds using a fixed percentile of earnings "is the fairest way to maintain consistency in workers' FLSA eligibility in light of inevitable economic change." EPI similarly noted updating the thresholds through the proposed methodology ensures that the standard under the Department's rule "is simply preserved – neither strengthened nor weakened."

Commenters that opposed automatic updating opposed the proposed updating methodology. Several of these commenters reiterated an assertion from comments on the 2016 rulemaking that the proposed updating mechanism—tied to a fixed percentile—would result in the salary level being "ratcheted" upward over time due to the resulting actions of employers. *See, e.g.*, Chamber; NAM; NRF (including a report by Oxford Economics); SBA Advocacy. The commenters contended that in response to each automatic update, most employers would either reclassify employees earning below the new salary level to hourly status or raise the salaries of those employees to keep their exempt status. These responses, the commenters claimed, would skew the relevant data for future updates in favor of substantial increases because those employees who were reclassified as hourly would fall out of the data pool causing the data pool to be smaller and skew towards higher-paid workers. *See, e.g.*, Chamber; National Association of Convenience Stores; National Restaurant Association; NRF. While expressing a strong preference that automatic updates be abandoned altogether, some of the commenters concerned about this possible effect suggested that the Department adopt an updating mechanism tied to an inflation-related index. *See* Seyfarth Shaw; SHRM.

The Department notes that very similar comments concerning an alleged "ratcheting" effect were received during the 2016 rulemaking, which also proposed an updating mechanism based on earnings percentiles. In response to those comments, the Department examined historical data to determine the impact of its previous salary increase.[140] Specifically, the Department looked at the share of full-time white-collar workers paid on an hourly basis before and after the 2004 rule (January–March 2004; January–March 2005) both below and above the

[140] 81 FR 32441.

standard salary level. The Department found that following the 2004 rule, the share of full-time white-collar workers being paid hourly actually decreased marginally in the group below the standard salary level and increased slightly in the group above the standard salary level.[141]

The Department finds the claim that updating with a fixed percentile methodology would lead to the "ratcheting" upward of the thresholds to be unsubstantiated. The "ratcheting" claim is almost entirely based on the assumption that employers will respond to an automatically updated salary level by converting all or a large number of newly nonexempt workers to hourly status, thus removing them from the data set of full-time salaried workers. Yet none of the commenters advancing this claim presented any tangible data or evidence to support their assumption. Even those few commenters that provided economic analyses rested their views on the same unsubstantiated assumption that employers will generally reclassify newly nonexempt employees as hourly. *See, e.g.*, NRF (including a report by Oxford Economics); PPWO (quoting a study by Edgeworth Economics).[142] The results of the Department's close examination of the impact of the 2004 salary level increase provide no evidence that salary level increases due to regular triennial updating will result in employers converting significant numbers of affected EAP workers to hourly pay status and thus raising potential concerns about skewing future updates. Although many commenters made nearly identical ratcheting claims in this rulemaking, none of the commenters addressed the Department's analysis in response to those same claims in the 2016 rule.

[141] *See id.* at 32441, 32507–08.

[142] The Edgeworth Economic study that was quoted by PPWO and a few other commenters seemed to assume, without any support, that all affected workers or newly nonexempt workers who earn between $684 and $1,059 per week will be reclassified as hourly employees.

Having found no merit in the "ratcheting" claim, the Department declines to adopt the alternative methodologies suggested such as an updating mechanism tied to an inflation-related index. As noted in the NPRM, the fixed percentile approach, as opposed to other methods such as indexing the thresholds for inflation, eliminates the risk that future levels will deviate from the underlying salary setting methodology established through rulemaking. During the 2016 rule, the Department extensively considered whether to update the thresholds based on changes in the Consumer Price Index for All Urban Consumers (CPI-U)—a commonly used economic indicator for measuring inflation.[143] The Department chose to update the thresholds using the same methodology used to initially set them in that rulemaking (*i.e.*, a fixed percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region), observing that the objectives that justify setting the salary level using a fixed percentile methodology also supported updating the thresholds using the same methodology.[144] The Department is persuaded that updating the earnings thresholds by applying the same methodology used to originally set the levels instead of indexing them for inflation best ensures that the earnings thresholds continue to fulfill their objective of helping effectively differentiate between bona fide EAP employees and those who are entitled to overtime pay and work appropriately with the duties test.

New § 541.607 therefore establishes triennial updates of the standard salary level and the HCE total compensation threshold using the same methodologies used to set those thresholds. Assuming the Department has not engaged in further rulemaking, the Department anticipates the

[143] *See* 81 FR 32438–41.
[144] *See id*. at 32440.

second update under the updating mechanism—which will occur 3 years after the date of the initial update discussed in section V.A—will use the methodologies established by this final rule as those will become effective before the second update. Accordingly, the second update will reset the standard salary level to the 35th percentile of weekly earnings of full-time workers in the lowest-wage Census Region and will reset the HCE total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally based on contemporaneous data at that time.

The Department further proposed to publish in the Federal Register a notice with the adjusted standard salary level and the HCE total annual compensation threshold at least 150 days before the date the adjusted thresholds are set to take effect and to publish the updated thresholds on WHD's website no later than their effective date. The Department proposed to update both thresholds using the most recent available 4 quarters of data, as published by BLS, preceding the publication of the Department's notice with the adjusted levels. The Department received fewer comments regarding these aspects of the proposal than on the updating mechanism itself.

Most commenters supporting the proposed updating mechanism did not separately comment on the 150-day notice period. Some commenters opposing automatic updates asserted that the 150-day notice period would not be adequate time to prepare for compliance with the new updated thresholds. *See, e.g.*, Association of Public and Land-grant Universities (APLU) (suggesting 180-day advance notice); Chamber (suggesting at least 1 year notice); National Association of Convenience Stores (same); The American Association of Advertising Agencies (The 4As) (same). Regarding the data set, EPI suggested the Department use the most recent quarter of data asserting that the salary threshold would be "suppressed" for 2 out of every 3 years if the Department adopts triennial updates. On the other hand, the National Association of Convenience Stores, while opposing automatic updating, recommended the Department use the most recent 6 quarters of data, or those quarters minus the 2 most recent, to account for changes it claimed employers may make preemptively to adjust to an upcoming update for budgetary reasons.

After considering the comments received, the Department is persuaded that a notice period of not less than 150 days provides sufficient time for employers to make the necessary adjustments to comply with the updated thresholds. This is especially true given that employers will be able to access the data set that will be used to make the adjustments as published by BLS and anticipate the extent of the adjustment even before the Department publishes the notice. A period substantially longer than 150 days would hinder the Department's ability to ensure that the thresholds that take effect are based on the most up-to-date data. Similarly, the Department believes that using the most recent available 4 quarters of data will account for the Department's goal that the thresholds reflect prevailing economic conditions while balancing the concerns of commenters that wanted a longer or shorter period for the data set. Therefore, the final rule establishes that for future updates under the updating mechanism, the Department will publish in the Federal Register a notice with the adjusted thresholds not fewer than 150 days before the date the new adjusted thresholds are set to take effect and will publish the updated thresholds on the WHD website no later than their effective date. The updates will be based on the most recent available 4 quarters of data as published by BLS.

Lastly, the Department's proposal included a provision providing for the delay of a scheduled update under the updating mechanism while the Department engages in notice and comment rulemaking to change the earnings requirements and/or updating mechanism, where economic or other conditions merit. The Department explained that the delay would be triggered if the Department publishes an NPRM proposing to change the salary level methodology and/or modify the updating mechanism by the date on which it publishes the notice of the revised salary and compensation thresholds. In that instance, the notice with the adjusted thresholds must state that the scheduled update will be paused for 120 days from the day the update was set to occur while the Department engages in rulemaking, and that the pause will be lifted on the 121st day unless the Department finalizes a rule changing the salary level methodology and/or automatic updating mechanism by that time. In the event the Department does not issue a final rule by the prescribed deadline, the pause on the scheduled update will be lifted and the new thresholds will take effect on the 121st day after they were originally scheduled to take effect. The Department also explained the 120-day pause would not affect the date for the next scheduled triennial update given the relative shortness of the delay and so as not to disrupt the updating schedule. The next update, therefore, would occur 3 years from the date on which the delayed update would have originally been effective.

The Department received somewhat mixed comments regarding its proposed pausing mechanism. For example, notwithstanding their objection to automatic updating (and in some cases, certain aspects of the pause mechanism), some employer organizations such as CUNA, AHLA, and the National Association of Professional Insurance Agents commended the Department for recognizing that there may be circumstances that may require temporarily delaying a scheduled update. Some commenters that supported the updating proposal agreed. For example, the Coalition of State AGs described the delay provision as "a fail-safe mechanism" that would provide the Department flexibility to adjust to changed circumstances as necessary. On the other hand, Sanford Heisler Sharp, while otherwise favoring the updating mechanism, objected to the pause feature asserting that it would "inject uncertainty into the administration of the threshold, undermining the stated purpose of the NPRM to simplify enforcement of overtime and minimum wage protections."

Some commenters took issue with the phrase "unforeseen economic or other conditions" in the NPRM's preamble which generally described the circumstances in which the Department may trigger the pause mechanism. AHLA, CUNA, and NAIS/NBOA asserted it is not clear what circumstances would constitute "unforeseen economic or other conditions." AFPI similarly pointed out the phrase was found only in the preamble and not in the proposed § 541.607. American Council of Engineering Companies expressed concern that the proposed pause mechanism does not provide sufficient flexibility for the Department to respond to unexpected economic conditions and recommended that the provision be modified to allow the Secretary "to suspend automatic updates if economic conditions warrant." RILA asserted the pause feature is an inflexible process asserting that if a catastrophic event were to occur within 150 days of the date of a scheduled update, the Department would have no flexibility or ability to delay or stop the update. A few commenters claimed that the 120-day pause period is not sufficient time to provide the Department the flexibility it needs to adjust to unforeseen circumstances or complete a rulemaking. *See, e.g.*, National Association of Convenience Stores; NRF.

Most of the comments objecting to or otherwise criticizing the pause mechanism seem to assume the only way the Department can alter a scheduled update or change any other aspect of the rule is through the updating mechanism's pause provision. That is not correct. Nothing in the proposed updating mechanism limits the Department's ability to engage in future rulemaking to change any aspect of the part 541 regulations at any time. The pause mechanism offers the Department added flexibility—in addition to its ability to engage in rulemaking at any time to change the rule—by allowing it the ability to delay a scheduled update as it engages in rulemaking. As the Department noted in the NPRM, the pause mechanism offers the Department 270 days—150 days before, and 120 days after, the effective date for the scheduled update—to complete the rulemaking process. The Department can still engage in rulemaking outside of this period and through that rulemaking can stop or delay a scheduled update or change any other aspect of the part 541 regulations. This is true regardless of whether the Department adopts the delay provision. The Department believes that the pause provision will provide additional flexibility in the context of the triennial updates and will not impact the Department's normal rulemaking powers.

The Department recognizes that the phrase "unforeseen economic or other conditions" was not in proposed § 541.607 and agrees that the lack of this language in the regulatory text creates ambiguity about the standard for pausing a triennial update. Therefore, the Department is revising § 541.607(d) to include similar language. The Department believes this revision clarifies the standard for when the pause mechanism may be triggered but does not impinge on the Department's normal authority to engage in rulemaking for other reasons. The Department is disinclined to further define what circumstances would trigger the pause mechanism, as some commenters suggested. In proposing the pause mechanism, the Department was mindful of previous statements from stakeholders, and the Department's own prior statements, about the need to preserve flexibility to adapt to unanticipated circumstances. As an example, the

Department referenced the COVID pandemic and its widespread impact on workplaces. However, it is not feasible for the Department to outline every possible circumstance that could warrant a delay of a scheduled update. Doing so would unduly limit the Department's flexibility to adjust to truly unanticipated circumstances.

For these reasons, the Department has concluded that the proposed pause mechanism, with the modification noted above, provides the Department sufficient flexibility to adopt to unforeseen circumstances where necessary. Therefore, the new § 541.607(b)(4) establishes that the Department can trigger the pause, where unforeseen economic or other conditions warrant, by issuing an NPRM proposing to change the salary level methodology and/or modify the updating mechanism by the date on which it publishes the notice with the adjusted salary and compensation thresholds. Section 541.607(b)(4) further clarifies that the notice with the adjusted thresholds must state that the scheduled update will be paused for 120 days from the day the update was set to occur while the Department engages in rulemaking, and that the pause will be lifted on the 121st day unless the Department finalizes a rule changing the salary level methodology and/or automatic updating mechanism by that time.

Lastly, as discussed in more detail in section V.D, the Department intends for the triennial updates of the standard salary level and the HCE total annual compensation threshold using current earnings data to be severable from the revision to those methodologies discussed in section V.B and section V.C. In implementing routine triennial updates, the Department intends to ensure that the salary and compensation thresholds set in the regulations reflect changes in earnings data and continue to function effectively in helping identify exempt white-collar employees. As already noted, the Department has different objectives for changing the methodologies for setting the standard salary level and HCE total annual compensation threshold. Specifically, in changing the methodology for the standard salary level, the Department intends to fully restore the salary level's historic screening function and account for the shift in the 2004 rule from a two-test to a one-test system for defining and delimiting the EAP exemption.[145] In changing the methodology for the HCE total annual compensation threshold, the Department intends to ensure the HCE threshold's role as a streamlined alternative for those employees most likely to meet the standard duties test by excluding all but those employees "at the very top of [the] economic ladder[.]"[146] These are independent objectives of this rulemaking and the provisions implementing them can each stand alone. Therefore, the Department intends for the triennial updates to remain in force even if the methodologies for the standard salary level and the HCE total annual compensation threshold established by this final rule are stayed or do not take effect. Similarly, the Department intends for the triennial updates under § 541.607(b) to remain in force even if the initial update for wage growth in § 541.607(a) is stayed or does not take effect.

B. Standard Salary Level

In its NPRM, the Department proposed to update the salary level by setting it equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (the South), resulting in a proposed salary level of $1,059 per week ($55,068 for a full-year worker). The proposed salary level methodology built on lessons learned in the Department's most recent rulemakings to more effectively define and delimit employees employed in a bona fide EAP

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145 *See* section V.B.
146 *See* section V.C.

capacity. Specifically, the Department's intent in the NPRM was to fully restore the salary level's screening function and account for the switch in the 2004 rule from a two-test system to a one-test system for defining the EAP exemption, while also updating the standard salary level for earnings growth since the 2019 rule.

The Department is finalizing the proposed standard salary level methodology and applying it to the most recent available earnings data, resulting in a salary level of $1,128 per week ($58,656 for a full-year worker). Setting the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity in a one-test system. Because the salary level is above the equivalent of the long test salary level, the final rule will (unlike the 2004 and 2019 rules) ensure that lower-paid white-collar employees who perform significant amounts of nonexempt work, and were historically considered by the Department not to be employed in a bona fide EAP capacity because they failed the long duties test, are not all included in the exemption. At the same time, by setting the salary level well below the equivalent of the short test salary level, the final rule will address potential concerns that the salary level test should not be determinative of EAP exemption status for too many white-collar employees. The combined result will be a more effective test for exemption. The final salary level will also reasonably distribute between employees and their employers what the Department now understands to be the impact of the 2004 shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

1. History of the Salary Level

The FLSA became law in 1938 and the first version of the part 541 regulations, issued later that year, set a minimum compensation requirement of $30 per week for executive and administrative employees.[147] Since then, the Department has increased the salary levels eight times—in 1940, 1949, 1958, 1963, 1970, 1975, 2004, and 2019.

In 1940, the Department maintained the $30 per week salary level for executive employees but established a higher $200 per month salary level test for administrative and professional employees. In selecting these thresholds, the Department used salary surveys from Federal and state government agencies, experience gained under the National Industrial Recovery Act, and Federal government salaries to determine the salary level that was a reasonable "dividing line" between employees performing exempt and nonexempt work.[148]

In 1949, recognizing that the "increase in wage rates and salary levels" since 1940 had "gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees," the Department calculated the percentage increase in weekly earnings from 1940 to 1949, and then adopted new salary levels at a "figure slightly lower than might be indicated by the data" to protect small businesses.[149] In 1949, the Department also established a short test for exemption, which paired a higher salary level with a less rigorous duties test. The justification for this short test was that employees who met the higher salary level were more likely to meet all the requirements of the exemption (including the 20 percent limit on nonexempt work), and thus a "short-cut test of exemption . . . would facilitate

[147] 3 FR 2518.
[148] *See* Stein Report at 20–21, 31–32.
[149] Weiss Report at 8, 14.

the administration of the regulations without defeating the purposes of section 13(a)(1)."[150] Employees who met only the lower long test salary level, and not the higher short test salary level, were required to satisfy the long duties test, which included a limit on the amount of nonexempt work that an exempt employee could perform. The two-test system remained part of the Department's regulations until 2004. In 1958, the Department reiterated that salary is a "mark of [the] status" of an exempt employee and reinforced the importance of salary as an enforcement tool, adding that the Department had "found no satisfactory substitute for the salary tests."[151] To set the salary levels, the Department considered data collected during 1955 WHD investigations on the "actual salaries paid" to employees who "qualified for exemption" (*i.e.*, met the applicable salary and duties tests in place at the time) and set the salary levels at $80 per week for executives and $95 per week for administrative and professional employees.[152] The Department set the long test salary levels so that only a limited number of employees performing EAP duties (about 10 percent) in the lowest-wage regions and industries would fail to meet the new salary level and therefore become entitled to overtime pay.[153] In laying out this methodology, often referred to as the "Kantor" methodology and generally referenced in this rule as the "long test" methodology, the Department echoed its prior comments stating that the salary tests "simplify enforcement by providing a ready method of screening out the obviously nonexempt employees."[154]

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[150] *Id.* at 22–23.
[151] Kantor Report at 2–3.
[152] *Id.* at 6, 9.
[153] *Id.* at 6–7.
[154] *Id.* at 2–3; *see* Weiss Report at 8.

The Department followed a similar methodology when determining the appropriate long test salary level in 1963, using data regarding salaries paid to exempt workers collected in a 1961 WHD survey.[155] The salary level for executive and administrative employees was increased to $100 per week, and the professional exemption salary level was increased to $115 per week.[156] The Department noted that these salary levels approximated the methodology used in 1958 to set the long test salary levels.[157]

The Department continued to use a similar methodology when it updated the salary levels in 1970. After examining data from 1968 WHD investigations, 1969 BLS wage data, and information provided in a report issued by the Department in 1969 that included salary data for executive, administrative, and professional employees,[158] the Department increased the long test salary level for executive and administrative employees to $125 per week and increased the long test salary level for professional employees to $140 per week.[159]

In 1975, instead of following the previous long test methodology, the Department set the long test salary levels "slightly below" the amount suggested by adjusting the 1970 salary levels for inflation based on increases in the Consumer Price Index.[160] The long test salary level for executive and administrative employees was set at $155, while the professional level was set at $170. The salary levels adopted were intended to be interim levels "pending the completion and analysis of a study by [BLS] covering a six-month period in 1975[,]" and were not meant to set a

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[155] 28 FR 7002 (July 9, 1963).
[156] *Id.* at 7004.
[157] *Id.*
[158] *See* 34 FR 9934, 9935 (June 24, 1969).
[159] 35 FR 885.
[160] 40 FR 7091.

precedent for future salary level increases.[161] The envisioned process was never completed, however, and the "interim" salary levels remained unchanged for the next 29 years.

The short test salary level increased in tandem with the long test level throughout the various rulemakings between 1949 and 2004. Because the short test was designed to capture only those white-collar employees whose salary was high enough to indicate a stronger likelihood of being employed in a bona fide EAP capacity and thus warrant a less stringent duties requirement, the short test salary level was always set significantly higher than the long test salary level (approximately 130 percent to 180 percent of the long test level).

When the Department updated the part 541 regulations in 2004, it created a single standard test for exemption instead of retaining the two-test system from prior rulemakings. The Department set the new standard salary level at $455 per week and paired it with a duties test that was substantially equivalent to the less rigorous short duties test. The Department set a salary level that would exclude from exemption roughly the bottom 20 percent of full-time salaried employees in each of two subpopulations: (1) the South and (2) the retail industry nationally. In setting the salary level the Department looked to earnings data for all white-collar workers—exempt and nonexempt—and looked to a higher percentile than the long test methodology (10th percentile of exempt workers in low-wage industries and areas). The Department acknowledged, however, that the salary arrived at by this method was, at the time, equivalent to the salary derived from the long test method using contemporaneous data.[162]

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[161] *Id*. at 7091–92.

[162] *See* 69 FR 22168. The 2004 rule looked to the 20th percentile of a data set of all full-time salaried workers and the long test methodology looked to the lowest paid 10 percent of exempt salaried workers. The two methodologies resulted in equivalent salary levels because exempt salaried workers generally have higher earnings than nonexempt salaried workers.

In the 2016 rule, the Department set the standard salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). This resulted in a standard salary level of $913 per week, which was at the low end of the historic range of short test salary levels. The Department explained that the increase in the standard salary level was needed because, in moving from a two-test to a one-test system, the 2004 rule exempted lower-salaried employees performing large amounts of nonexempt work who had historically been, and should continue to be, covered by the overtime compensation requirement.[163] Since the standard duties test was equivalent to the short duties test, the Department asserted that a salary level in the short test salary range—traditionally 130 to 180 percent of the long test salary level—was necessary to address this effect of the 2004 rule. As explained earlier, the U.S. District Court for the Eastern District of Texas held the 2016 rule invalid.

In the 2019 rule, the Department reapplied the methodology for setting the standard salary threshold from the 2004 rule, setting the salary level equal to the 20th percentile of weekly earnings of full-time salaried workers in the South and/or in the retail sector nationwide.[164] This methodology addressed concerns that had been raised that the 2016 methodology excluded too many employees from the exemption based on their salary alone and produced the current standard salary level of $684 per week (equivalent to $35,568 per year).[165] Unlike in 2004, however, where the 20th percentile of weekly earnings of full-time salaried workers in the South and retail nationally was essentially the same as the long test, in 2019 this methodology now

[163] 81 FR 32405.
[164] *See* 84 FR 51260 (Table 4).
[165] *Id*. at 51238.

produced a salary level amount that was lower than the equivalent of the long test salary level using contemporaneous data ($724 per week, $37,648 per year). Put another way, the salary level set in the 2019 rule was $40 per week below the long test level (used to validate the salary level in the 2004 rule) and $292 per week below the low end of the short test range (used to set the salary level in the 2016 rule).

2. Standard Salary Level Proposal

In its NPRM, the Department proposed to update the salary level by setting it equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (the South), resulting in a proposed salary level of $1,059 per week ($55,068 for a full-year worker). The Department's proposal explained that fully restoring the salary level's screening function required setting a salary level at least equal to the long test salary level. The Department elaborated that prior to the 2019 rule (when the Department set the salary level $40 per week below the long test level), employees who earned below the long test salary level were screened from the EAP exemption by virtue of their pay—either by the long test salary level itself or, in the case of the 2004 rule, a standard salary level set equal to the long test salary level. The Department stated that the long test salary level provided what it believed should be the lowest boundary of the new salary level methodology because it would ensure the salary level's historic screening function was restored.

In selecting the proposed salary level methodology, the Department also considered the impact of its switch in 2004 to a one-test system for determining exemption status. The Department explained that a single-test system cannot fully replicate both the two-test system's heightened protection for employees performing substantial amounts of nonexempt work and its increased efficiency for determining exemption status for employees who are highly likely to perform EAP duties. Rather than reinstate the long duties test with its limitation on nonexempt work, the Department examined earnings ventiles that would produce a salary level between the long and short test salary levels (which were, respectively, equivalent to between the 26th and 27th percentiles, and the 53rd percentile, of full-time salaried worker earnings in the lowest-wage Census Region). The Department explained that the long and short tests had served as the foundation for nearly all the Department's prior rulemakings, either directly under the two-test system, or indirectly as a means of evaluating the Department's salary level methodology under the one-test system, and therefore were useful parameters. The Department concluded that setting the salary level equal to the 35th percentile would, in combination with the standard duties test, more effectively identify in a one-test system who is employed in a bona fide EAP capacity in a manner that reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move to a one-test system.

After reviewing the comments received, the Department is finalizing its proposal to set the standard salary level equal to the 35th percentile of full-time salaried worker earnings in the lowest-wage Census Region (the South), which is below the midpoint of the long and short test salary levels. Applying this methodology to data for calendar year 2023 results in a salary level of $1,128 per week ($58,656 annually for a full-year worker). This approach will fully restore the salary level's function of screening obviously nonexempt workers from the EAP exemption, and account for the switch in the 2004 rule to a one-test system in a way that reasonably distributes the impact of this shift among employees earning between the long and short test salary levels and their employers. The resulting salary level will work effectively with the standard duties test to better define who is employed in a bona fide EAP capacity.

3. Salary Level Test Function and Effects

For 85 years, the Department's regulations have consistently looked at both the duties performed by the employee and the salary paid by the employer in defining and delimiting who is a bona fide executive, administrative, or professional employee exempt from the FLSA's minimum wage and overtime protections. From 1949 to 2004, the Department determined EAP exemption status using a two-test system comprised of a long test (a lower salary level paired with a more rigorous duties test that limited performance of nonexempt work to no more than 20 percent for most employees) and a short test (a higher salary level paired with a less rigorous duties test that looked to the employee's primary duty and did not have a numerical limit on the amount of nonexempt work). The two-test system facilitated the determination of whether white-collar workers across the income spectrum were employed in a bona fide EAP capacity, and employees who met either test could be classified as EAP exempt.

In a two-test system, the long test salary level screens from the exemption the lowest-paid white-collar employees, thereby ensuring their right to overtime compensation. The Department has often referred to many of the employees who are screened from the exemption by virtue of their earning below the lower long test salary level as "'obviously nonexempt employees[.]'"[166] The long test salary level helped distinguish employees who were not employed in a bona fide EAP capacity because the Department found that employees who were screened from exemption

[166] *See id.* at 51237 (quoting Kantor Report at 2–3).

by the long test salary level generally did not meet the other requirements for exemption.[167] Since 1958, the long test salary level was generally set to exclude from exemption approximately the lowest-paid 10 percent of salaried white-collar employees who performed EAP duties in the lowest-wage regions and industries.[168] The long test salary level also served as a line delimiting the population of white-collar employees for whom the duties test determined their exemption status. In the two-test system, this duties analysis included an examination of the amount of nonexempt work performed by lower-salaried employees, which ensured that these employees were employed in an EAP capacity by limiting the amount of time they could spend on nonexempt work. The duties and salary level tests worked in tandem to properly define and delimit the exemption: lower-paid workers had to satisfy a more rigorous duties test with strict limits on nonexempt work, and higher-paid employees were subject to a less rigorous duties test because they were more likely to satisfy all the requirements of the exemption (including the limit on nonexempt work).[169]

Because employees who met the short test salary level were paid well above the long test salary level, the short test salary level did not perform the same function as the long test salary level of screening obviously nonexempt employees. Instead, the short test salary level was used to determine whether the full duties test or the short-cut duties test would be applied to determine EAP exemption status. The exemption status of employees paid more than the long and less than the short test salary levels was determined by applying the more rigorous long duties test that

[167] *See* Kantor Report at 2–3; Weiss Report at 8 ("In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations[.]").
[168] *See* 84 FR 51236.
[169] Weiss Report at 22–23.

ensured overtime protections for employees who performed substantial amounts of nonexempt work. The exemption status of employees paid at or above the higher short test salary level was determined by the less rigorous short duties test that looked to the employee's primary duty and did not cap the amount of nonexempt work an employee could perform. The short test thus provided a faster and more efficient duties test based on the Department's experience that employees paid at the higher short test salary level "almost invariably" met the more rigorous long duties test, including its 20 percent limit on nonexempt work, and therefore a shortened analysis of duties was a more efficient test for exemption status.[170]

In 2004, rather than updating the two-test system, the Department chose to establish a new, single-test system for determining exemption status. The new single standard test for exemption used a duties test that was substantially equivalent to the less rigorous short duties test in the two-test system.[171] Since the creation of the standard test, the Department has taken two different approaches to set the standard salary level that pairs with the standard duties test.

In 2004, as noted above, the Department set the new salary level roughly equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationwide.[172] The Department acknowledged that the salary level ($455 per week) was, in fact, equivalent to the lower long test salary level amount under the two-test system using contemporaneous data.[173] Because it was equivalent to the long test salary level, the standard salary test continued to perform the same initial screening function as the long test salary level:

[170] *Id.*
[171] 69 FR 22214.
[172] *See id.* at 22168–69.
[173] *See id.*

employees who historically were entitled to overtime compensation because they earned below the long test salary level remained nonexempt under the new standard test.

Without a higher salary short test, however, all employees who met the standard salary level were subject to the same duties test. Since the single standard duties test was equivalent to the short duties test, some employees who previously did not meet the long duties test met the standard duties test. As a result, the shift from a two-test to a one-test system significantly broadened the EAP exemption because employees who historically had not been considered bona fide EAP employees were now defined as falling within the exemption and would not be eligible for overtime compensation. This broadening specifically impacted lower-paid, salaried white-collar employees who earned between the long and short test salary levels and performed substantial amounts of nonexempt work. Under the two-test system, these employees had been entitled to overtime compensation if their nonexempt duties exceeded the long test's strict 20 percent limit on such work. Under the 2004 standard test, these employees became exempt because they met both the low standard salary level and the less rigorous standard duties test, which does not have a numerical limit on the amount of nonexempt work.

The Department's discussion of the elimination of the long duties test in the 2004 rule focused primarily on the minimal role played by the long test at that time due to the erosion of the long salary level, and on the difficulties employers would face if they were again required to track time spent on nonexempt work when the dormancy of the long duties test meant that they had generally not been performing such tracking for many years.[174] While asserting that employees who were then subject to the long test would be better protected under the higher

[174] *See* 69 FR 22126-27.

salary level of the new standard test, the Department in the 2004 rule did not compare the protection lower salaried employees would receive under the standard test with the protection they would have received under an updated long test with a salary level based on contemporaneous data and the existing long duties test.

To address the concern that lower-salaried employees performing large amounts of nonexempt work historically were not considered bona fide EAP employees and thus should be entitled to overtime compensation, in 2016 the Department set the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). This methodology produced a salary level ($913 per week) that was at the low end of the historical range of short test salary levels, which had traditionally been paired with the short duties test, and above the midpoint between the long and short test salary levels.[175] This approach restored overtime protection for employees performing substantial amounts of nonexempt work who earned between the long and short test salary levels, as they failed the new salary level test. However, this approach generated potential concerns that the salary level test should not be determinative of exemption status for too many individuals. Specifically, the 2016 rule's narrowing of the exemption prevented employers from using the exemption for employees who earned between the long test salary level and the low end of the short test salary range and would have met the more rigorous long duties test. Prior to 2004, employers could use the long test to exempt these employees, and under the 2004 rule these employees remained exempt under the one-test system. Thus, while the 2016 rule accounted for the absence of the long duties test by restoring overtime protections to employees earning between the long test salary level and the

[175] 81 FR 32405, 32467.

low end of the short test salary range who perform significant amounts of nonexempt work, it also made a group of employees who had been exempt under the two-test system newly nonexempt under the one-test system: employees earning between the long test level and the short test salary range who perform only limited nonexempt work.

In its 2019 rule, the Department determined that the 2016 rule had not sufficiently considered the impact of the increased standard salary level on employers' ability to use the exemption for this group of lower-paid employees who performed only limited amounts of nonexempt work.[176] The Department emphasized that "[f]or most . . . employees the exemption should turn on an analysis of their actual functions, not their salaries," and that the 2016 rule's effect of making nonexempt lower-paid, white-collar employees who traditionally were exempt under the long test "deviated from the Department's longstanding policy of setting a salary level that does not 'disqualify[] any substantial number of' bona fide executive, administrative, and professional employees from exemption."[177] To address these concerns, the Department simply returned to the 2004 rule's methodology for setting the salary threshold. Applying the 2004 method to the earnings data available in 2019 produced a standard salary level of $684 per week, which was below the equivalent of what the long test salary level would have been using contemporaneous data ($724 per week).[178] The 2019 rule was the first time the Department paired the standard duties test with a salary level that was not at least equivalent to the long test level.

[176] 84 FR 10908.
[177] *Id.* (quoting Kantor Report at 5).
[178] 84 FR 51260.

The 2019 rule, like the 2004 rule, exempted all employees who earned between the long and short test salary levels and performed too much nonexempt work to meet the long duties test, but passed the standard duties test (equivalent to the short duties test). The 2019 rule also for the first time permitted the exemption of a group of low-paid white-collar employees (those earning between $684 and $724 per week) who had always been protected by the salary level test's initial screening function—either under the long test or under the 2004 rule salary level that was equivalent to the long test salary level. The Department stated that the standard salary level's "fairly small difference" from the long test level did not justify using the long test methodology to set the salary level and emphasized that its approach preserved the salary level's principal function as a tool for screening from exemption obviously nonexempt employees.[179] In response to commenter concerns about the 2019 rule exempting employees who traditionally earned between the long and short test salary levels and received overtime compensation because they did not meet the long duties test, the Department cited the legal risks posed by the 2016 methodology (drawing on the district court's decisions as evidence) and explained that such employees were already exempt in the years leading up to 2004 because the Department's outdated salary levels had rendered the long test with its more rigorous duties requirement largely dormant.[180] As in the 2004 rule, the Department did not address the protection such lower salaried employees would have received had the Department updated the long test using contemporary data.

[179] *Id.* at 51244.
[180] *Id.* at 51243.

As explained in the NPRM, the Department's experience with a one-test system shows that it is less nuanced than the two-test system, which allowed for finer calibration in defining and delimiting the EAP exemption. In a two-test system, there are four variables (two salary levels and two duties tests) that can be adjusted to define and delimit the exemption. In a one-test system, there are only two variables (one salary level and one duties test) that can be adjusted, necessarily yielding less nuanced results. The loss in precision does not impact the lowest-paid white-collar employees, who were screened from exemption by the long test salary level, because they maintain their right to overtime pay so long as the standard salary level is set at least equivalent to the lower long test salary level—a condition that was met by the 2004 rule's salary level but not by the 2019 rule's salary level. Instead, the Department's experience shows that the shift from a two-test system to a one-test system impacts employees earning between the long and short test salary levels and, in turn, employers' ability to use the exemption for these employees.

In the two-test system, employees who earned between the long and short test salary levels and performed large amounts of nonexempt work were protected by the long duties test, while bona fide EAP employees in that earnings range who performed only limited amounts of nonexempt work were exempt. Meanwhile, the short test provided a time-saving short-cut test for higher-earning employees who would almost invariably pass the more rigorous, and thus more time consuming, long duties test. But the more rigorous long duties test, with its limitation on the amount of nonexempt work that could be performed, was always core to the two-test system, with the higher short test salary level and less rigorous short duties test serving as a time-saving mechanism for employees who would likely have met the more rigorous long duties test.[181]

As explained in the NPRM, one way in a one-test system to ensure appropriate overtime protection to lower-salaried employees earning between the long and short test salary levels who were historically entitled to overtime compensation under the long test would be to reinstate the long duties test with its limitation on nonexempt work. A one-test system with a more rigorous duties test would appropriately emphasize the important role of duties in determining exemption status. However, the Department did not propose in this rulemaking to replace the standard duties test with the long duties test or to return to a two-test system with the long duties test. The Department has not had a one-test system with a limit on nonexempt work other than from 1940 to 1949,[182] when the Department replaced this approach with its two-test system, and the two-test system was replaced 20 years ago. Returning to the two-test system would eliminate the benefits of the current duties test, including having a single test with which employers and employees are familiar.

In light of these considerations, the Department's goal in this rulemaking is not only to update the single standard salary level to account for earnings growth since the 2019 rule through the use of the updating mechanism, but also to build on the lessons learned in its most recent rulemakings to more effectively define and delimit employees employed in a bona fide EAP capacity. Consistent with its broad authority under section 13(a)(1), the Department's aim is to

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[181] Numerous employer organizations supported the Department's decision in 2004 to move to a one-test system. *See* 69 FR 22126-27. Commenters likewise opposed returning to the two-test structure in the 2016 and 2019 rulemakings. *See* 84 FR 10905; 81 FR 32444.

[182] *See* 5 FR 4077.

have a single salary level test that will work effectively with the standard duties test to better define who is employed in a bona fide EAP capacity and will both fully perform the salary level's initial screening function and account for the change to a single-test system.

4. Discussion of Comments and Final Standard Salary Level

i. Overall Commenter Feedback.

The Department received a significant number of comments in response to its proposal to set the standard salary level equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Numerous commenters supported the Department's proposed salary level. Supporters included thousands of individual employees, writing separately or as part of comment campaigns, and many groups representing employees or employee interests. *See, e.g.*, American Association of Retired Persons (AARP); AFSCME; AFT; NEA; Restaurant Opportunities Center United; United Auto Workers Region 6; United Steelworkers; WorkMoney. Many other commenters, including advocacy groups, academics, and State officials also supported the Department's proposal. *See, e.g.*, Administrative Law Professors; CLASP; Coalition of Gender Justice and Civil Rights Organizations; Coalition of State AGs; Common Good Iowa; EPI; The Leadership Conference on Civil and Human Rights; National Partnership; NWLC. A number of supportive commenters urged the Department to set a higher salary level than the one it proposed. *See, e.g.*, AFL-CIO; Demos; Nichols Kaster; Sanford Heisler Sharp; SEIU; Winebrake & Santillo, LLC (Winebrake & Santillo). A minority of employers, including most notably a campaign of small business commenters, also supported the proposed salary level. *See, e.g.*, Business for a Fair Minimum Wage; Dr. Bronners; Firespring; Small Business Majority. Some members of Congress also commented in support of the proposed salary level.

See 19 Democratic Senators; 10 Democratic Representatives; U.S. Representative Maxwell Frost (D-FL).

Commenters that supported increasing the salary level often emphasized that the FLSA's minimum wage and overtime requirements are fundamental employee protections, intended to spread employment to more workers and provide extra compensation (above the statutory minimum) to employees who work more than 40 hours in a week. *See, e.g.*, AARP; AFL-CIO; Coalition of State AGs; NELA; NELP; Nichols Kaster; United Steelworkers. Some supportive commenters, including Sanford Heisler Sharp, Texas RioGrande Legal Aid, and Washington State Department of Labor and Industries, stressed that the EAP exemption was premised in part on the expectation that exempt employees received high salaries and other privileges to compensate for their long hours of work and lack of FLSA protections. Other commenters similarly stressed that the exemption is intended for employees who, based on the nature of their work and their compensation, have sufficient bargaining power not to need the Act's protections. *See, e.g.*, Business for a Fair Minimum Wage; CLASP; NELP; NWLC.

Supportive commenters often also emphasized that the salary level test has an important and longstanding role in helping define which employees are employed in a bona fide executive, administrative, or professional capacity. Some commenters, including AARP and NELA, stressed that the salary level provides an important "bright line" test for helping determine exemption status, and NWLC similarly stated that the salary level provides a "clear, objective, and straightforward" test that is "easy for employers to apply and for employees to understand[.]" NELP, quoting testimony from EPI at a 2015 Congressional hearing on this issue, stated that salary level tests have been used since the Department's earliest part 541 regulations because the "'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.'" The Coalition of State AGs stated that a salary level that is too low "no longer accurately delimits the boundaries of who is an EAP" employee.

The vast majority of employers and commenters supporting employer interests opposed the proposed salary level. As discussed in section III, many employer representatives opposed any salary level increase and urged the Department to withdraw its proposal. *See, e.g.*, AHLA; Americans for Prosperity; Chamber; CUPA-HR; FMI; NAM; National Restaurant Association; Oregon Restaurant and Lodging Association; PPWO; Wisconsin Bankers Association. Some Members of Congress also opposed the proposed salary level and urged that the proposal be withdrawn. *See* 10 Republican Senators; 16 Republican Representatives; U.S. Senator Mike Braun (R-IN). Some commenters opposed to the proposal, writing separately or as part of comment campaigns, expressed general opposition to the rule but did not specifically address what, if any, salary level increase they would support in a final rule. *See, e.g.*, American Dental Association; Humane Society of Manatee County; National Sporting Goods Association. Others that opposed or questioned any salary level change stated, in the alternative, what method they preferred if the Department updated the salary level in the final rule. Most such commenters favored applying the methodology that the Department used to set the salary level in its 2004 and 2019 rulemakings (the 20th percentile of earnings of full-time salaried workers in the South and in the retail industry nationally) or updating for inflation the current salary level, which was set using that methodology. *See, e.g.*, ABC; CWC; NAM; National Restaurant Association. A handful of employer commenters supported, or stated that they did not oppose, an increase based on the 2004/2019 methodology (resulting in a salary level of $822 per week based on data used in the NPRM), citing, for example, that this approach promoted predictability, *see* RILA, and accounted for regional and industry-specific differences, *see* YMCA. *See also, e.g.*, SHRM; WFCA. Others supported or suggested a salary level that was higher, but below the Department's proposed level. *See, e.g.*, American Society of Association Executives; Ho-Chunk, Inc.; University System of Maryland.

Commenters that opposed the Department's proposal almost always objected to the size and/or timing of the proposed salary level increase rather than to the existence of the salary test itself. Most employer commenters, whether favoring no increase or a smaller increase, presumed the salary level test's continued existence and lawfulness, with some, such as National Restaurant Association, expressly referencing their support for the 2019 rule's salary level increase. As discussed in detail below, many commenters acknowledged the salary level's longstanding function of screening obviously nonexempt employees from the exemption. *See* section V.B.4.ii. Other commenters that opposed the proposal nonetheless cited benefits of having a salary level test, including helping to ensure that the EAP exemption is not abused, *see, e.g.*, AASA/AESA/ASBO, Bellevue University, and "sav[ing] investigators and employers time by giving them a quick, short-hand test[.]" *See* National Restaurant Association. APLU recognized "DOL's mission and responsibility to update the Fair Labor Standards Act overtime regulations and ensure a baseline of protections for our nation's workers, including periodic updates to the minimum salary threshold for overtime exemptions." In rather stark contrast, AFPI asserted that employee "[c]ompensation is no more helpful than would be a dress code test" in determining exemption status. AFPI was one of only a small number of commenters, as previously discussed in section V.A.1, that asserted the Department lacks authority under section 13(a)(1) to adopt a salary level test. *See, e.g.*, Job Creators Network Foundation; NFIB; Pacific Legal Foundation.

As the Department stated in its 2019 rule, an employee's salary level "is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees."[183] The amount an employee is paid is also a "valuable and easily applied index to the 'bona fide' character of employment for which exemption is claimed," as well as the principal "delimiting requirement . . . prevent[ing] abuse" of the exemption.[184] As the Department has explained, if an employee "is of sufficient importance . . . to be classified" as a bona fide executive employee, for example, and "thereby exempt from the protection of the [A]ct, the best single test of the employer's good faith in attributing importance to the employee's services is the amount [it] pays for them."[185] Employee compensation is a relevant indicator of exemption status given that, as many commenters observed, the EAP exemption is premised on the understanding that individuals who are employed in a bona fide executive, administrative, or professional capacity typically earn higher salaries and enjoy other privileges to compensate them for their long hours of work, setting them apart from nonexempt employees entitled to overtime pay.[186] Accordingly, the Department agrees with the overwhelming majority

[183] 84 FR 51239 (internal quotation marks omitted).
[184] Stein Report at 19, 24; *see also* 81 FR 32422.
[185] Stein Report at 19*; see also id.* at 26 ("[A] salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity.").
[186] *See* Report of the Minimum Wage Study Commission, Vol. IV, at 236, 240; *see also, e.g.*, Stein Report at 19 (explaining that the "term 'executive' implies a certain prestige, status, and importance" denoted by pay "substantially higher than" the federal minimum wage).

of commenters that, explicitly or implicitly, supported the salary level continuing to have a role in helping determine whether employees are employed in a bona fide executive, administrative, or professional capacity.[187]

The Department nonetheless recognizes that commenters had a wide range of views about the salary level test and that no salary level methodology can satisfy all stakeholders. As discussed below, competing commenter views were often grounded in differing opinions about the salary level test's role in defining the EAP exemption. Broadly speaking, commenters that opposed the proposal generally favored a far more limited role for the salary level test and emphasized perceived negative effects on employers of the proposed increase, while commenters that supported the proposal or urged the Department to set a higher salary level often deemed the proposal modest by historical standards and emphasized perceived positive effects on employees of the proposed increase. Against this backdrop, the Department has reviewed the comments received on its proposed methodology, with particular focus on feedback on the NPRM's rationale that the proposed methodology will better define and delimit the EAP exemption by fully restoring the salary level's screening function and accounting for the switch from a two-test to a one-test system.

ii. Fully Restoring the Salary Level's Screening Function

Some employer advocates that opposed the Department's proposal emphasized the salary level's limited function of screening obviously nonexempt employees from the EAP exemption.

[187] Consistent with its longstanding practice, the Department declines requests from commenters, including Defiance College, International Bancshares Corporation, Rachel Greszler, and WFCA, that suggested the Department adopt multiple salary level tests for different regions, industries, and/or small businesses, rather than a single salary level that applies to all entities nationwide. *See* 84 FR 51239; 81 FR 32411; 69 FR 22171.

See, e.g., Independent Community Bankers of America; IFDA; National Council of Farmer Cooperatives (NCFC); SHRM. Many employer representatives stated that the proposed salary level exceeded this purpose by excluding from the exemption too many employees who pass the duties test, particularly in low-wage regions and industries. *See, e.g.*, Chamber; NAW; PPWO; RILA; Seyfarth Shaw. AFPI quoted the statement in the Department's 2019 rule that any salary level increase must "have as its primary objective the drawing of a line separating exempt from nonexempt" employees, and the Chamber asserted that to the extent employee "protection or fairness" concerns motivated the proposed increase, such considerations exceed the Department's statutory authority.

Employer representatives that focused on the salary level's screening function often contrasted the Department's proposal with prior rules that they stated met this objective. CWC referenced the Department's 1958 and 2004 rules as such examples, while AHLA stated more broadly that the Department historically set a salary level that was "intentionally low" to screen out nonexempt employees, and that the Department's proposed methodology "is objectively not the low end of the salary range as that has been understood since 2004[.]" Other commenters similarly cited the 2004 and 2019 rules as fulfilling the salary level test's screening function, with National Restaurant Association, for example, emphasizing the salary level's screening function when explaining that the "2004 methodology's chief virtue is its consistency with historical practice." *See also, e.g.*, Bellevue University. Some commenters, including NCFC and PPWO, stated that the proposed salary level would change the salary level from a "screening device" to a "de facto sole test" for exemption, while others cautioned that the salary level set in the 2016 rule was declared invalid for exceeding this screening function. *See also, e.g.*, Argentum & ASHA; NAM.

Though some employee representatives addressed the salary level's screening function, they generally emphasized other considerations that they believed justified setting a salary level equal to or higher than what the Department proposed. A number of commenters stated that, along with the duties test, the salary level "is intended to set a guardrail so that employers do not incorrectly classify lower-paid salaried employees as" exempt. *See, e.g.*, AFSCME; Family Values @ Work; North Carolina Justice Center; United Steelworkers; Yezbak Law Offices. Similarly alluding to the salary level's screening function, AFL-CIO emphasized that until 2019 the Department had never set the salary level below the long test level and that as a result more than half of the employees affected by the proposed salary level would have been nonexempt under every prior rule (because they earned below the long test or long test-equivalent salary level). EPI similarly stated that the 2019 rule set a salary level "that was even lower than what the long-test methodology would have yielded." *See also* Coalition of State AGs (referencing the salary level's screening function).

The Department has considered commenter feedback about the salary level test's screening function. The Department agrees with all commenters that emphasized the salary level test's function of screening obviously nonexempt employees from the exemption, a principle that, as the Department observed in the 2019 rule and in the NPRM, "has been at the heart of the Department's interpretation of the EAP exemption for over 75 years."[188] Fully effectuating the salary level's screening function is a key part of ensuring that the salary level sets an appropriate

[188] 88 FR 62165 (citing 84 FR 51241).

dividing line separating exempt and nonexempt employees. In response to the Chamber's concern about the motivations underlying the proposed salary level, the Department notes that while its proposal protects employees and promotes fairness (by helping ensure that only employees employed in a bona fide executive, administrative, or professional capacity are deprived of the FLSA's minimum wage and overtime protections), these beneficial effects are a byproduct of any higher salary level, not a basis for the proposed salary level.

As the Department explained in its NPRM, the concept of the salary level's screening function dates back to the two-test system, when the lower long test salary level provided "a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary."[189] When the Department updated the long test in 1958, it reaffirmed the long test salary's function as a screening tool.[190] When the Department moved to a one-test system in 2004, the standard salary test had to perform the initial screening function that the long test salary level performed in the two-test system. In the 2004 rule, the Department reaffirmed its historical statements emphasizing the salary level's critical screening function and, most significantly, used the long test salary level methodology to validate its new salary level of $455 per week.[191] The Department stressed in its final rule that both the 2004 rule standard salary level methodology and the long test salary level methodology "are capable of reaching exactly the same endpoint" and demonstrated that the two methods, in fact, produced equivalent salary

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[189] Weiss Report at 8.
[190] Kantor Report at 2–3.
[191] 69 FR 22165–22166.

levels using contemporaneous data.[192] By setting a salary level equivalent to the long test level, the Department ensured that employees earning at levels that would have entitled them to overtime compensation under the two-test system because they earned below the long test salary level remained screened from the exemption by the new standard salary test, regardless of whether they met the less rigorous standard duties test. The Department rejected requests from commenters that supported a salary level that was $30 to $95 lower than the level the Department ultimately adopted,[193] thus maintaining the historic screening function by declining to set a salary level lower than the long test level.

In its 2019 rule, the Department reemphasized the salary level's screening function.[194] The Department distinguished the 2016 rule, which was invalidated because it "'untethered the salary level test from its historical justification' of '[s]etting a dividing line between nonexempt and potentially exempt employees' by screening out only those employees who, based on their compensation level, are unlikely to be bona fide executive, administrative, or professional employees."[195] In contrast, the Department explained, reapplying the 2004 methodology to contemporaneous data was likely to pass muster because the district court that invalidated the 2016 rule "endorsed the Department's historical approach to setting the salary level" and

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[192] *See id.* at 22167–71 (showing that for all full-time salaried employees, $455 in weekly earnings corresponded to just over the 20th percentile in the South and the 20th percentile in retail, and that for employees performing EAP duties, $455 in weekly earnings corresponded to just over the 8th percentile in the South and the 10th percentile in retail). AFPI commented that in the 2003 NPRM the Department "acknowledged that 'equivalency to either the current long or short test salary levels is not appropriate' *because of* the switch to a one-test system." (quoting 68 FR 15560, 11570 (Mar. 31, 2003)). However, the Department shifted in its final rule and validated its chosen methodology using the long test salary level.
[193] *See* 69 FR 22164.
[194] 84 FR 51237.
[195] *Id.* at 51231 (quoting 84 FR 10901).

"explained that setting 'the minimum salary level as a floor to screen[] out the obviously nonexempt employees' is 'consistent with Congress's intent.'"[196]

In its NPRM, the Department explained that it needed to set a salary level at least equal to the long test—$925 per week, equating to between the 26th and 27th percentiles of weekly earnings of full-time salaried workers in the South—to fully restore the salary level's screening function. As noted above, employer commenters that emphasized the salary level's screening function generally viewed this function (which they often construed narrowly) as a justification for limiting the size of any potential salary increase. However, such commenters did not directly address the NPRM's explanation of the long test salary level's key role in the salary level's screening function or the relationship between the 2004/2019 methodology and the long test. Other commenters that endorsed the screening function as embodied in the 2004 rule did not grapple with the fact that in the 2019 rule, that methodology did not fully fulfill that function because it no longer arrived at the same endpoint as prior rules (*i.e.*, a long test or long-test equivalent salary level).

The Department's position remains that a core function of the salary level test is to screen from the EAP exemption employees who, based on their low pay, should receive the FLSA's overtime protections. For decades under the Department's two-test system, the long test salary level performed this screening function. In the 2004 rule, the Department used a different approach to reach the same outcome—setting a single salary level test that was equivalent to, and thus set the same line of demarcation as, the long test salary level. The Department deviated from this approach in 2019, setting a salary level that was $40 per week below the level produced

[196] *Id.* at 51241 (quoting 275 F. Supp.3d at 806).

using the long test methodology.[197] In doing so, the Department for the first time expanded the exemption to include employees who were paid below the equivalent of the long test salary level.

The Department reaffirms its position stated in the NPRM that the salary level test must equal at least the long test salary level in order to fulfill its historical screening function. From 1938 to 2019, all salaried white-collar employees paid below the long test salary level were entitled to the FLSA's protections, regardless of the duties they performed. This was true from 1938 to 1949 under the salary level test that became the long test;[198] from 1949 to 2004 under the long test; and from 2004 to 2019 under the standard salary level test that was set equivalent to the long test level—a key fact that commenters that opposed the Department's proposal generally did not address. Setting the salary level below the long test level as was done in the 2019 rule—because the 2004 methodology no longer matched the long test salary level based on contemporaneous data—departed from this history by enlarging the exemption to newly include employees who earned less than the long test salary level. As an initial step, the new salary level methodology must fully restore the salary level's screening function by ensuring that employees who were nonexempt because they earned less than the long test or long test-equivalent salary level are also nonexempt under the standard test. Achieving this objective requires a standard salary level amount at least equal to the long test level ($942 per week using current data, which equates to approximately the 25th percentile of full-time salaried worker earnings in the South).

As discussed in section V.B.5.iii, fully restoring the salary level's screening function would affect 1.8 million employees. These are currently exempt employees who earn between

[197] *Id.* at 51244.

[198] During this period the Department used a one-test system that paired a lower salary level with a more rigorous duties test. *See, e.g.*, 5 FR 4077.

$684 (the current salary level) and $942 per week (the long test level calculated using current data) and would become nonexempt absent intervening action by their employers. In every rule prior to 2019, employees who earned below the long test or long-test equivalent salary level have always been excluded from the exemption based on their salary alone—even if they passed the standard duties test or (prior to 2004) the more rigorous long duties test. The Department's approach does not, as commenters asserted, create an impermissible "de facto" salary-only test or make nonexempt too many employees who pass the duties test, and is compatible with the district court decision's emphasis on the salary level test's historic screening function.[199]

iii. Accounting for the Shift to a One-Test System

In addition to fully restoring the salary level test's screening function, the Department's proposed salary level methodology also accounted for the shift from a two-test to a one-test system for determining who is employed in a bona fide executive, administrative, or professional capacity. Commenters that supported the proposed salary level and specifically addressed this rationale agreed with it. A group of Administrative Law Professors stated that the Department's move to a one-test system in 2004 "significantly expanded the number of relatively low-income workers who might fall within the exemption . . . despite engaging in substantial nonexempt work[,]" and concluded that the Department's proposal was "reasonably geared" to restoring nonexempt status to this class of workers. The Coalition of State AGs similarly stated that the proposal "does more to take into account the shift to a one-test system in 2004 and establishes more of a middle ground between . . . the previous short- and long-test methodologies." They

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[199] The district court was principally concerned with the 2016 rule exceeding the salary level's screening function and making too many employees nonexempt based on salary alone. *See Nevada* 275 F.Supp.3d at 806 & n.6.

elaborated that "the balance struck is a more appropriate one" because most salaried white-collar employees paid less than the proposed standard salary level do not meet the duties test, whereas a substantial majority of salaried white-collar employees earning above the proposed standard salary level meet the duties test. Some commenters asserted that this aspect of the Department's rationale supported setting a salary level higher than proposed. For example, AFL-CIO stated that the proposed salary level captures only "a portion of workers who have been wrongly excluded from nonexempt status since the 2004 elimination of the long and short test in favor of a single test," and Sanford Heisler Sharp stated that the proposal "does not go far enough towards meeting [the] goal" of "'ensur[ing] that fewer white-collar employees who perform significant amounts of nonexempt work and earn between the long and short test salary levels are included in the exemption.'"[200] NELA similarly urged the Department to adopt its 2016 methodology to more fully account for the shift to a one-test system.

Employer commenters that directly addressed the shift to a one-test system generally rejected the premise that any adjustment for this change was warranted or appropriate. Some commenters emphasized that the long test's limit on nonexempt work became inoperative in 1991 and/or that the Department fully accounted for the move to the standard duties test in its 2004 rule. *See* Bellevue University; Chamber; NAM; RILA. The National Association of Convenience Stores, which likewise emphasized that the short and long tests have not existed since 2004, stated that to "the extent the two-test system still has any limited relevancy to the current inquiry, it is that the salary level should be closer to what the pre-2004 long test would have produced" rather than "to what the pre-2004 'short' test would have produced" today. AFPI

[200] Quoting 88 FR at 62158.

asserted that "[a]ny salary level that excludes employees who are not 'obviously nonexempt' is invalid[,]" that the long test salary level is a "made-up concept[,]" and that the "'long test' and the 'short test' are terms [that have not been] considered since the Department's regulatory changes in 2004 . . . [and] should have no place in determining an appropriate increase to the minimum salary level for exemption today."[201]

The Department agrees with commenters that supported the NPRM's objective of updating the salary level in part to account for the move to a one-test system. As previously explained in detail in the NPRM and in section V.B.3 of this preamble, the Department traditionally considered employees earning between the long and short test salary levels to be employed in a bona fide EAP capacity only if they were not performing substantial amounts of nonexempt work. With the adoption of a duties test based on the less rigorous short duties test, the shift to a single-test system significantly decreased the examination of the amount of nonexempt work employees performed. Following this shift, the Department has taken two approaches to setting the salary level to pair with the standard duties test. The approach taken in the 2004 rule permitted the exemption of all employees earning above the long test salary level who met the standard duties test—including many employees who performed substantial amounts of nonexempt work and traditionally were protected by the long duties test. The approach taken in the 2016 rule was challenged and criticized as making employees earning between the long test salary level and the low end of the short test salary range nonexempt—

[201] NRF included an Oxford Economics report that questioned the Department's long test figure ($925 per week), and, observing that the long test methodology varied over time, stated that a "more reasonable" approach for replicating the long test would be to adjust the 1975 long test level for inflation (which it concluded would result in a salary level of $843 per week in 2022 dollars).

including employees who performed very little nonexempt work and would have been exempt under the long duties test.

The Department recognizes that a single-test system cannot fully replicate both the two-test system's heightened protection for employees performing substantial amounts of nonexempt work and its increased efficiency for determining exemption status for employees who are highly likely to perform EAP duties. Inevitably, any attempt to pair a single salary level with the current duties test will result in some employees who perform substantial amounts of nonexempt work being exempt, and some employees who perform almost exclusively exempt work being nonexempt.[202] But such a result is inherent in setting any salary level. The Department continues to believe that it can better identify which employees are employed in a bona fide EAP capacity by, in combination with the current duties test, using a salary level methodology that accounts for the shift to a one-test system, and that doing so will both restore overtime eligibility for many individuals who perform substantial amounts of nonexempt work and historically would have been protected by the long duties test, and address potential concerns that the salary level test should not be determinative of exemption status for too many individuals. Such a salary level will also more reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift to a one-test system on employees earning between the long and short test salary levels.

[202] *See* Stein Report at 6 ("In some instances the rate selected will inevitably deny exemption to a few employees who might not unreasonably be exempted, but, conversely, in other instances it will undoubtedly permit the exemption of some persons who should properly be entitled to benefits of the act.").

The Department disagrees with commenters that disputed this aspect of the NPRM based on their view that the only valid salary level function is to screen from exemption obviously nonexempt employees. Section 13(a)(1)'s broad grant of statutory authority for the Department to define and delimit the EAP exemption provides the Department a degree of latitude in determining an appropriate salary level for identifying individuals who are employed in a bona fide EAP capacity. As discussed in section V.B.3, for decades, the short test salary level did not perform a screening function, but rather was used to determine whether the full duties test or the short-cut duties test would be applied to determine EAP exemption status. In a one-test system, the Department can change the duties test, the salary level, or both, to ensure that the test for exemption appropriately distinguishes bona fide EAP employees from nonexempt workers. As discussed at length in the NPRM,[203] while acknowledging that it could lessen the salary level test's role by returning to a duties test that explicitly limited the amount of nonexempt work that could be performed, the Department ultimately declined to propose changes to the duties test in this rulemaking. Given that decision, it is appropriate for the Department to choose to better define the EAP exemption by accounting for the shift to a one-test system, and to select a salary level methodology that excludes from exemption some employees who historically were nonexempt because of the more rigorous long duties test. The 2004 and 2019 rules' significant broadening of the statutory exemption (a fact employer commenters generally did not address) to permit all salaried employees earning between the long and short tests who passed the standard duties test to be exempt was not unlawful, but it leaves room for refinement. Section 13(a)(1)

[203] 88 FR 62164–65. Although some commenters addressed changes to the duties test, *see, e.g.*, AFL-CIO, AHLA, NELA, FMI, such changes are beyond the scope of the current rulemaking.

does not require the Department to forever maintain the regulatory choice it made 20 years ago to pair the current duties test with a salary level that places the entire burden of the move to a one-test system on employees who historically were entitled to the FLSA's overtime protection because they performed substantial amounts of nonexempt work and earned between the long and short test salary levels.

The Department continues to believe that the long and short tests provide useful parameters for determining the new salary level test methodology in this rulemaking. The Department disagrees with AFPI that variations in the long test methodology render it a "made-up concept" or that the long and short tests have "no place" in determining the new salary level. The long test salary level has played a crucial role in defining the EAP exemption for the better part of a century, either directly under the two-test system or indirectly under the one-test system. As the Department explained in detail in its 2004 rule, the long test salary level "regulatory history reveals a common methodology used, with some variations, to determine appropriate salary levels[,]" and (with the exception of the 1975 rule) beginning in 1958 "the Department set the [long test] salary levels to exclude approximately the lowest-paid 10 percent of exempt salaried employees" in low-wage areas and industries.[204] The Department "[u]se[d] this regulatory history as guidance" in its 2003 NPRM and, most importantly, validated its chosen methodology in the 2004 rule by showing that it produced the same salary level as the long test methodology—a critical fact employer representatives generally did not address in their comments.[205] While the Department agrees with AFPI and the Oxford Economics report that the

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[204] 69 FR 22166.
[205] *See id.* at 22166–70; *see also* section V.B.3.

data set used to set the long test salary level was not exactly the same in each regulatory update, just as in 2004, minor historical variations do not deprive the long test of its usefulness in helping determine an appropriate salary level now. The Oxford Economics report's suggestion to calculate the long test by updating the 1975 long test salary level for inflation would not faithfully replicate the long test because it would produce a salary level below the 10th percentile of exempt workers in low-wage regions and industries and would conflict with the Department's historical practice of avoiding the use of inflation indicators in updating the salary level.[206]

The Department also disagrees with commenters who asserted that no adjustment is needed to account for the shift to a one-test system because the long test became largely dormant in 1991. In the 2004 rule, the Department acknowledged this dormancy resulting from its outdated salary levels and asserted that employees who were then subject to the long test would be better protected under the higher salary level of the new standard test.[207] But as previously explained, section V.B.3, in the 2004 rule the Department did not compare the overtime protection lower-salaried employees would receive under the standard test with the protection they would have received had the Department updated the long test with a salary level based on contemporaneous data and kept the existing long duties test. Instead, the Department's discussion of the elimination of the long duties test in the 2004 rule focused primarily on the minimal role played by the long test at that time due to the erosion of the long salary level, and on the difficulties employers would face if they were again required to track time spent on nonexempt

[206] *See, e.g.*, 84 FR 51245; 69 FR 22167.
[207] *See* 69 FR 22126.

work when the dormancy of the long duties test meant that they had generally not been performing such tracking for many years.[208]

The Department also disagrees with commenters that asserted that the 2004 rule fully accounted for the move to the standard duties test. Because the 2004 rule did not fully account for the lessened overtime protection for employees who would have been nonexempt under an updated long test (as just described), it created a group of employees with lessened protection under the standard test—those who earned between the long and short test salary levels. These employees were traditionally nonexempt because they failed the long duties test, but were exempt under the 2004 rule because they passed the more lenient standard duties test.[209] By setting the standard salary level equivalent to the long test salary, the 2004 rule in effect created a group of employees who bore the impact of the change from the two-test to the one-test system.

iv. Selecting the Salary Level Methodology

In its NPRM, the Department explained that fully restoring the salary level's screening function and accounting for the move to a one-test system supported setting the salary level at the 35th percentile of full-time salaried worker earnings in the lowest-wage Census Region (the South)—resulting in a proposed salary level of $1,059 per week. Commenters provided competing views on this proposed increase. Employers and employer representatives that

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[208] *See id.* at 22126–27.

[209] The Chamber asserted that the Department's decision to adjust the salary level to account for the shift to a one-test system "fails to appreciate the continued importance of the 'primary duty' principles, the application of which includes an analysis of non-exempt work performed and its relation to the employee's exempt work." Although the Chamber is correct that the standard duties test accounts for nonexempt work, it does so in a less rigorous manner than the long duties test, resulting in some lower-paid white-collar employees who pass the standard duties test but (due to their nonexempt work) would have failed the long duties test.

opposed the proposed salary level often characterized it as "too much, too soon"—stating that an increase of 54.8 percent (or 69.3 percent, based on the $60,209 projected salary level figure included in footnote 3 of the NPRM)[210] less than 4 years after the most recent increase was unnecessary and unprecedented. *See, e.g.*, Air Conditioning Contractors of America; Americans for Prosperity; Joint Comment from Argentum and American Seniors Housing Association; CUPA-HR; International Sign Association; NRF. Some commenters, including American Association of Community Colleges and Associated Builders and Contractors, observed that, by contrast, prior salary level updates have ranged from 5 to 50 percent, and others commented that the proposed increase greatly exceeded the rate of inflation since the 2019 rule, *see* Independent Community Bankers of America, Ohio Township Association. Many employer organizations asserted that the Department was trying to resurrect a methodology akin to the invalidated 2016 rule and that, like that rule, the proposed salary level (which many stressed is a higher dollar figure than the level set in the 2016 rule) would unlawfully supplant the duties test. *See, e.g.*, Americans for Prosperity; National Restaurant Association; PPWO.

Commenters that opposed the proposed salary level were particularly concerned about the impact of this change on specific industries and on businesses in low-wage regions. Some commenters, such as the American Outdoors Association, CUPA-HR, NAHB, and SHRM, provided information from internal surveys to support how the proposal would negatively affect their members. SBA Advocacy similarly summarized concerns received from small businesses. *See also, e.g.*, NFIB. Some commenters emphasized the proposal's impact on particular

[210] Several commenters criticized the Department for providing projected salary level figures in footnote 3. *See, e.g.*, PPWO; NRF. NAM stated that footnote 3 was "inconsistent" with the Administrative Procedure Act.

occupations in their industries, including first-line supervisors, *see, e.g.*, AHLA, NAHB, and entry-level managers, *see, e.g.*, NAM, NRF. Emphasizing the proposed salary level's geographic impact, National Restaurant Association and PPWO warned that the proposal would exclude from exemption a high percentage of employees who pass the duties test in lower-wage regions, and could result in employees in the same job classification being treated differently based on where they live. A number of educational institutions opposed the proposed increase due to cost-related concerns specific to the educational sector. *See, e.g.*, American Association of Community Colleges; Association of Independent Colleges and Universities of Ohio; National Association of Independent Colleges and Universities. The National Association of Counties raised similar concerns about the impact of the increased salary level on local governments. Nonprofit sector feedback was more mixed, with the National Council of Nonprofits characterizing the industry response as one of "moral support" and "operational anxiety." Some nonprofit organizations opposed the proposal, *see, e.g.*, Children's Alliance of Kentucky, U.S. Public Interest Research Group (U.S. PIRG), some supported it, *see, e.g.*, CLASP, Justice at Work, and some agreed with the Department's intent but raised cost and other concerns, *see, e.g.*, Catholic Charities, Open Roads Bike Program.

Commenters had different suggestions for how the Department should account for such regional and industry-specific differences. For example, RILA urged the Department to include the retail industry in its data set, AFPI suggested setting the salary level equal to the 20th percentile of non-hourly employee earnings in the ten lowest-wage states, and Seyfarth Shaw recommended using the East South Central Census Division. The Chamber asked the Department to focus on data from the lowest-wage types of entities (such as small businesses, small nonprofits or small public employers), in the lowest-wage industries, in rural areas, in the lowest-wage Census Region. The Chamber and National Association of Convenience Stores favored excluding nonexempt workers from the data set (and using a lower earnings percentile) and questioned the Department's use of Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data for nonhourly earnings for full-time workers as a proxy for salaried worker earnings.

Commenters that supported increasing the salary level viewed the Department's proposal very differently than employer representatives. Whereas many employer representatives focused on specific regions or industries to assert that the proposed salary level was too high, supportive commenters focused on the national impact to assert that the salary level was appropriate or too low. Many supportive commenters considered it "modest." *See, e.g.*, AFSCME; CLASP; Family Caregiving Coalition; National Partnership. Others stated that the salary level "could have reasonably been significantly higher and still within historical precedent." *See, e.g.*, Common Good Iowa; Jobs to Move America; Louisiana Budget Project; Maine Center for Economic Policy; North Carolina Justice Center. The statistic most often cited to support that the proposal was conservative by historical standards was that whereas 62.8 percent of full-time salaried workers earned less than the short test salary level in 1975, 28.2 percent of full-time salaried workers earned less than the proposed standard salary level (and several of these commenters noted that only approximately 9 percent earned less than the current salary level). *See, e.g.*, EPI; National Center for Law and Economic Justice; Worker Justice Center of New York; Workplace Justice Project. AFL-CIO and others highlighted that the proposed salary level was 19 percent lower than the inflation-adjusted value of the 1975 short test salary level, and EPI stated that, on average, the proposed salary level was 16 percent lower than inflation-adjusted short test salary levels set from 1949 and 1975. Some supportive commenters stressed that a significant salary level increase was needed in part to account for the 2004 rule's elimination of the long duties test, *see, e.g.*, EPI, NELP, while NWLC stated that the proposed methodology would "not eclipse the role of the duties test" and instead would "restore[] a reasonable balance between the strength of the duties test and the height of the salary threshold."

Some commenters advocated for a much higher salary level than the Department proposed, and a number of commenters specifically proposed alternate methodologies for the Department to adopt in the final rule. For example, NELA stated that the proposed level was "too low from a historical perspective" and, favoring "[b]older federal action[,]" asked the Department to (like in the 2016 rule) set the salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (which would produce a salary level of $1,196 per week based on the data used in this final rule). Winebrake & Santillo similarly favored a return to that methodology. AFL-CIO supported setting the salary level higher—at the historical average short test salary level (which would result in a salary level of $1,404 per week based on current data). Other commenters sought a salary level that they stated would exclude from exemption the same proportion of full-time salaried workers as under the 1975 salary level test. For example, Demos urged the Department to set the salary level at the 55th percentile of weekly earnings of full-time salaried workers nationwide to meet this "high-water" mark, and Nick Hanauer supported a salary level of at least $83,000 to "restore the overtime threshold" to a time "when the American middle class was strongest[.]" Commenters that sought a higher salary level than the Department proposed often expressed their disagreement with the district court's decision invalidating the 2016 rule. *See, e.g.*, NELA; Sanford Heisler Sharp; Winebrake & Santillo.

After considering the comments received, the Department is finalizing the salary level methodology as proposed, setting it equal to the 35th percentile of full-time salaried worker earnings in the lowest-wage Census Region (the South)—which produces a salary level of $1,128 per week using calendar year 2023 data. Consistent with the Department's responsibility to "not only … determin[e] which employees are entitled to the exemption, but also [to] draw[] the line beyond which the exemption is not applicable[,]"[211] this salary level will, in combination with the standard duties test, effectively calibrate the scope of the exemption for bona fide EAP employees and do so in a way that distributes across the population of white-collar employees earning between the long and short test salary levels the impact of the shift to a one-test system. As previously discussed, updating the salary level for wage growth since the 2019 rule produces a salary level of $844 per week, and fully restoring the salary level's historic screening function would result in a salary level of $942 per week, equivalent to the 25th percentile of full-time salaried worker earning in the South (*i.e.*, the long test level). Accordingly, the increase from the 25th percentile to the 35th percentile is to account for the shift to a one-test system.[212] The Department set the standard salary level at (or below) the long test level in the 2004 and 2019 rules and set it at the low end of the historic range of short test salary levels in the 2016 rule.

[211] Stein Report at 2.
[212] AFPI mistakenly asserts that the increase from the 20th percentile to the 35th percentile "is based entirely on the switch to a one-test system in 2004." The majority of the salary level increase (from $684 to $942) is to update the salary level for wage growth and fully restore the salary level's historic screening function, with less than half (the increase from the $942 to $1,128) made to account for the shift from the two-test system.

Setting the salary level at either the long test salary level or equivalent to a short test salary level in a one-test system with the standard duties test, however, results in either denying overtime protection to lower-paid employees who are performing large amounts of nonexempt work, and thus, would have been exempt under the Department's historical view of the EAP exemption, or in raising concerns that the salary level is determining the exemption status of too many employees. In contrast, an appropriately calibrated salary level between the long and short test salary levels better defines and delimits which employees are employed in a bona fide EAP capacity, and thus better fulfills the Department's duty to define and delimit the EAP exemption.

The Department's methodology established in this final rule uses the second-to-lowest of the earnings ventiles between the long test salary level (the 25th percentile of full-time salaried worker earnings in the lowest-wage Census Region) and the short test salary level (approximately the 51stth percentile of this data set). These ventiles are the 30th, 35th, 40th, 45th, and 50th percentiles of full-time salaried worker earnings in the lowest-wage Census Region. The Department continues to believe that its methodology produces a salary level high enough above the long test salary level to ensure overtime protection for some lower-paid employees who were traditionally entitled to overtime compensation under the two-test system by virtue of their performing large amounts of nonexempt work, and also low enough, as compared with higher salary levels, to significantly shrink the group of employees performing EAP duties who are excluded from the exemption by virtue of their salary alone. Whereas the 2004 and 2019 rules permitted the exemption of employees earning between the long and short test salary levels even if they performed significant amounts of nonexempt work, and the 2016 rule prevented employers from using the exemption for such employees earning below the short test salary range even if they performed EAP duties, the methodology adopted in this final rule falls between these two methodologies and thus, as commenters including the Administrative Law Professors and Coalition of State AGs agreed, reasonably balances the effect of the switch to a one-test system in a way that better differentiates between those who are and are not employed in a bona fide EAP capacity. Of the 10.8 million salaried white-collar employees earning between the equivalent of the long and short test salary levels, approximately 40 percent earn between $942 (the equivalent of the long test salary level) and $1,128 (the new salary level) and would receive overtime protection by virtue of their salary, while approximately 60 percent earn between $1,128 and $1,404 (the equivalent of the short test salary level) and would have their exemption status turn on whether they meet the duties test. These and other statistics, discussed in section V.B.5.iii, demonstrate that the salary level will not "essentially eliminate[] the role of the duties test" as National Restaurant Association and others contended. *See also, e.g.*, AHLA; CWC.

Even though the Department's decision to select a salary level below the midpoint between the long and short tests means that the effect of the salary level on employees earning within this range and their employers is not exactly equal, a higher salary level could disrupt the reliance interests of employers who (due in part to the Department's failure to update the salary level tests between 1975 and 2004), have been able to use a lower salary level and more lenient duties test to determine exemption status since 1991. However, a significantly lower salary level akin to the long test salary level would avoid disrupting such reliance interests only by continuing to place the burden of the move to a one-test system entirely on employees who historically were entitled to the FLSA's overtime protections because they perform substantial amounts of nonexempt work. The Department believes that employer reliance interests should inform where the salary level is set between the long and short test levels, and that its approach appropriately balances the impact of the move to a one-test system between employees' right to receive overtime compensation and employers' ability to use the exemption. Such balancing is fully in line with the Department's authority under the FLSA to "mak[e] certain by specific definition and delimitation" the "general phrases" "bona fide executive, administrative, or professional capacity." [213] This grant of authority confers discretion upon the Department to determine the boundaries of these general categories; any such line-drawing, as courts have recognized, will "necessarily" leave out some employees "who might fall within" these categories.[214]

The Department recognizes the tension between the methodology adopted in this final rule and some statements made in its 2016 and 2019 rules. The Department stated in its 2016 rule that the current duties test could not be effectively paired with a salary level below the short test salary range, and for this reason expressly rejected setting the salary level at the 35th percentile of weekly earnings of full-time salaried workers in the South.[215] But that rule, which would have prevented employers from using the EAP exemption for some employees who were considered exempt under the prior two-test system, was challenged in court, and a return to it would result in significant legal uncertainty for both workers and the regulated community. In the 2019 rule, the Department expressly rejected setting the salary level equal to the long test or higher.[216]

[213] *See Walling*, 140 F.2d at 831-32.
[214] *Id.* at 832.
[215] 81 FR 32410.
[216] *See* 84 FR 51244.

However, as noted above, the Department did not fully address in that rule the implications of the switch from a two-test to a single-test system. Having now grappled with those implications, the Department concludes that not only can it pair the current duties test with a salary between the long and short test salary levels, but that doing so appropriately recalibrates the salary level in a one-test system to ensure that it effectively identifies bona fide EAP employees.

In setting the salary level, the Department continues to believe that it is important to use a methodology that is transparent and easily understood. As in its prior rulemakings, the Department is setting the salary level using earnings data from a lower-salary regional data set (as opposed to nationwide data) to accommodate businesses for which salaries generally are lower due to geographic or industry-specific reasons.[217] Specifically, the Department is setting the salary level using the data set of full-time nonhourly[218] workers in the lowest-wage Census Region (the South). This approach promotes transparency because BLS routinely compiles this data. It also promotes regulatory simplification because the data set is not limited to exempt EAP employees and thus does not require the Department to model which employees pass the duties test.[219] In keeping with the Department's past practice, it is relying on up-to-date data to determine the salary level.[220] In the NPRM, the Department used 2022 salary data for estimating the salary level resulting from the proposed methodology, which was current at the time the

[217] *See id.* at 51238; 81 FR 32404.
[218] Consistent with recent rulemakings and the NPRM, *see* 88 FR 62188, 84 FR 51258, in determining earnings percentiles the Department looked at nonhourly earnings for full-time workers from the CPS MORG data collected by BLS.
[219] As discussed in the economic analysis, *see* section VII, this modeling is done using the Department's probability codes. *See* 84 FR 51244; 69 FR 22167.
[220] *See* 84 FR 51245; 81 FR 32405; 69 FR 22168.

Department developed its proposal. In this final rule, the Department is relying on calendar year 2023 salary data, as published by BLS, to set the salary level.[221]

Given the strong views expressed by commenters, including those opposing the proposal or favoring a higher salary level, the Department did not arrive lightly at its decision to finalize the salary level methodology as proposed. Commenter feedback often reflected competing vantage points for assessing the Department's proposal. Commenters that supported the Department's proposal or a higher salary level (most often, the 2016 rule methodology) often compared the proposed salary to short test salary levels, while commenters that opposed the proposed increase often stressed the size of the change from the current salary level. The Department agrees with supportive commenters that past salary levels should inform the current update, and agrees that statistics such as the percentage of salaried white-collar workers who earn below the salary level or statistics comparing the new salary level to inflation-adjusted prior levels, reinforce the reasonableness of the Department's approach. However, the Department is wary of comments urging a return to the 2016 rule methodology that do not account for subsequent court decisions and the Department's 2019 rulemaking. The Department also recognizes concerns from some commenters about the size of the salary level increase. But this metric is influenced by many factors and thus does not, in and of itself, establish whether a salary level sets an appropriate dividing line for determining whether an employee is employed in a bona fide EAP capacity. For example, the size of the current increase is influenced by factors including significant wage growth since the 2019 rule (simply adjusting the current salary level

[221] BLS currently publishes this data at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.

methodology for wage growth would result in a roughly 23 percent increase); the Department for the first time updating a salary level that was set below the long test; and the Department adjusting the salary level to account for the move to a one-test system. While the 65 percent increase is greater in percentage terms than most prior updates, the Department does not consider this factor dispositive.[222]

The salary level methodology adopted in this final rule ($1,128 per week; $58,656 annually) produces a salary level that is lower than the two salary level estimates provided in footnote 3 of the NPRM ($59,284 and $60,209), which were based on a quarter of data. The Department disagrees with commenters that criticized the Department for providing projected salary level figures in its NPRM. These comments overlook that the NPRM proposed a methodology for updating the salary level test, not just a salary level figure. Providing commenters an estimate of the salary level that the proposed methodology could produce in a final rule based on updated data promoted rulemaking transparency and the opportunity for fully informed commenter feedback. That many commenters used the figures in footnote 3 in their comments, and the final salary level based on calendar year 2023 data is between the proposed salary level and the two estimates in the footnote, reinforces that footnote 3 in no way deprived commenters of the opportunity to meaningfully comment on the NPRM.

As previously discussed, most employer commenters that opposed the proposed salary level opposed any increase or at most supported a return to the 2004/2019 methodology, and so they did not address the NPRM's analysis examining where to set the salary level between the

[222] As discussed in section IV, in part to provide employers more time to adjust, the new methodology will not be applicable until January 1, 2025.

long and short test salary levels. The Department does not find these comments persuasive because they in effect sought a salary level below the long test level, which would not even fully restore the salary level's screening function, let alone account at all for the move to a one-test system. As for commenter concerns about the salary level's impact on low-wage regions and industries, the Department accounts for these concerns by setting the salary level using the lowest-wage Census Region. This aspect of the rulemaking differs from the 2016 rulemaking, where the Department proposed to set the salary level using a national data set and then, in response to commenters concerns, shifted to the lowest-wage Census Region in the final rule to account for low-wage regions and industries.[223] The Department used this past experience to account for the impact on low-wage regions and industries in developing the NPRM and, having done so, is again basing the salary level on the earnings of workers in the lowest-wage Census Region in this final rule.

The Department declines requests from some commenters to change the data set it used to set the salary level. Some asked the Department to add earnings data from a specific industry to the CPS earnings data. The Department is not altering the data set in this way because it believes that using earnings data from the lowest-wage Census Region produces a salary level that accounts for differences across industries and regional labor markets. The Department also is not altering the Census region data set so that it excludes all states with higher earnings, nor is the Department creating a new data set that includes only States with the lowest earnings. The Department's chosen approach is consistent with its practice since the 2004 rule of using the South, rather than a narrower geographic region, when setting the salary level. Restricting the

[223] *See* 81 FR 32408.

data set to the ten lowest-wage states or to the East South Central Region (made up of just four states, Alabama, Kentucky, Mississippi, and Tennessee) would give undue weight to low-wage areas and skew the salary level. The Chamber's suggestion to restrict the data set even further (by focusing on low-wage entities within low-wage industries within rural areas within the South) would even further compound this concern.

The purpose of the data set is not simply to produce the lowest possible salary level. The Department's approach directly accounts for low-wage areas while producing a salary level that is appropriate to apply nationwide. The Department also declines requests to limit its data set to exempt workers, instead continuing to set the salary level using earnings data for exempt and nonexempt workers—as it has done in every one of its rulemakings under the one-test system. As explained in the 2004 rule, the Department's chosen approach is preferable in part because restricting the data set to exempt employees requires "uncertain assumptions regarding which employees are actually exempt[.]"[224] The Department is also continuing to use data on nonhourly worker earnings as a proxy for compensation paid to salaried workers. Although some commenters challenged this approach, the Department is not aware of, and commenters did not provide, any statistically robust data source that more closely reflects salary as defined in the Department's regulations. Also, as discussed in section VII, the Department believes that relatively few nonhourly workers were paid by methods other than salaried.

In response to commenter opposition to the proposed salary level and the concerns described above, the Department considered setting the salary level equal to the 30th percentile of earnings of full-time salaried workers in the lowest-wage Census Region. The Department

[224] 69 FR 22167.

ultimately decided not to adopt this approach, however, because it would less effectively account for the shift to a one-test system. This methodology would set the salary level based on the lowest earnings ventile between the short and long test salary levels and produce a salary level that is only $77 above the long test level. As a result, for the population of white-collar workers earning between the long and short tests, only 18 percent would earn below the salary level (whereas 40 percent of this population earn below the new salary level). This approach thus would not sufficiently address the problem inherent in the 2004 methodology of including in the exemption employees who perform significant amounts of nonexempt work, including those earning salaries close to the long test salary level—where the Department would expect a higher proportion of workers to perform more nonexempt work.[225] In contrast, the Department's approach addresses these concerns in a manner that more reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move to a one-test system.

The Department disagrees with commenters that stated that the chosen methodology simply resurrects the 2016 methodology—which set the salary level equal to the 40th percentile of full-time salaried worker earnings in the lowest-wage Census Region. The fact that the new salary level is higher in nominal dollars than the level set in the 2016 rule ($913 per week) is

[225] The Department has repeatedly recognized that increasing salary level tends to correlate with the performance of bona fide EAP duties. *See* section V.B.1 (discussing role of long test and short test salary levels); section V.C (discussing the role of the HCE total annual compensation threshold). Thus, increasing overtime protection specifically for workers earning at the lower end of the range between the long test salary level and short test salary level—but not those earning at the higher end of that range—is an especially appropriate approach to balancing these concerns.

irrelevant because that level was calculated using 2015 data.[226] Applying the 2016 methodology to current data produces a salary level of $1,196 per week. Whereas under this rule an employee's salary level will be determinative of exemption status for 40 percent of the 10.8 million employees earning between the long and short test levels, under the 2016 methodology salary would be determinative for 55 percent of such employees. A salary level equivalent to the 40th percentile in the South would also result in 5.0 million affected workers. Although some of these workers earn below the long test level and would be nonexempt under either approach, this alternative approach would result in 949,000 more affected workers than the Department's chosen methodology. The Department's decision to deviate from the 2016 methodology is significant, as underscored by the fact that (as discussed in more detail below) a number of employee representatives urged the Department to adopt that methodology or a higher percentile.

The Department recognizes that many commenters found the proposed methodology conservative, or overly conservative, with some commenters urging the Department to select a methodology that produces a higher salary level. Repeating the 2016 rule methodology, as some commenters requested, by setting the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would further reduce the impact of the move to a one-test system on lower-paid white-collar employees who perform significant amounts of nonexempt work. As discussed above, commenters that supported the 2016 rule methodology provided statistics demonstrating that this approach yields a salary level within historical norms. The 40th percentile would produce a salary level ($1,196 per week) that is above the midpoint between the long and short test salary levels. As noted above, of the

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[226] *See* 81 FR 32393.

approximately 10.8 million salaried white-collar employees who earn between the long and short test salary levels, approximately 55 percent earn between the long test salary level and $1,196 and would receive overtime protection by virtue of their salary, while approximately 45 percent earn between $1,196 and the short test salary level and would have their exemption status turn on whether they meet the duties test.

The Department believes this rule appropriately distributes the burden of the change from a two-test to one-test system between employees and employers. By contrast, the Department remains concerned that courts could find that adopting the 2016 rule methodology would make the salary level test determinative of overtime eligibility for too many employees. Setting the salary level equal to a higher percentile of weekly earnings (such as the 55th percentile as Demos recommended), would further amplify this concern. Setting the salary level based on a lower percentile of earnings will (compared to such higher levels) increase the number of employees for whom duties is determinative of exemption status, and in turn increase the ability of employers to use the exemption for more lower-paid employees who meet the EAP duties requirements. This outcome is consistent with the important role of the duties test in identifying bona fide EAP employees. EPI did not find the number of workers affected by a salary level increase to be an informative metric for assessing whether a threshold is appropriate and the Department agrees that this statistic has significant limitations. In particular, it is notable that although the standard salary level changes will result in 4.0 million affected workers (1.0 million from the initial update and 3.0 million from applying the new standard salary level),[227] only 2.2 million of these workers are due to the increase from the long test to the new methodology, while

[227] *See* Table 25.

1.8 million affected workers (or 45 percent) are a result of restoring the historic screening function of the long test salary level. By comparison, updating the salary level using the 2016 methodology and current data would result in 5.0 million affected workers. Although the number of affected workers for this rule is above the number of affected workers in the 2019 rule, the difference is necessary to fully restore the salary level's screening function and account for the shift to a one-test system, and the overall impact of this change on the workforce is relatively small (*see* section V.B), such that the new salary level is a proper exercise of the Department's authority to define and delimit the scope of the EAP exemption.

In declining to adopt the 2016 rule methodology, the Department is also responding to concerns that setting the salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would foreclose employers from exempting any white-collar employees who earn less than that amount ($1,196 per week based on the data used in this final rule) and perform EAP duties, including those who were exempt under the long test and remained exempt when the Department established the one-test system in 2004 and set the salary level equivalent to the long test level.[228] Litigants challenging the 2016 rule emphasized this consequence of setting a salary level above the long test in a one-test system, and those arguments have contributed to the Department more fully attempting to account for the impact of the shift to a one-test system. Although some commenters favored a salary level equivalent to the short test level, such an approach would result in employers being unable to use the exemption for any employees who earn between the long and short test and have previously been exempt, either under the long test, or under the standard test set equal to the long test. In

[228] *See* 84 FR 51242.

contrast, the methodology in this final rule produces a salary level that is not only below any short test level, but also lower than the midpoint between the long and short test salary levels. This approach appropriately balances the goal of ensuring that employees earning above the long test salary level who perform substantial amounts of nonexempt work are not exempt with the goal of enabling employers to use the exemption for employees who do not perform substantial amounts of nonexempt work.

v. Salary Level Effects

In selecting the salary level methodology, the Department also considered commenter views that the proposed salary level would generate a range of repercussions. Many commenters that opposed the proposed salary level stated that it would cause widespread reclassification of currently exempt employees to nonexempt status and a corresponding decrease in flexible work arrangements, including remote work opportunities. *See, e.g.*, FMI; IFDA; National Lumber and Building Material Dealers Association; NRF. Others stated that employers would convert newly nonexempt employees from salaried to hourly status, which they contended would harm employee morale, *see, e.g.*, Independent Electrical Contractors, National Small Business Association, and create an undesirable "punch the clock" mentality, *see, e.g.*, North Carolina Center for Nonprofits, The 4A's. Some commenters that opposed the proposal stated that the rule would "harm the very workers the Department says it is trying to benefit," asserting, for example, that the proposal would result in reduced employee benefits and career advancement opportunities, and increased turnover. *See* Americans for Prosperity; *see also* PPWO. Other commenters expressed concern that the proposed increase would decrease employee productivity, *see, e.g.*, John. C. Campbell Folk School, decrease social services, *see, e.g.*, Social

Current, increase employer costs, prices, and inflation, *see, e.g.*, Chamber, and/or cause salary compression issues, *see, e.g.*, Seyfarth Shaw.

Commenters that supported the Department's proposed salary level or a higher salary level than proposed often highlighted what they viewed as positive effects of the proposed increase. Many emphasized that the updated salary level would make it more difficult to exempt lower-paid employees who they believed should be nonexempt, particularly low-level managers with many duties equivalent to non-managerial employees. *See, e.g.*, Coalition of Gender Justice and Civil Rights Organizations; NELP; Winebrake & Santillo. Restaurant Opportunities Center United stated that the current "low salary threshold discourages restaurant employees from taking managerial and supervisory positions, thereby gaining skills and experience that would enable them to advance their careers[.]" Sanford Heisler Sharp stated that the "need for monitoring and protecting white-collar workers' hours is critical today" because the significant increase in telework since 2020 has meant that employers are "no longer constrained by the practical limitation of the worker leaving the workplace." Other employee representatives explained that the rule would produce positive societal benefits such as increased economic security, *see, e.g.*, NELP, improved worker health due to decreased work hours, *see, e.g.*, SEIU, decreased poverty, *see, e.g.*, NEA, and disproportionate benefits for women, people of color, and workers with disabilities, *see, e.g.*, National Partnership.

Taken together, the above comments do not provide a compelling justification for deviating from the Department's proposed salary level methodology. The Department agrees that the salary level increase will result in some currently exempt employees becoming nonexempt and therefore receiving minimum wage and overtime protections. Employee reclassification is a consequence of any salary level increase, and the number of reclassified employees will depend on how employers choose to respond to this rule for their employees who earn between the current and new salary levels. Moreover, there is no prohibition on paying nonexempt employees a salary as long as any overtime hours are appropriately compensated, and employers may therefore choose to continue to pay a salary to affected workers. Employers likewise have latitude to determine what flexible work arrangements to provide employees and, more broadly, need not structure their pay plans in a manner that results in the potentially adverse effects (such as decreased employee benefits) that some employers identified. Significantly, employees and employee representatives did not share employer commenter concerns about potential adverse consequences of the proposed salary level, let alone view them as a justification for deviating from the proposed salary level. This includes comments from individual employees. For example, an exempt manager for a small nonprofit organization stated that they "would love the opportunity to be reclassified to nonexempt and be compensated for time worked beyond 40 hours, or alternatively be given a raise if that level of flexibility is deemed necessary by my employer." As to potential consequences of the updated salary level on the economy more broadly, such implications are speculative and in dispute (as discussed in some detail in section VII), and do not provide a basis for a different salary level methodology.

iv. Other Issues

The Department also addresses some other issues stakeholders raised in their comments.

Many nonprofit organizations worried that the proposed salary level would disproportionately affect them, raising concerns related to, for example, their reliance on government grants, *see, e.g.*, Asclepius Initiative, Catholic Charities, National Council of

Nonprofits, and their inability to raise prices, *see, e.g.*, Advancing States, Independent Sector, YMCA. Some commenters asked the Department to exempt at least certain nonprofit organizations from the salary level test. *See, e.g.*, Oklahoma Wesleyan University; U.S. PIRG. Many nonprofit organization commenters opposed this idea. *See, e.g.*, A Second Chance; Delaware Alliance for Nonprofit Advancement; National Council for Nonprofits; North Carolina Center for Nonprofits. The Department recognizes and values the enormous contributions that nonprofit organizations make to the country. Nonprofit organizations provide services and programs that benefit many vulnerable individuals in a variety of facets of life, including services that benefit the vulnerable workers who the Department also works to protect by ensuring that their workplaces are fair, safe, and secure. However, the Department's EAP exemption regulations have never had special rules for nonprofit organizations; the employees of nonprofits have been subject to the EAP exemption if they satisfied the same salary level, salary basis, and duties tests as other employees.[229] Consistent with this history, the Department declines to exempt nonprofit organizations from the salary level test. As with other industries, as discussed above, the Department accounts for nonprofit industry concerns by setting the salary level using the lowest-wage Census Region.

A number of community-based service providers for people with intellectual and developmental disabilities urged the Department to work closely with other government agencies, including the Centers for Medicare and Medicaid Services (CMS) and the Administration for Community Living (ACL), to implement the Department's proposed changes in the context of Medicaid home and community-based services (HCBS). *See, e.g.*, ANCOR;

[229] *See* 81 FR 32398, 32421; *see also* 84 FR 51234.

BrightSpring Health Services; NASDDDS; United Cerebral Palsy Association. Some commenters specifically referenced a policy that was adopted by the Department related to the enforcement of the 2016 regulation for providers of Medicaid-funded services for individual with intellectual or developmental disabilities in residential homes or facilities with 15 or fewer beds.[230] *See, e.g.*, Chimes; The Arc of the United States. Consistent with its approach in the 2019 rule, the Department is not adopting a similar policy in this rulemaking. The Department believes following this approach is appropriate given that the initial update (to $844 per week) is less than salary level increase in the 2019 rule, and service providers will have approximately 8 months from publication of this rule to comply with the new salary level ($1,128 per week). Additionally, the Department intends (as many commenters requested) to issue technical assistance to help employers comply with the FLSA and will continue to coordinate (as other commenters requested) with ACL and CMS on supporting Medicaid-funded service providers impacted by this rule.

Some commenters asked the Department to permit employers to prorate the salary level for part-time employees. *See, e.g.*, NCFC; PPWO; Seyfarth Shaw; University System of Maryland. The Department has never prorated the salary level for part-time positions; considered and rejected similar requests in its 2004, 2016, and 2019 rules; and declines to establish a prorated salary level for part-time positions in this rule.[231] As the Department has previously explained, employees hired to work part time generally do not work in excess of 40 hours in a workweek, and overtime pay is not at issue for these employees. An employer may pay a

[230] *See* 81 FR 32390 (May 23, 2016).
[231] 84 FR 51239; 81 FR 32422; 69 FR 22171.

nonexempt employee a salary to work part time without violating the FLSA, so long as the salary equals at least the minimum wage when divided by the actual number of hours (40 or fewer) the employee worked.[232]

The Chamber objected to the Department's proposed change to the example provided in § 541.604(b), a salary basis test regulation establishing that an exempt employee may be paid on an hourly, daily, or shift basis if the employment arrangement "includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned." The Department did not propose any substantive change to this regulation and only proposed to update the dollar amounts in light of the proposed increase in the standard salary level. The Department has again updated the figures in the regulation to account for the salary level change from the NPRM to the final rule. The updated numbers in this final rule produce the same ratios between actual and guaranteed earnings as example in the current regulations. The Department declines the Chamber's suggestion to change the numbers, which would change the ratio.

Some commenters urged the Department to increase the percentage of the salary level that employers could satisfy using nondiscretionary bonuses and incentive payments (including commissions). *See, e.g.*, FMI; National Automobile Dealers Association; National Golf Course Owners Association; TechServe Alliance. The Department did not propose any changes to how bonuses are counted toward the salary level requirement,[233] and declines to make any such

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[232] *See* FLSA2008–1NA (Feb. 14, 2008).
[233] *See* 88 FR 62169.

changes in this final rule. Consistent with the current regulations, employers can satisfy up to 10 percent of the new salary level ($112.80 per week under this final rule) through the payment of nondiscretionary bonuses and incentive payments (including commissions) paid annually or more frequently.

5. Assessing the Impact of the Salary Level

i. The Department's Assessment of the Impact of the Proposed Salary Level

As stated in the NPRM, the Department sought to achieve three objectives in proposing to set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region: preserve the primary role that the duties test plays in determining EAP exemption status; fully restore the initial screening function of the salary level; and more effectively identify in a one-test system who is employed in a bona fide EAP capacity in a manner that reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move from a two-test to a one-test system.

In assessing whether the proposal met these objectives, the Department first considered the impact of its proposed salary level on salaried white-collar workers across the income spectrum. The Department noted that almost three-quarters of salaried white-collar workers earned above the proposed salary level, and therefore duties, rather than salary, would remain determinative of exemption status for a significant majority of white-collar workers. The Department also concluded that a minority of the smaller share of salaried white-collar workers who earn less than the proposed standard salary level would meet the duties test, whereas approximately three-quarters of the far-larger share of salaried white-collar workers who earn at least the proposed standard salary level would meet the duties test. The Department noted that this supported that the proposed salary level would be an effective indicator of the capacity in which salaried white-collar workers are employed. The Department also examined the impact of the proposed salary level on currently exempt EAP workers—salaried white-collar employees who meet the standard duties test and earn at least $684 per week. The Department found that 1.8 million of the workers who would be affected by the proposed salary level earned less than the long test salary level and therefore would have been screened from the exemption under every prior rule issued by the Department except for the 2019 rule, thus confirming that the proposed standard salary level would play a relatively modest role in determining EAP exemption status.

ii. Comments Received

The Department received relatively few comments directly addressing its estimates of the impact of the proposed salary level or the metrics it identified to assess those impacts. As previously discussed, some commenters representing employer interests stated that the proposal would exclude too many workers from the exemption based on their earnings. *See, e.g.*, Chamber; PPWO; Seyfarth Shaw. However, commenters that expressed such views generally did not challenge the Department's analysis of the impact of its proposed salary level on all salaried white-collar workers,[234] nor did they generally address the Department's conclusion that under the proposed standard salary level, duties would be determinative of exemption status for a

[234] Some commenters asserted that the proposed salary level would make nonexempt too many workers in lower-wage regions and industries. *See, e.g.*, AHLA; CUPA-HR; NAHB; National Restaurant Association. As discussed above, the Department has accounted for low-wage industries and regions by using earnings data from the lowest-wage Census Region to set the salary level.

large majority of full-time salaried white-collar workers.[235] As noted in section V.B, employer advocates that opposed the Department's proposed salary level instead often emphasized the salary level's function of screening obviously nonexempt employees from the exemption, albeit asserting that the proposed salary level would exceed its screening function, *see, e.g.*, PPWO, RILA, SHRM, whereas worker advocates often favored a greater role for the salary level than employer representatives, *see, e.g.,* AFSCME, EPI, Family Values @ Work.

AFPI challenged the Department's estimate of the number of workers who earn between the proposed salary level and the long test salary level, which it claimed is a "made-up number."[236] Some commenters representing employer interests stated that the Department underestimated the number of currently exempt workers who would be impacted by its proposed salary level. *See, e.g.*, AFPI; NAM; NRF (including a report by Oxford Economics); Rachel Greszler; Seyfarth Shaw. The Oxford Economics report claimed that up to 7.2 million workers could be affected by the proposed salary level; AFPI asserted that approximately "7.5 million

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[235] AFPI objected to the Department's use of nonhourly workers' earnings to estimate the impact of the proposed salary level on salaried workers. *See also* Chamber; National Association of Convenience Stores. The Department disagrees with the suggestion that data on compensation paid to full-time nonhourly workers is not representative of the earnings of full-time salaried workers. The Department used the same approach in the 2004, 2016, and 2019 rules. *See* 84 FR 51258; 81 FR 32414; 69 FR 22197. As explained in greater detail below, *see* section VII, while the CPS MORG data on full-time nonhourly workers on which the Department has relied includes workers paid on a salary basis along with workers paid on other bases, such as on a piece-rate or day-rate basis, the Department's analysis of data from the Panel Study of Income Dynamics (PSID) shows that relatively few nonhourly workers were paid by methods other than salaried.

[236] NRF included a report from Oxford Economics which stated that a more reasonable methodology for modeling the long test salary level would be to update the 1975 long test level for inflation. As discussed in section V.B, the Department disagrees with Oxford Economics' suggestion, which would conflict with the Department's historical practice of avoiding the use of inflation indicators in updating the salary level.

employees would be non-exempt for the first time based on salary alone"; and Rachel Greszler stated that the correct figure is as high as 12.3 million workers. NAM stated that the Department "underestimated the impact," though it did not elaborate. Some of these commenters also challenged the probability codes the Department used to estimate the number of workers who meet the duties test. *See, e.g.*, AFPI; Rachel Greszler.

On the other hand, AFL-CIO, the Coalition of State AGs, and EPI relied on the Department's estimates in their comments. For instance, the Coalition of State AGs observed that "'most salaried white-collar employees paid less than the proposed standard salary level do not meet the duties test, whereas a substantial majority of salaried white-collar employees earning above the proposed standard salary level meet the duties test,'" quoting the NPRM, in opining that the proposed salary level struck a more appropriate balance between the long and short test salary levels than the 2004 and 2019 rules. In asserting that the proposed salary level, although "too low[,]" would restore overtime protections to lower-paid workers "who were wrongly classified as exempt[,]" AFL-CIO referenced the Department's estimate that the proposed salary level would be "restorative for more than half of the workers it affects" since "these employees would have been entitled to overtime in every rule prior to the 2019 rule." EPI noted that the 3.4 million workers that the Department estimated would be affected by the proposed salary level, plus the approximately 248,000 workers who would be affected by the proposed change in the total compensation threshold for the HCE test, discussed below, together constituted "just 2.6% of workers subject to [the] FLSA . . . and just 2.3% of all workers." As discussed in section V.B, numerous commenters representing workers also pointed to additional data points which, they stated, show that the Department's proposed salary level would fulfill a relatively limited role in determining exemption status, particularly by historical standards. For instance, multiple commenters stated that approximately 28.2 percent of all full-time salaried workers earn below the proposed salary level, whereas in 1975 approximately 62.8 percent of full-time salaried workers earned below the short test salary level. *See, e.g.*, AFL-CIO; EPI; NELP; NWLC.

iii. Assessing the Impact of the New Salary Level

As discussed in section V.B, the Department is finalizing its proposal to set the standard salary level equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which, based on the most recent earnings data, produces a salary level of $1,128 per week. The Department has analyzed the impact of the new salary level, applying generally the same metrics that it applied in the NPRM. Upon consideration of the comments received, the Department concludes that this salary level meets the objectives it sought to achieve in undertaking this rulemaking: preserving the primary role of an analysis of employee duties in determining EAP exemption status; fully restoring the initial screening function of the salary level; and more effectively identifying in a one-test system who is employed in a bona fide EAP capacity in a manner that reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move from a two-test to a one-test system.

The Department intentionally chose a salary level methodology that will ensure that EAP exemption status for the great majority of white-collar employees will continue to depend on their duties. Consistent with the NPRM, the Department thus began by analyzing the impact of the new salary level on all full-time white-collar salaried workers. The Department continues to believe that an analysis of how the new salary level will impact all full-time salaried white-collar workers is necessary to put the salary level and its relation to an examination of duties in the appropriate context, as this is the universe of workers who could potentially be impacted by an increase in the standard salary level. As noted above, commenters representing employers did not directly challenge this aspect of the Department's analysis. And many commenters representing workers effectively endorsed this approach in stating that the proportion of full-time salaried workers who earn less than the proposed salary level shows the relatively modest impact of the proposed salary level in determining EAP exempt status, in comparison to an examination of duties. *See, e.g.*, AFL-CIO; EPI; NELP; NWLC.[237]

The Department's analysis confirms that the number of full-time salaried white-collar workers who will be excluded from the EAP exemption due to the Department's salary level is greatly exceeded by the far-larger population of full-time salaried white-collar workers for whom duties will continue to determine their exemption status. As illustrated in Figure A below, of the approximately 45.4 million full-time salaried white-collar workers in the United States subject to the FLSA,[238] about 12.7 million earn below the new salary level of $1,128 per week, and about 32.7 million earn above the salary level.[239] Thus, approximately 28 percent of full-time salaried

[237] As discussed further below, the Department does not believe, as some commenters representing workers suggested, that the proportion of full-time salaried workers who earned below the short test salary level in 1975 is the most appropriate comparator for the population of workers who earn below the new salary level.
[238] Excluded from this number are workers in named occupations and those exempt under another non-EAP overtime exemption. The exemption status of these groups will not be impacted by a change in the standard salary level. Commenters did not address the Department's exclusion of these workers from its analysis of the impact of the proposed salary level.
[239] This estimate is conservative, as it excludes 8.1 million white-collar workers employed as teachers, attorneys, and physicians, for whom there is no salary level requirement under the part

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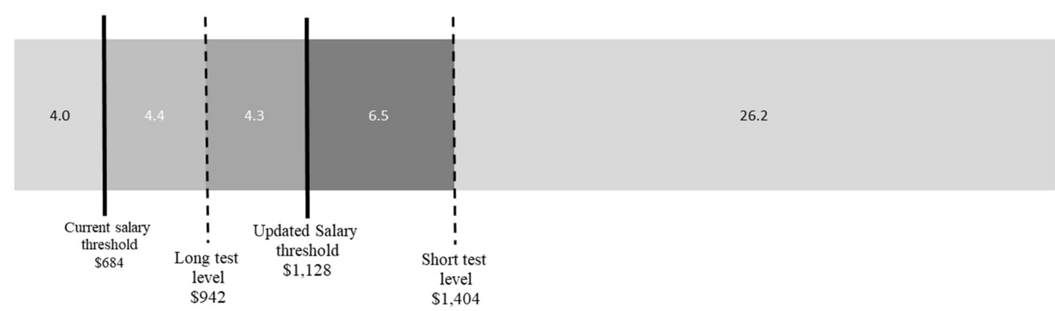
white-collar workers (most of whom, as discussed below, do not perform EAP duties) earn below the new salary level, whereas approximately 72 percent of full-time salaried white-collar workers earn above the salary level and would have their exemption status turn on their job duties.

Figure A: Distribution of Full-Time Salaried White-Collar Workers by Weekly Earnings



Note: Numbers are in millions of workers.

Scrutinizing these figures more closely reinforces the continued importance of the duties test under the final rule. Of the approximately 12.7 million full-time salaried white-collar workers who earn below the new salary level of $1,128 per week, about 8.3 million earn below the long test salary level of $942 per week. With the exception of the 2019 rule when the Department set the salary level slightly lower, the Department has always set salary levels that screened from exemption workers earning below the long test salary level. As discussed in section V.B, the long test salary level is a key parameter for determining an appropriate salary

541 regulations and whose exemption status is therefore always determined by their duties. If these workers in "named occupations" are included, the percentage of salaried full-time white-collar employees for whom exemption status would depend on duties, rather than salary, increases to 76 percent. *See* §§ 541.303–304.

level.[240] The number of full-time salaried white-collar workers for whom salary would be determinative of their nonexempt status and who earn at least the long test salary level—4.3 million—is over seven times smaller than the number of full-time salaried white-collar workers for whom job duties would continue to be determinative of their exemption status because they earn at least the new salary level—32.7 million.

In analyzing how the Department's new salary level will impact all salaried white-collar workers, the Department also considered the extent to which full-time salaried white-collar workers across the income distribution perform EAP duties. As the Department stated in the NPRM and the 2019 rule, the salary level has historically served as "a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees; however, the salary level should not eclipse the duties test.[241] In considering the extent to which full-time salaried white-collar workers perform EAP duties, the Department uses probability estimates of passing the standard duties test, as it did in the NPRM.[242]

The Department's analysis shows that the new salary level is a helpful indicator of whether salaried workers perform EAP duties, since a minority of full-time salaried white-collar workers who earn less than the salary level meet the standard duties test, whereas a large majority of such workers who earn more than the salary level meet the standard duties test. As illustrated in Figure B, of the 12.7 million full-time salaried white-collar workers who earn less

[240] The Department calculated the value of the long test salary level using the same methodology it used in the NPRM, updated for current earnings data: the 10th percentile of earnings of likely exempt workers in low-wage industries and regions. As explained in section V.B, any minor historical variations in the long test methodology do not deprive it of its usefulness in helping determine an appropriate salary level now.
[241] 88 FR 62171;84 FR 51239, 51237.
[242] *See* section VII.

than $1,128 per week, the Department estimates that only 38 percent—about 4.8 million workers—meet the standard duties test. In contrast, of the 32.7 million full-time salaried white-collar workers who earn at least $1,128 per week, a large majority—77 percent, or about 25.3 million workers—meet the standard duties test.[243] The number of full-time salaried white-collar workers who meet the standard duties test and earn below the salary level is thus over five times smaller than the number of full-time salaried white-collar workers who meet the standard duties test and earn at least the salary level amount.[244] And 84 percent of all full-time salaried white-collar workers who meet the standard duties test—25.3 million out of a total of approximately 30.0 million—earn at least the new salary level.[245]

Figure B: Salaried White-Collar Workers Earning Above and Below the Standard Salary Level Who Meet or Do Not Meet the Standard Duties Test

[243] While a significant majority of full-time salaried white-collar workers who earn above the new salary level meet the duties test, helping confirm its appropriateness as an indicator of the capacity in which individuals are employed, a large number of full-time salaried white-collar workers who earn above the salary level—7.4 million—do not meet the duties test. A comparable number of salaried white-collar workers who earned above the proposed salary level did not meet the duties test, as EPI and AFI-CIO noted in their comments. PPWO's statement that "[t]he Department seem[ed] to be setting the salary level at a point at which all employees above the line would be exempt" is thus incorrect. The Department agrees with EPI that the fact that a large number of salaried white-collar workers who earn above the salary level will be nonexempt because they do not meet the duties test underscores the importance of an examination of duties under this rule. These 7.4 million workers will continue to be entitled to overtime because of their duties, not their salaries. Notably, this population is significantly larger than the population of workers who will become nonexempt under the new salary level. Rather than indicating that the salary level must be set higher, as AFL-CIO suggested, this fact indicates that this rule meets the Department's objective of preserving a primary role for an examination of duties.

[244] As noted above, *see supra* note 239, these figures exclude salaried white-collar workers who are not subject to the part 541 salary criteria.

[245] Note that these numbers refer only to salaried white-collar workers at all salary levels who meet the standard duties test, including workers who are nonexempt because they earn below the current standard salary level.

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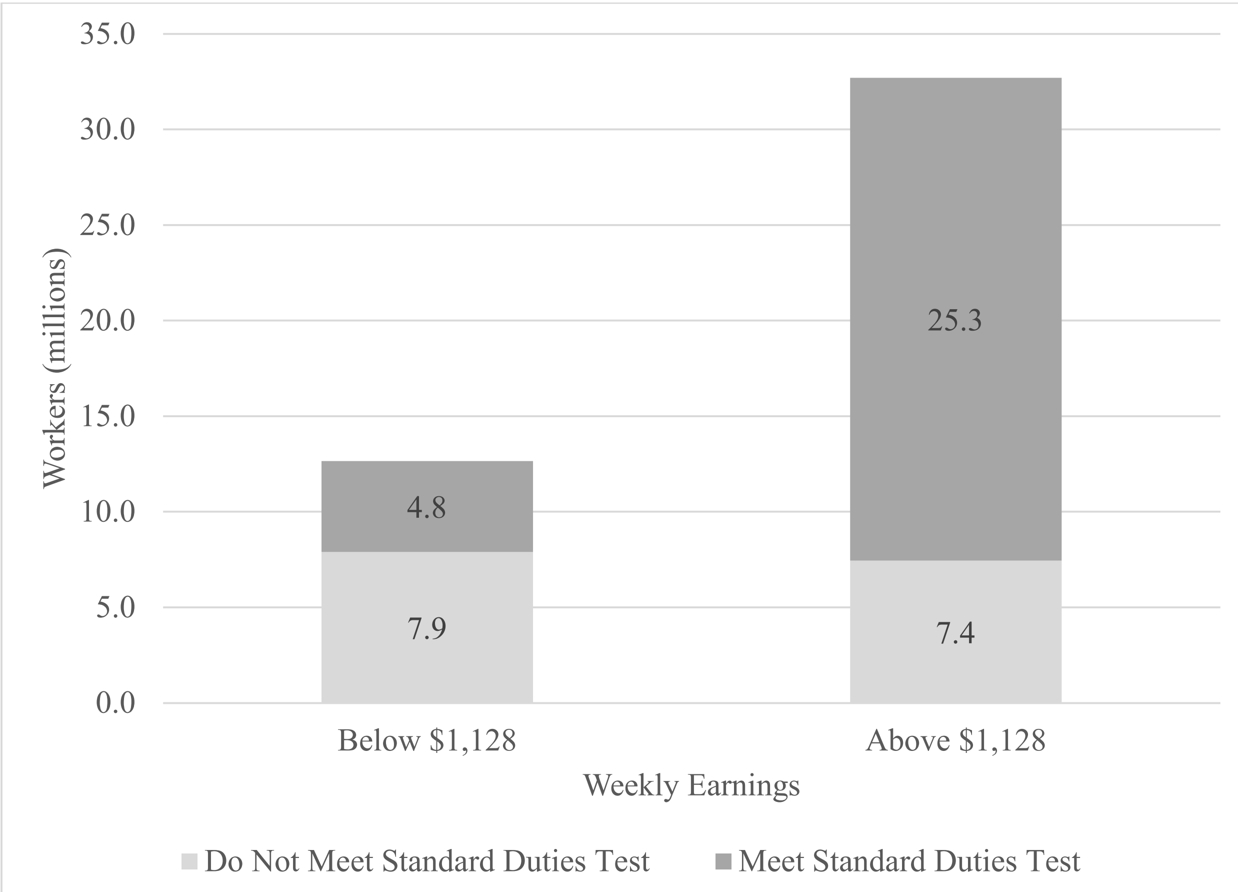

The Department disagrees with commenters that challenged its use of its probability codes to determine whether a worker meets the duties test in light of changes in occupational codes and the duties test since the probability codes were first developed. The Department has used the probability codes to estimate the number of workers who meet the duties test in its last three EAP rules.[246] As noted in section VII, although the probability codes were developed 25 years ago, the standard duties test is not substantively different from the former short duties tests reflected in the probability codes,[247] and the Department used occupational crosswalks to map the occupational codes on which the probability codes were originally based onto the 2018

[246] *See* 84 FR 51258-59; 81 FR 32458; 69 FR 22198.
[247] *See* 69 FR 22214.

Census occupational codes, which are used in the most recent CPS MORG data.[248] Additionally, the Department verified the continued appropriateness of the probability codes in 2016 through a review of the O*NET database,[249] which confirmed that the probability codes reflected current occupational duties.[250] The Department's probability codes remain reliable and appropriate indicators for evaluating whether workers meet the standard duties test.

Consistent with the NRPM, the Department next examined how the new salary level will impact salaried white-collar workers earning between the historic long and short test thresholds. As discussed in section V.B, the long and short test salary levels are important parameters for assessing the appropriateness of the salary level. Under the final rule, duties will continue to be determinative of exemption status for a majority of white-collar workers earning between these thresholds. As illustrated in Figure C, of the approximately 10.8 million salaried white-collar workers who earn between the long test salary level of $942 per week and the short test salary level of $1,404 per week, about 40 percent (4.3 million) earn below the new salary level, and about 60 percent (6.5 million) earn at or above the new salary level. Moreover, of the 4.3 million workers earning between the long test and the new standard salary level, almost half do not meet the standard duties test.[251]

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[248] *See* section VII.

[249] The O*NET database contains hundreds of standardized and occupation-specific descriptors. *See* https://www.onetcenter.org.

[250] *See* 81 FR 32459.

[251] As discussed further below, about 2.1 million of the approximately 4.3 million salaried white-collar workers who earn between the long test salary threshold and the Department's new salary level (about 48 percent of these workers) do not meet the standard duties test. Thus, in effect, only 21 percent of salaried white-collar workers who earn between the long and short test salary levels—2.2 million out of a total of 10.8 million—have their exemption status determined solely by the new standard salary level.

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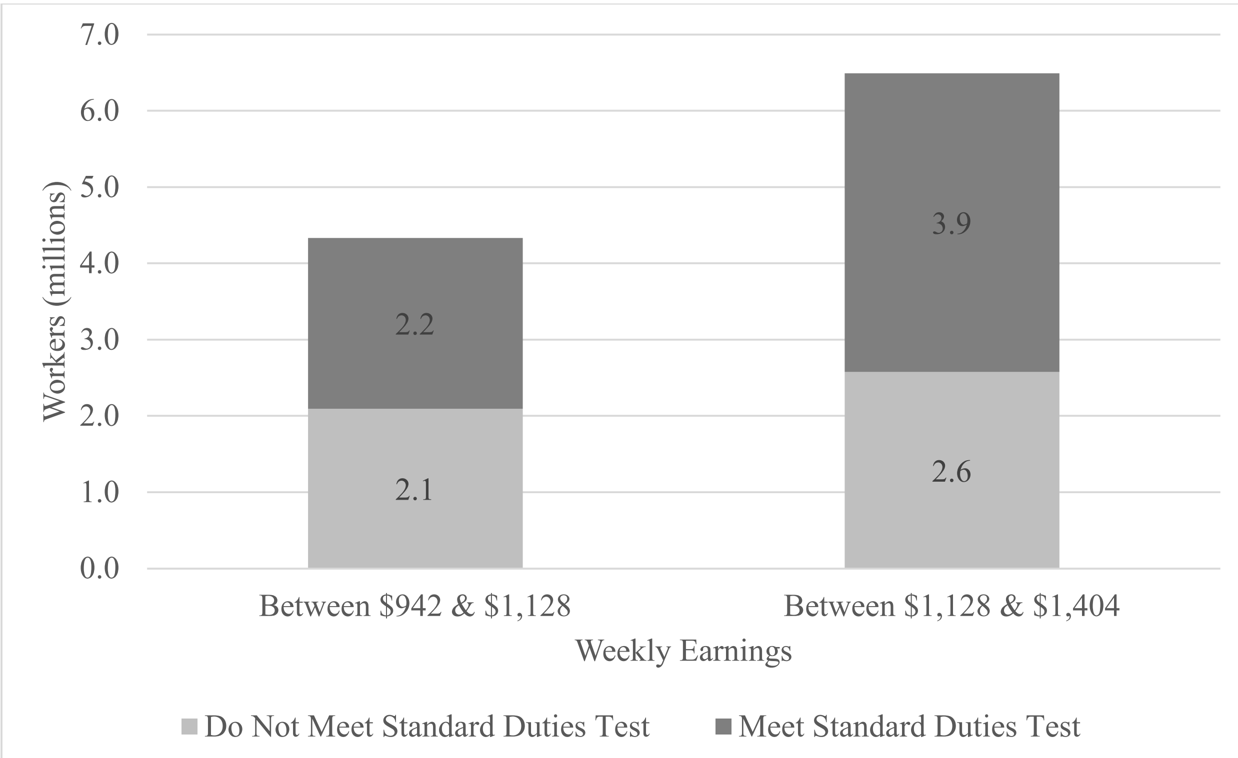
Figure C: Salaried White-Collar Workers Between the Long and Short Test Salary Levels Who Meet or Do Not Meet the Standard Duties Test



Commenters representing workers pointed to the proportion of full-time salaried workers who earned below the short test salary level in 1975, as compared to the proportion of full-time salaried workers who earned below the proposed salary level, in stating that the Department could or should set the salary level higher than the proposed salary level. *See, e.g.*, AFL-CIO; EPI; NELP; NWLC. As emphasized above, the Department agrees that the short test and long test salary levels are key parameters for assessing the appropriateness of a salary level in a one-test system. It is also useful to put any salary level in historical context.

However, the Department notes that under the two-test system, employers could also use the long test, which paired a lower salary level with a more rigorous duties test. Accordingly, a segment of the workers who earned below the short test salary level in 1975—those who earned between the short and long test salary levels and performed limited amounts of nonexempt work—were still exempt from overtime under the long test even though they earned below the short test salary level. As explained in section V.B.4, the Department has elected to set the salary level well below the short test salary level in part because setting it in the short test salary range would prevent employers from using the EAP exemption for this entire population of historically exempt workers.

Lastly, the Department also looked at the impact of the new salary level on currently exempt employees—those salaried white-collar workers who meet the standard duties test and earn at least $684 per week. As with every prior rulemaking to increase the part 541 salary levels, a relatively small percentage of currently exempt workers will become nonexempt. Of the approximately 45.4 million salaried white-collar workers in the United States, approximately 29.3 million currently qualify for the EAP exemption.[252] Of these 29.3 million presently exempt workers, just 4.0 million earn at or above the current $684 per week standard salary level but less than $1,128 per week and will, without some intervening action by their employers, become entitled to overtime protection as a result of the combined effect of the initial update and the

[252] Note that the 29.3 million worker figure only refers to workers who meet the standard EAP exemption and thus differs from the population of potentially affected EAP workers identified in the economic analysis (29.7 million), which includes workers who qualify only for the HCE exemption. As noted above, this is a conservative estimate because there are also 8.1 million workers in the "named occupations" who, under the Department's regulations, are exempt based on their duties alone.

subsequent application of the new standard salary level in this rule. A test for exemption that includes a salary level component will necessarily result in a number of workers who earned at or above the prior salary level and pass the duties test becoming nonexempt when the salary level is increased. As the Department has consistently found since 1938, salary is an important indicator of whether an individual is employed in a bona fide EAP capacity and therefore a key element in defining the exemption.

As the Department explained in its analysis of the impact of the proposed salary level, the new salary level will impact the exemption status of two distinct and important, but relatively small, groups of lower-paid EAP workers. First, the new salary level will restore overtime protections to 1.8 million currently exempt workers who meet the standard duties test but earn less than the equivalent of the long test salary level ($942 per week). Such employees were excluded from the EAP exemption under every rule prior to 2019, either by the long test salary level itself, or under the 2004 rule standard salary level, which was set equivalent to the long test salary level. Fully restoring the salary level's initial screening function requires a salary level that will ensure all employees who earn below the long test level are excluded from the exemption.

Second, the new salary level will result in overtime protections for an additional 2.2 million currently exempt workers who meet the standard duties test and earn between the long test salary level ($942 per week) and the final salary level. As explained earlier, the Department is setting the standard salary level above the long test level to account for the shift to a one-test system in a manner that reasonably distributes the impact of this switch. The final rule will limit the number of affected workers by setting a standard salary level below the midpoint between the long and short test salary levels and by using earnings data from the lowest-wage Census Region (the South).

Even among the 4.0 million workers affected by the combination of the initial update and the subsequent application of the new standard salary level in this rule, the fact that a large share of these workers earn below the long test level underscores the modest role of the final salary level. Beyond the 1.8 million workers earning less than the long test salary level—to whom the final rule will simply restore overtime protections that they had under every rule prior to 2019—the increase in the salary level will affect the exemption status of 2.2 million workers. This group makes up about 8 percent of all currently exempt, salaried white-collar workers and just under 5 percent of all salaried white-collar workers.[253] The salary level methodology adopted in this rule will thus maintain the "useful, but limited, role" of the salary level in defining and delimiting the EAP exemption.[254]

Finally, the Department does not agree with commenters that stated that it underestimated the number of affected workers in the NPRM. Commenters that asserted the number of affected workers could be much higher generally referenced estimates of the number of workers earning between the current salary level and the proposed salary level, regardless of whether they passed the duties test, and then posited that up to that many workers (e.g., 7.2 million, 7.5 million, or 12.3 million) could be affected. *See* AFPI; NRF; Rachel Greszler. The position that all workers earning below the new salary level, regardless of their duties, will be affected by the new salary

[253] The 4.0 million workers affected by the new salary level represent only 13.8 percent of the 29.3 million salaried white-collar workers who currently qualify for the standard EAP exemption.
[254] *See* 88 FR 62173; 84 FR 51238.

level fails to account for the fact that that millions of these workers are already nonexempt because they fail the duties test. The exemption status of workers who fail the duties test will not be affected by this rule.

Determining the workers who will be affected by a change in the salary level requires an examination of workers' earnings and their duties. Consistent with the NPRM, the Department determined the populations of currently exempt workers who will be affected by the salary level by applying its probability codes. For the reasons discussed earlier in this section and in section VII below, the Department's probability codes are reliable and appropriate indicators of whether an employee meets the standard duties test. The Department has consistently applied this methodology in all its recent part 541 rules.[255] Though some commenters criticized the Department's method for calculating the affected worker figure, they did not offer an alternate methodology for determining which workers pass the current duties test, let alone one as robust and proven as the Department's probability codes.

C. Highly Compensated Employees

In the 2004 rule, the Department created the HCE test for certain highly compensated employees. Combining a much higher compensation requirement with a minimal duties test, the HCE test is based on the rationale that employees who earn at least a certain amount annually—an amount substantially higher than the annual equivalent of the weekly standard salary level—will almost invariably pass the standard duties test.[256] The HCE test's primary purpose is

[255] *See* 84 FR 51258–59; 81 FR 32458; 69 FR 22198.
[256] 84 FR 51249; *see also* § 541.601(c) ("A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties.").

therefore to serve as a streamlined alternative for very highly compensated employees because a very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis.[257]

As outlined in § 541.601, to be exempt under the HCE test, an employee must earn at least the amount specified in the regulations in total annual compensation—presently $107,432 per year.[258] Of this HCE threshold amount, no less than the full standard salary level amount must be paid on a salary or fee basis.[259] Finally, the employee must "customarily and regularly perform[] any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee[.]"[260] The HCE test applies only to employees whose primary duty includes performing office or non-manual work.[261]

Employees qualifying for exemption under the HCE test must receive at least the standard salary level per week on a salary or fee basis, while the remainder of the employee's total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.[262] Total annual compensation does not include board, lodging, or other facilities, and does not include payments for medical insurance, life insurance,

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[257] *See* 69 FR 22173–74.
[258] § 541.601(a)(1).
[259] § 541.601(b)(1). Although § 541.602(a)(3) allows employers to use nondiscretionary bonuses, incentives, and commissions to satisfy up to 10 percent of the weekly standard salary level when applying the standard salary and duties tests, the Department's regulation at § 541.601(b)(1) does not permit employers to use such payments to satisfy the weekly standard salary level requirement for HCE workers. *See* 84 FR 51249.
[260] § 541.601(c).
[261] § 541.601(d).
[262] § 541.601(b)(1). The criteria for determining if an employee is paid on a "salary basis" are identical under the standard exemption criteria and the HCE test. *See Helix Energy Solutions,* 143 S.Ct. at 683.

retirement plans, or other fringe benefits. An employer is permitted to make a final "catch-up" payment during the last pay period or within 1 month after the end of the 52-week period to bring an employee's compensation up to the required level.

As stated in the NPRM, the Department continues to believe that the HCE test is a useful alternative to the standard salary level and duties tests for highly compensated employees. However, as with the standard salary level, the HCE total annual compensation level must be updated to ensure that it remains a meaningful and appropriate standard to pair with the minimal HCE duties test. To maintain the HCE test's role as a streamlined alternative for those employees most likely to meet the standard duties test, the HCE total annual compensation level must be high enough to exclude all but those employees "at the very top of [the] economic ladder[.]"[263] The proposal noted that when it was created in 2004, the HCE test featured a $100,000 threshold that exceeded the annual earnings of approximately 93.7 percent of salaried workers nationwide.[264] More recently in the 2019 rule, the Department set the HCE test threshold so it would be equivalent to the annual earnings of the 80th percentile of full-time salaried workers nationwide. At the time of the NPRM, however, the $107,432 per year HCE threshold covered only 72 percent of full-time salaried workers nationwide.[265]

The Department proposed to update the HCE test by setting the total compensation amount equal to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide. Based on earnings data used in the NPRM, this proposed methodology resulted in a proposed HCE threshold of $143,988, of which at least $1,059 per week (the

[263] 69 FR 22174.
[264] *See* 88 FR 62159.
[265] *Id*.

proposed standard salary level) would have to be paid on a salary or fee basis.[266] The Department noted that its proposed methodology would produce an HCE threshold that was higher than under the methodology adopted in the 2019 final rule (which set the HCE threshold equal to the annualized weekly earnings of the 80th percentile of full-time salaried workers nationwide),[267] but lower than under the 2004 rule (which covered 93.7 percent of salaried workers nationwide) and the method adopted in the 2016 rule (which would have covered 90 percent of salaried workers nationwide).[268] In justifying the proposed HCE threshold, the Department explained in the NPRM that it was concerned that repeating the 2019 rule's methodology now would not produce a threshold high enough to reserve the HCE test for employees at the top of today's economic ladder and could risk the unintended exemption of large numbers of employees in high-wage regions.[269]

The Department is finalizing its proposal to increase the HCE total compensation threshold to the 85th percentile of annualized weekly earnings of full-time salaried workers nationwide. Applying this methodology to calendar year 2023 earnings data results in a total compensation threshold of $151,164 per year. This approach will guard against the unintended exemption of workers who are not bona fide executive, administrative, or professional employees, including those in higher-income regions and industries.

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[266] It is the Department's intent that the increase in the HCE total annual compensation threshold is independent of, and severable from, the increase in the standard salary level to the 35th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region (the South) and the updating provision, pursuant to which the HCE total annual compensation threshold will be regularly updated to reflect current earnings.
[267] *See* 84 FR 51250.
[268] *See* 69 FR 22169–70 (Tables 3 and 4); 81 FR 32429.
[269] 88 FR 62176.

As in prior rulemakings, the Department received significantly less feedback from commenters on the proposed increase to the HCE threshold than on the proposed increase to the standard salary level. Most commenters did not address the issue. Among the comments that addressed the proposed HCE threshold, stakeholder sentiment was split; employee representatives generally supported the proposed increase or asked for a higher increase, while most employer representatives favored a smaller increase or no increase at all.

A number of commenters expressed support for the proposed increase to the HCE threshold. *See, e.g.*, AFT; AFL-CIO; Coalition of State AGs. For example, the Coalition of State AGs asserted that "[s]ignificant inflation since the 2019 rule became effective in January 2020 has eroded the purchasing power of the HCE salary level" and remarked that the HCE threshold "could arguably be made even higher than the proposed level, particularly for high-cost, high-wage states[.]" The National Partnership described the proposed HCE threshold as "in line with historic and economic precedent," while the AFT commented that the proposed HCE threshold "will ensure [that] workers in the health care sector, and workers who provide a wide range of services and expertise for state and local governments, are not completely excluded from possibly qualifying for overtime."

A handful of commenters advocated for the adoption of a higher HCE threshold than proposed. Noting that the HCE threshold originally exceeded the earnings of 93.7 percent of all salaried employees nationwide when it was introduced in 2004, Sanford Heisler Sharp asserted that the Department's proposal to set the HCE threshold at the 85th percentile "introduces a substantial risk of harming employees who truly need overtime protections." NELA and Nichols Kaster urged the Department to repeat the approach it took in the 2016 rule, which set the HCE threshold equal to the 90th percentile of salaried earnings nationwide. Invoking the FLSA's policy goal of spreading employment, NELA also opined that "an overly permissive HCE [test] will result in fewer 'highly compensated' jobs available for workers aspiring to climb the economic ladder to benefit themselves and their families."

Employer stakeholders that addressed the HCE threshold opposed the Department's proposed increase, with many commenters disputing that the current HCE threshold should be increased at all. *See, e.g.*, ABC; AHLA; Argentum & ASHA; NAW; Visiting Angels. A number of commenters that opposed the proposed HCE threshold asserted that it would be administratively burdensome to reevaluate the exemption status of employees who earn between the current and proposed HCE thresholds. *See, e.g.*, HR Policy Association; NAM; NCFC. PPWO commented that "[e]mployers will be faced with the task of reviewing the basis on which each employee was accorded exempt status, including employees for whom the exempt status decision was made a decade ago and who may be among the most highly paid employees in the company."

Other employer-side stakeholders opposed the proposed HCE threshold but indicated (either in the alternative or outright) that they would be open to a smaller increase. Several commenters stated an increase to the HCE threshold using the 80th percentile methodology applied in the 2019 rule would be preferable. *See, e.g.*, CWC; LeadingAge; RILA; *see also* Chamber (asserting that the NPRM "does not address whatsoever why the 80th percentile [methodology] would be insufficient"). National Restaurant Association asserted that if the Department changes the HCE threshold, it "should calculate any new HCE highly compensated level by using data from the South Census Region, rather than on a nationwide basis, to ensure that the HCE exemption is at least within reach of some employers in the lowest-wage regions in the country." WFCA similarly recommended that the Department set the HCE threshold at the 85th percentile of salaried earnings in lowest-wage Census Region or, alternatively, use the 80th percentile of national data for full-time salaried workers (*i.e.*, the 2019 rule's approach).

Having considered the comments received, the Department is finalizing its proposal to increase the HCE threshold to the 85th percentile of annualized weekly earnings of full-time salaried earnings nationwide. This results in a new HCE threshold of $151,164 per year, using calendar year 2023 earnings data, of which at least $1,128 per week (the standard salary level) must be paid on a salary or fee basis.[270]

As an initial matter, the Department maintains that the current HCE threshold must be increased. In nominal terms, the current $107,432 HCE threshold is only 7 percent higher than the $100,000 HCE threshold that was introduced in 2004 and, as multiple commenters noted, it has failed to keep up with wage growth over the last 20 years. According to 2023 earnings data, the current HCE threshold ($107,432) now covers just 70 percent of full-time salaried workers nationwide, less than the 80 percent of such workers that it covered when it was set in 2019. This coverage would continue to decrease in the absence of an increase, which is needed to reserve the HCE test for employees "at the very top of today's economic ladder,"[271] as the Department originally intended. Inaction could risk the unintended exemption of employees in higher-income regions and industries who clearly are outside of the scope of the exemption.[272]

[270] As discussed in section IV, the increase in the HCE threshold and the standard salary level using the new methodologies will be applicable on January 1, 2025.
[271] 69 FR 22174.
[272] *Id*.

The Department concludes that increasing the HCE threshold to the 85th percentile of annualized weekly earnings of full-time salaried workers nationwide will ensure that the threshold is sufficiently high to provide a meaningful and appropriate complement to the minimal HCE duties test, and that nearly all of the highly paid white-collar workers earning above this threshold "would satisfy any duties test."[273] The Department considered keeping the 2019 rule's methodology for the HCE threshold (*i.e.*, the 80th percentile of earnings of full-time salaried employees nationwide) and applying it to current earnings data. However, the Department reaffirms its determination from the NPRM that this methodology is not appropriate because it does not produce a threshold high enough to reserve the HCE test for employees who would almost invariably pass the standard duties test. The Department agrees with commenters that stated that setting the HCE threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide will guard against the unintended exemption of workers who are not bona fide executive, administrative, or professional employees, including those in higher-income regions and industries.

The Department disagrees that the new HCE threshold is too high. Adjusting for wage growth, the proposed HCE threshold is significantly lower than the original HCE threshold that was introduced in 2004 (which surpassed the earnings of 93.7 percent of full-time salaried workers). Going forward, employers with employees affected by the increased HCE threshold can still use the standard exemption criteria to take advantage of the EAP exemption. The HCE test is a streamlined alternative to the standard exemption criteria for a select class of employees

[273] 84 FR 51250 (internal citation omitted).

who are so highly paid that they will almost invariably pass the standard duties test.[274] By design, the HCE test is reserved for employees "at the very top of today's economic ladder" who would satisfy "any duties test" in "virtually every" case.[275] This exclusivity is necessary because of the risk that the HCE test poses to salaried employees in high-income regions and industries who are not bona fide EAP employees, which the Department acknowledged when the HCE test was created in 2004.[276]

Although the Department has previously acknowledged that the HCE test may exempt some employees who fail the standard duties test and would otherwise be entitled to overtime pay, such outcomes should be "rare," involving employees whose pay is high enough that their exemption "would not defeat the objectives of section 13(a)(1) of the Act."[277] The only way to ensure that the HCE test serves its intended purpose—*i.e.*, serving as an efficient, streamlined test for employees who would "almost invariably" meet the standard duties test—is for the test to include an earnings threshold high enough to exclude nearly all employees whose EAP status may be questionable. The exemption status of such employees should be determined by the standard exemption criteria.

The Department acknowledges that some commenters requested the adoption of a higher HCE threshold, closer in magnitude to the original $100,000 HCE threshold that was adopted in

[274] *See* § 541.601(c) ("A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties."); *see also* 84 FR 51249.
[275] 69 FR 22174.
[276] *See id*. (explaining the need to avoid the unintended exemption 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.").
[277] *See* 84 FR 51249.

2004. As noted above, the original HCE threshold exceeded the earnings of over 93 percent of salaried white-collar workers when it was adopted. Germane to these comments, the Department considered repeating the approach it took in the 2016 final rule and proposed in the 2019 NPRM of setting the HCE threshold at the annualized weekly earnings of the 90th percentile of full-time salaried workers nationwide, which would result in a threshold of $179,972 per year. As noted in the NPRM, however, the Department is concerned that an HCE threshold set at $179,972 could unduly restrict the use of the HCE test for employers in lower-wage regions and industries.[278] While the new HCE threshold does not exclude from the HCE test as high a percentage of full-time salaried employees as the HCE threshold initially adopted in 2004, it excludes a sufficiently large percentage (*i.e.*, 85 percent of full-time salaried employees nationwide) to guard against the unintended exemption of employees in higher-income regions and industries who are not bona fide EAP employees.

For all of the reasons provided above, the Department adopts its proposal to set the HCE threshold equal to the annualized weekly earnings of the 85th percentile of full-time salaried workers ($151,164). This new level will be applicable on January 1, 2025.

D. Severability

1. The Department's Proposal

The Department proposed to add a severability provision to its part 541 regulations at § 541.5. Proposed § 541.5 stated that if any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intended that the provision be given the fullest effect

[278] *See* 88 FR 62176*; see also* 84 FR 51250.

permitted by law, unless the provision is held to be completely invalid or unenforceable, in which case, the Department intended the provision to be severable and not to affect the remaining provisions.

The Department illustrated the intended effect of proposed § 541.5 with some examples. The Department noted that it was its intent that the proposed updating mechanism be effective even if the proposed increase in the standard salary level were invalidated. It was also the Department's intent that the proposed increase in the HCE total annual compensation threshold be effective even if the increase in the standard salary level were invalidated. And it was the Department's intent that the proposed increases in the standard salary level and HCE annual total compensation requirement apply even if the updating mechanism was determined to be invalid.[279]

The Department is finalizing § 541.5, Severability, as proposed, with that addition of clarifying language as discussed below.

2. Discussion of Comments and Final Rule

Most commenters did not address proposed § 541.5. Of the few commenters that did address the Department's severability proposal, the Administrative Law Professors and NELP supported the inclusion of a severability provision in the final rule.

[279] The Department also stated that it was the Department's intent that its proposal to apply the standard salary level to the U.S territories subject to the Federal minimum wage remain in effect even if the proposed change to the standard salary level were invalidated. As discussed above, *see supra* note 9, at this time the Department is not finalizing in this final rule its proposal to apply the standard salary level to the U.S. territories subject to the Federal minimum wage and to update the special salary levels for American Samoa and the motion picture producing industry.

In expressing their support, the Administrative Law Professors provided the most in-depth discussion of the Department's proposed severability provision. The Administrative Law Professors explained that a provision of a rule is severable where the agency intends for the remainder of the rule to be effective, even if the provision is invalidated, and the rule would be workable absent the provision, citing precedent from the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit.[280] The professors noted that the Department "clearly state[d] [its] intention" in proposed § 541.5 that the updating mechanism in proposed § 541.607 "be effective even if the proposed increase in the standard salary level is invalidated." They further noted that the Department "expresse[d] the same intention with regard to the implementation of the HCE total annual compensation requirement whether or not the standard salary level is invalidated" and "the application of the Department's proposed 2023 earnings thresholds, whether or not automatic updating is upheld."

The Administrative Law Professors observed that the Department's inclusion of a severability provision in the NPRM was consistent with guidance from the Administrative Conference of the United States (ACUS), which advised agencies in a 2018 report[281] to address severability in the text and preamble of both the NPRM and the final rule where the agency intends the provisions of a rule to be severable and anticipates that the rule may be challenged in court. The professors suggested that the Department further explain in the final rule how the rule "would remain workable" if any of its provisions were declared invalid. As an example, the

[280] *See K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997).
[281] *See* Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 FR 30683, 30685 (June 29, 2018).

professors suggested stating explicitly that invalidation of the updating provision "would have no bearing on the rationality or administrability of the standard salary and HCE salary thresholds" as set in the rule. They further noted that in the event of the invalidation of either the standard salary level or the HCE compensation threshold, the updating provision could function independently because "updating would simply take as the 2023 baseline the thresholds left in place from the 2019 rule." The Administrative Law Professors made clear that expanding the explanation of "the independent workability of any of the rule's provisions" should not be seen as an indication of legal vulnerability but instead as merely an acknowledgement of the possibility of legal challenge.

NELP also supported the proposed severability provision, noting the "vital importance" of the proposed rule to millions of workers. Specifically, NELP stated that if any provision of the rule "is deemed legally questionable, only that provision should be stayed while litigation proceeds."

A small number of commenters representing employer interests specifically opposed the proposed severability provision or criticized the Department's severability proposal. Indiana Chamber of Commerce and U-Haul Holding Company (U-Haul) stated that the proposed severability provision was an acknowledgement of the legal vulnerability of the Department's proposed updating section. The YMCA stated that the Department failed to explain the need for, or appropriateness of, the proposed severability provision, and RILA asserted that the Department failed to explain how the proposed rule would function if any of its provisions were declared invalid. The Chamber and the National Association of Convenience Stores asserted that the Department should withdraw the severability provision.

The Chamber further asserted that, pursuant to the district court decision invalidating the 2016 rule, "the automatic increase provision in the Proposed Rule cannot survive if the increase to the minimum salary level is struck down." The Department does not read the court's decision as substantively examining the validity of the 2016 rule's automatic updating provision or analyzing whether that provision was severable from the remainder of the rule. And importantly, the 2016 rule did not contain a severability provision or discuss the Department's intent regarding severability of the provisions of that rule. In contrast, the Department's current NPRM included a severability provision and a detailed discussion of the Department's intent that specifically addressed severability of the updating provision. As the Administrative Law Professors noted, as proposed, the updating provision was not dependent on the proposed increases to the standard salary level and the HCE compensation threshold. If either of the new thresholds were vacated, the updating provision would simply use the existing methodologies set in the 2019 rule as the baseline for the update (*i.e.*, the Department would apply those methodologies triennially to update the earnings thresholds as established in § 541.607). This is a significant change from the 2016 updating provision, which would have updated the standard salary level and HCE total compensation requirement based on the specific methodologies set in that rule and facially could not function if those methodologies were invalidated.[282]

Upon consideration of the comments received, the Department is finalizing the severability provision in § 541.5 as proposed, with an additional sentence to further clarify its intent. The Department intends that each of this rule's provisions be considered separate and severable and operate independently from one another. The Department is revising § 541.5 to

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[282] *See* 81 FR 32251.

state this explicitly. In this regard, the Department intends that if any application of a provision is stayed, enjoined, or invalidated, the provision be construed to continue to give the maximum effect to the provision permitted by law. In the event any provision within a section of the rule is stayed, enjoined, or invalidated, the Department intends that all remaining provisions within that section, plus all other sections, remain effective and operative. And in the event any whole section of the rule is stayed, enjoined, or invalidated, the Department intends that all remaining sections remain effective and operative.

It is the Department's position that the provisions and sections of the rule can function sensibly in the event that any specific provisions, sections, or applications are invalidated, enjoined, or stayed. To begin, the new standard salary level set forth in § 541.600(a)(2) of $1,128 per week—the 35th percentile of weekly nonhourly earnings in the lowest-wage Census Region—can function sensibly, even if, for instance, the rule's new updating section or the revision to the HCE total compensation requirement are stayed, enjoined, or invalidated. The revision to the standard salary level under the new methodology operates independently of and does not depend on either the new updating section or the revision to the HCE total compensation requirement. If, for instance, the triennial updating of the standard salary level were invalidated, the new salary level of $1,128 would still go into effect, and it would remain $1,128 per week until the Department conducts further rulemaking. The new standard salary level of $1,128 per week would also still take effect if the initial update to the standard salary level were invalidated.[283] And the new standard salary level would still go into effect and

[283] As noted in section IV, the initial update to the standard salary level and HCE total annual compensation requirement are applicable July 1, 2024, whereas the new standard salary level and HCE total annual compensation requirement are applicable 6 months later on January 1, 2025.

function sensibly if the revision to the HCE total compensation requirement were invalidated as well. Notably, in such an event, the total annual compensation an employee would need to receive to qualify for the HCE test would remain at the existing level;[284] however, the employee's total annual compensation would need to include at least $1,128 per week paid on a salary or fee basis. As discussed in section V.B, the revised standard salary level will work effectively with the standard duties test to better define who is employed in a bona fide EAP capacity by restoring the initial screening function that the salary level long fulfilled and adjusting the salary level to account for the change to a single-test system. Finalizing the new standard salary level will thus accomplish several of the key objectives the Department is seeking to achieve in undertaking this rulemaking, even if all or part of the updating section or the revisions to the HCE total compensation requirement do not also go into effect.

The revised HCE total compensation requirement of $151,164 per year set forth in § 541.601(a)(1)—the 85th percentile of annualized weekly earnings of full-time nonhourly workers nationally—can also function sensibly, even if the other provisions of this final rule are stayed, enjoined, or invalidated. The revision to the HCE total compensation requirement under the new methodology operates independently of, and does not depend on, either the new updating provision or the revision to the standard salary level. Accordingly, if, for instance, the triennial updating of the HCE total compensation requirement were invalidated, the new HCE total compensation requirement of $151,164 per year would still become effective, and the HCE total compensation requirement would remain at that amount until the Department undertakes

[284] Under these circumstances, the HCE total annual compensation requirement would be $132,964 per year or, if the initial update to the earnings thresholds under this rule did not go into effect, the current HCE total annual compensation requirement of $107,432 per year.

further rulemaking. If the initial update to the HCE total compensation requirement were invalidated, the revised HCE total compensation requirement would still go into effect, too. And the revised HCE total compensation requirement would still go into effect and function sensibly if the revision to the standard salary level were invalidated. In such an event, an employee would need to be paid the new total annual compensation amount of $151,164 per year to qualify as exempt under the HCE test, though the total annual compensation would need to include only the existing standard salary level[285] per week paid on a salary or fee basis. As noted in section V.C, the HCE test was intended to be limited to those highly paid employees who would almost invariably meet the standard duties test. The revision to the HCE total compensation requirement would restore it to a level that is high enough to avoid the unintended exemption of large numbers of employees in high-wage regions but not so high as to unduly restrict the use of the HCE test in lower-wage regions and industries, even if the revisions to the standard salary level and all or part of the updating provision do not go into effect.

The new updating section can also function sensibly, independent of the other provisions of this final rule. As explained in section V, the updating section provides in § 541.607(a) and (b) that the Department will update the standard salary level and HCE total compensation requirement, respectively, initially on July 1, 2024 and every 3 years thereafter, to reflect current earnings data, in accordance with the methodology used to set each threshold. Both the triennial updating of the earnings thresholds for exemption and the initial update to these thresholds can function sensibly on their own.

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[285] Under these circumstances, the standard salary level would be $844 per week or, if the initial update to the earnings thresholds under this rule did not go into effect, the current standard salary level of $684 per week.

The triennial updating of the earnings thresholds for exemption can function sensibly, even if the new standard salary level and new HCE total compensation requirement are stayed, enjoined, or invalidated, as the triennial updates are based on the methodology used to set each threshold that is in place at the time of the update. If all the provisions of this rule do go into effect (and assuming the Department has not engaged in further rulemaking), as discussed in section V.A, the triennial updates to the standard salary level and HCE total compensation threshold will be based on the new methodologies established in this rule: the 35th percentile of weekly nonhourly earnings in the lowest-wage Census Region and the 85th percentile of annualized weekly earnings of full-time nonhourly workers nationally, respectively. However, the updating provision does not depend on the revisions to the standard salary level and HCE methodologies also going into effect. If, for instance, both the new standard salary level and HCE total compensation requirement were invalidated, the updating provision would, as the Administrative Law Professors noted, use the existing methodologies set in the 2019 rule as the baseline for the each triennial update: the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region and/or retail nationally, in the case of the standard salary level, and the 80th percentile of annualized weekly earnings of full-time nonhourly workers nationally, in the case of the HCE test. The updating section thus ensures that the standard salary level and HCE total compensation requirement continue to reflect current earnings—among the key objectives the Department is seeking to achieve in undertaking this rulemaking, *see* section V.A—even if the new methodologies for setting these earnings thresholds do not go into effect.

The initial update of the earnings thresholds for exemption can function sensibly as well, even if this rule's other revisions do not go into effect, as the baseline for the initial update to each threshold is the current methodology established in 2019. Accordingly, if, for instance, the new standard salary level, new HCE total compensation requirement, and the triennial updating provision were invalidated, the standard salary level and HCE total compensation requirement would still be updated on July 1, 2024 to $844 per week and $132,964 per year, respectively. In undertaking this rulemaking, the Department sought (among other objectives) to account for the considerable earnings growth that has taken place since it last updated the earnings thresholds for exemption.[286] The initial updating of the standard salary level and HCE total compensation requirement ensures these thresholds reflect earnings growth since the Department's 2019 rule, even if the new methodologies for setting the standard salary level and the HCE total compensation requirement and the future triennial updates to these earnings thresholds do not go into effect.

In sum, the Department has taken care to draft this final rule such that its provisions function independently and is including a severability section, § 541.5, to make clear that all the rule's provisions are separate and severable and should be given the fullest possible effect. As the Administrative Law Professors observed, this discussion of severability is not an acknowledgement of the legal vulnerability of any particular provision. However, since some commenters have indicated that they may challenge all or part of this rule, *see e.g.*, AFPI, Chamber, NFIB, and the 2016 and 2019 rules were both subject to legal challenge, the Department, consistent with ACUS guidance, makes explicit in the regulatory text that it

[286] *See* section V.A.2.

considers the provisions of this rule to be severable and explains here how the various provisions of the rule can operate sensibly in the event another provision of the rule is stayed, enjoined, or declared invalid.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, the information collections' practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. Under the PRA, an agency may not collect or sponsor an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.[287]

OMB has assigned control number 1235-0021 to the information collection that gathers information from complainants alleging violations of the labor standards that WHD administers and enforces, and OMB has assigned control number 1235-0018 to the information collection, Records to be kept by Employers—Fair Labor Standards Act. In accordance with the PRA, the Department solicited public comments on the proposed burden changes to the information collection under control number 1235-0021 and the proposed burden changes to the information collection under OMB control number 1235-0018.[288] Because OMB control number 1235-0021 was encumbered by a different rulemaking at the time of submission of the NPRM to OMB, the Department at that time created a duplicate ICR of 1235-0021 under OMB control number 1235-

[287] *See* 5 CFR 1320.8(b)(3)(vi).
[288] *See* 88 FR 62181.

0NEW to allow the public to comment on the proposed estimates. The Department submitted a contemporaneous request for OMB review of the proposed revisions to the existing information collection and the duplicate ICR in accordance with 44 U.S.C. 3507(d). On October 12, 2023, OMB issued a notice that assigned the duplicate information collection control number 1235-0035 and indicated the Department should address comments received during the NPRM comment period and resubmit for approval at the time of the final rule. Also on October 12, 2023, OMB issued a notice that continued the previous approval of the information collection under 1235-0018 under the existing terms of clearance and advised the Department to address any comments received during the NPRM comment period and resubmit at the time of the final rule.

Circumstances Necessitating this Collection: This rulemaking revises 29 CFR part 541 and affects provisions that could be considered to entail collections of information including (1) the complaint process under which employees may file a complaint with the Department to investigate potential violations of the laws administered by the Department, including the FLSA; and (2) disclosure and recordkeeping requirements for covered employers under the FLSA. This rulemaking does not impose new information collection requirements. Rather, burdens under the existing requirements would increase due to the changes in the universe of employees for whom employers are required to maintain records. The changes adopted in this rulemaking may also cause an initial increase in burden if more employees file complaints with WHD to collect back wages under the overtime pay requirements.

Information and technology: There is no particular order or form of records prescribed by the regulations. A respondent may meet the requirements of this final rule using paper or electronic means. WHD, to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process in which complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under federal wage and hour laws and regulations to an agency that may be able to assist.

Public comments: The Department invited public comment on its analysis that the rule would create a slight increase in the paperwork burden associated with the complaint ICR 1235–0021 (submitted as a duplicate ICR at the NPRM stage under control number 1235-0NEW and later assigned by OMB as 1235-0035) and on the burden associated with ICR 1235–0018, Records to be kept by employers—Fair Labor Standards Act. The Department did not receive comments on the ICRs themselves or any comments submitted regarding the PRA analysis in particular, including the methodology. No comments were received with respect to the complaint ICR (1235-0021). However, commenters addressed aspects of the information collections while commenting on the text of the proposed rule as it relates the records ICR (1235-0018).

For example, Horizon Health Services commented that "[r]equiring supervisors to record their hours worked and request overtime, as needed, would [be] a disruption to business operations by adding a significant administrative burden." The University of Dayton agreed that a change would require additional administrative burden stating, "new training and systems would need to be put in place for newly nonexempt employees to record their time and for their supervisors to track and approve their time. They would have to become accustomed to tracking their hours, being sure not to work unbudgeted hours and overtime unless approved, and so forth." Others, like Argentum & ASHA and Oklahoma Wesleyan University, similarly expressed concerns about the costs associated with having newly nonexempt employees record their time. SBA Advocacy stated that "DOL should consider" that "small entities face vast administrative and operational costs to schedule and track employee hours to minimize overtime costs." In addition, some commenters expressed concern that the Department's cost estimates related to recordkeeping were too low, given among other things that employers would need to adjust their recordkeeping and payroll systems for newly overtime-eligible employees. *See, e.g.*, NFIB; PPWO; Seyfarth Shaw. The National Roofing Contractors Association stated that it "is concerned the proposed regulation would result in dramatically increased labor costs and additional paperwork burdens for employers, while also reducing workplace flexibility and compensation for many workers."

In response to these comments, the Department observes that most employers currently have both exempt and nonexempt workers and therefore have systems already in place for employers to track hours. Additionally, commenters did not offer alternatives for estimates or make suggestions regarding the methodology for calculating the PRA burdens. The actual recordkeeping requirements are not changing in the final rule. However, the pool of workers for whom employers will be required to make and maintain records has increased under the final rule, and as a result the burden hours have increased. Included in this PRA section are the regulatory familiarization costs for this final rule. However, this is a duplication of the regulatory familiarization costs contained in section VII, economic impact analysis.

The Department plans to submit these ICR's to OMB upon publication of the final rule. The agency will publish a notice in the FEDERAL REGISTER to inform the public of OMB's decision.

Total burden for the subject information collections, including the burdens that will be unaffected by this final rule and any changes, is summarized as follows:

Type of review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 29,160 (2,150 from this rulemaking).

Estimated number of responses: 29,160 (2,150 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 9,720 (717 burden hours due to this rulemaking).

Capital/Start-up costs: $0 ($0 from this rulemaking).

Title: Records to be kept by Employers—Fair Labor Standards Act.

Type of review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

OMB Control Number: 1235–0018.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 4,068,419 (0 from this rulemaking).

Estimated number of responses: 42,725,207 (10,320,000 from this rulemaking).

Frequency of response: on occasion.

Estimated annual burden hours: 1,157,993 (344,000 from this rulemaking).

Capital/Start-up costs: $0 ($0 from this rulemaking).

VII. Analysis Conducted in Accordance with Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review. As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive Order. OIRA has determined that this rule is a "significant regulatory action" within the scope of section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department of Labor (Department) anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

1. Background

The Fair Labor Standards Act (FLSA or Act) requires covered employers to (1) pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of their employees and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity, as those terms are "defined and delimited" by the Department.[289] The Department's regulations implementing these "white-collar" exemptions are codified at 29 CFR part 541. Since 1940, the regulations implementing the exemption have

[289] 29 U.S.C. 213(a)(1).

generally required each of the following three tests to be met: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test).

The Department has updated the salary level test many times since its implementation in 1938. Table 1 presents the weekly salary levels associated with the EAP exemptions since 1938, organized by exemption and long/short/standard duties tests. From 1949 to 2004, the Department determined exemption status using a two-test system comprised of a long test (a lower salary level paired with a more rigorous duties test that limited performance of nonexempt work to no more than 20 percent for most employees) and a short test (a higher salary level paired with a less rigorous primary duties requirement that did not have a numerical limit on the amount of nonexempt work). In 2004, rather than update the two-test system, the Department chose to establish a new single-test system for determining exemption status, setting the standard salary level test at $455 a week, which was equivalent to the long test salary level, and pairing it with a standard duties test that was substantially equivalent to the more lenient short duties test. Because the single standard duties test was equivalent to the short duties test, employees who met the long test salary level and previously passed either the more rigorous long, or less rigorous short, duties test passed the standard duties test. The Department also added a new highly compensated employee (HCE) test, which used a very minimal duties test and a very high total compensation test set at $100,000 per year (*see* section II.B.2 for further discussion). In

2016, to address the concern that the standard test exempted lower-paid salaried employees performing large amounts of nonexempt work who had previously been protected by the more rigorous long duties test, the Department published a final rule setting the standard salary level at $913 per week, which was equivalent to the low end of the historic range of short test salary levels, and the HCE annual compensation level at $134,004. This approach restored overtime protection for employees performing substantial amounts of nonexempt work who earned between the long test salary level and the low end of the short test salary range, as they failed the new standard salary level test. As previously discussed, the U.S. District Court for Eastern District of Texas held the 2016 rule invalid. In 2019, in part to address the concern raised in the litigation that the approach taken in the 2016 rulemaking would have prevented employers from using the exemption for employees who earned between the long test salary level and the low end of the short test salary range and met the more rigorous long duties test, the Department returned to the methodology used in the 2004 rule and set the salary level at the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationally. Applying this method to the earnings data available in 2019 produced a standard salary level that was below the long test salary level. The current earnings thresholds, as published in 2019, are $684 a week for the standard salary test and $107,432 per year for the HCE test.

Table 1: Historical Weekly Salary Levels for the EAP Exemptions

Date Enacted	Long Duties Test			Short Duties Test
	Executive	Administrative	Professional	
1938	$30*	$30	-	-
1940	$30	$200 (per month)	$200 (per month)	-
1949	$55	$75	$75	$100
1958	$80	$95	$95	$125
1963	$100	$100	$115	$150
1970	$125	$125	$140	$200

1975	$155	$155	$170	$250
Standard Duties Test				
2004	$455			
2019	$684			

*Unless otherwise specified, all figures are dollars per week

2. Need for Rulemaking

The goal of this rulemaking is to set effective earnings thresholds to help define and delimit the FLSA's EAP exemption. To this end, the Department is finalizing its proposed change to the standard salary level. Specifically, the Department is adjusting the standard salary level by setting it equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), based on the most recent year of Current Population Survey (CPS) data at the time of drafting.[290] Using the Bureau of Labor Statistics (BLS) 2023 data on percentiles of usual weekly earnings of nonhourly full-time workers, the standard salary level will be set at $1,128 per week.[291] Additionally, to maintain the effectiveness of this test, the Department is finalizing an updating mechanism that will update the earnings thresholds to reflect current wage data initially on July 1, 2024 and every 3 years thereafter.

The Department's new standard salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity in a one-test system. As explained in greater detail in sections III and V.B, setting the standard salary

[290] The Department uses the terms *salaried* and *nonhourly* interchangeably in this rule because, consistent with its 2004, 2016, and 2019 rules, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department also notes that the terms *employee* and *worker* are used interchangeably throughout this analysis.
[291] BLS publishes quarterly and annual estimates of percentile earnings values beginning with 2022 data at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.

level at or below the long test salary level, as the 2004 and 2019 rules did, results in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work, in effect significantly broadening the exemption compared to the two-test system. Setting the salary level at the low end of the historic range of short test salary levels, as the 2016 rule did, would have restored overtime protections to those employees who perform substantial amounts of nonexempt work and earned between the long test salary level and the low end of the short test salary range. However, it also would have resulted in denying employers the use of the exemption for lower-salaried employees who traditionally were not entitled to overtime compensation under the long test, which raised concerns that the Department was in effect narrowing the exemption. By setting a salary level above the equivalent of the long test salary level (using current data), the final rule will restore the right to overtime pay for salaried white-collar employees who prior to the 2019 rule were always considered nonexempt if they earned below the long test (or long test-equivalent) salary level. And it will ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting it well below the equivalent of the short test salary level (using current data), the rule will allow employers to continue to use the exemption for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. The new salary level will also more reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

As the Department has previously noted, the amount paid to an employee is "a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed, as well as the "principal[]" "delimiting requirement . . .prevent[ing] abuse" of the exemption.[292] Additionally, the salary level test facilitates application of the exemption by saving employees and employers from having to apply the more time-consuming duties analysis to a large group of employees who will not pass it. For these reasons, the salary level test has been a key part of how the Department defines and delimits the EAP exemption since the beginning of its rulemaking on the EAP exemption.[293] At the same time, the salary test's role in defining and delimiting the scope of the EAP exemption must allow for appropriate examination of employee duties.[294] Under the final rule, duties will continue to determine the exemption status for most salaried white-collar employees.

The Department also will adjust the HCE total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($151,164 using 2023 data). Though not as high a percentile as the HCE threshold initially adopted in 2004, which covered 93.7 percent of all full-time salaried workers,[295] the Department's new HCE threshold will ensure it continues to serve its intended function, because the HCE total annual compensation level will be high enough to exclude all but those employees at the very top of the economic ladder.

[292] Stein Report at 19, 24; *see also* 81 FR 32422.
[293] *See* 84 FR 51237.
[294] *See* 84 FR 51238.
[295] *See* 69 FR 22169 (Table 3).

In this final rule, the Department is not finalizing its proposal in section IV.B.1 and B.2 of the NPRM to apply the standard salary level to the U.S. territories subject to the federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry.[296]

In its three most recent part 541 rulemakings, the Department has expressed its commitment to keeping the earnings thresholds up to date to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees. In contrast, routine updates of the earnings thresholds to reflect wage growth will bring certainty and stability to employers and employees alike. Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for regularly updating the salary levels, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status. Accordingly, in addition to the salary level changes discussed above, the Department is including in this rule a mechanism for updating the salary and compensation levels to reflect current wage data initially on July 1, 2024 and every 3 years thereafter. As explained in greater detail in section V.A, employees and employers alike will benefit from the certainty and stability of regularly scheduled updates.

[296] The Department will address these aspects of its proposal in a future final rule. While the Department is not finalizing its proposal, it is making nonsubstantive changes in provisions addressing the territories as a result of other changes in this final rule.

3. Summary of Affected Workers, Costs, Benefits, and Transfers

The Department estimated the number of affected workers and quantified costs and transfer payments associated with this final rule using pooled CPS Merged Outgoing Rotation Group (MORG) data. *See* section VII.B.2. The Department estimates in the first year after implementation, there will be 4.3 million affected workers.[297] This includes 4.0 million workers (1.0 million at the first update and 3.0 million when the new salary level is applied) who meet the standard duties test and earn at least $684 per week but less than $1,128 per week and will either become eligible for overtime or have their salary increased to at least $1,128 per week (Table 2).[298] An estimated 292,900 workers will be affected by the increase in the HCE compensation test from $107,432 per year to $151,164 per year. In Year 10, with triennial updating of the standard salary and HCE thresholds, the Department projects that 5.0 million workers will be affected by the change in the standard salary level test and 1.0 million workers will be affected by the change in the HCE total annual compensation test.[299]

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[297] The term "affected workers" refers to the population of potentially affected EAP workers who either pass the standard duties test and earn at least $684 but less than the new salary level of $1,128 per week or pass only the HCE duties test and earn at least $107,432 but less than the new HCE compensation level of $151,164 per year.

[298] Here and elsewhere in this analysis, numbers are reported at varying levels of aggregation, and are generally rounded to a single decimal point. However, calculations are performed using exact numbers. Therefore, some numbers may not match the reported totals or the calculations shown due to rounding of components.

[299] In later years, earnings growth will cause some initially affected workers to no longer be affected because their earnings will exceed the new salary or compensation threshold. This occurs both in update years (i.e., triennially) and non-update years but will occur to a much greater degree in non-update years. Additionally, some workers will become newly affected because their earnings will reach at least $684 per week, and in the absence of this rule they would lose their overtime protections. To estimate the total number of affected workers over time, the Department accounts for both of these effects.

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This analysis quantifies three direct costs to employers: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs (*see* section VII.C.3). Total annualized direct employer costs over the first 10 years were estimated to be $802.9 million, assuming a 7 percent discount rate.[300] This rule will also transfer income from employers to employees in the form of increased wages. The Department estimated annualized transfers will be $1.5 billion. Most of these transfers will be attributable to wages paid under the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement. These transfers also account for employers who may choose to increase the salary of some affected workers to at least the new threshold so that they can continue to use the EAP exemption.

The Department also provides a qualitative discussion of the potential benefits and unquantified transfers of this rule, including strengthened overtime protections for some workers, increased worker productivity, increased personal time for workers, and reduced reliance on social assistance programs. *See* section VII.C.5.

Table 2: Summary of Affected Workers, Regulatory Costs, and Transfers - Standard and HCE Salary Levels

Impact	Year 1	Future Years [a]		Annualized Value	
		Year 2	Year 10	3% Real Discount Rate	7% Real Discount Rate
Affected Workers (1,000s)					
Standard	4,045	3,783	4,978	[b]	[b]
HCE	293	323	1,015	[b]	[b]
Total	4,337	4,106	5,993	[b]	[b]
Costs and Transfers (Millions in $2022) [c]					

[300] Hereafter, unless otherwise specified, annualized values will be presented using the 7 percent real discount rate.

Direct employer costs	$1,436.2	$641.5	$906.1	$794.0	$802.9
Transfers [d]	$1,509.2	$1,094.3	$2,490.1	$1,565.2	$1,534.1

[a] These cost and transfer figures represent a range over the nine-year span.

[b] Not annualized.

[c] Costs and transfers for affected workers passing the standard and HCE tests are combined.

[d] This is the net transfer from employers to workers. There may also be transfers of hours and income from some workers to others.

B. Number of Affected EAP Workers

1. Overview

This section explains the methodology used to estimate the number of workers who will be affected by the final rule. The pool of potentially affected workers is workers who are currently EAP exempt. In this final rule, as in previous rules, the Department estimated the current number of EAP exempt workers because there is no data source that identifies workers as EAP exempt. Employers are not required to report EAP exempt workers to any central data collection agency or as part of any employee or establishment survey. The methodology described in this final rule is consistent with the approach the Department used in the 2004, 2016, and 2019 final rules.[301] To estimate the number of workers who will be affected by the rule, the new standard salary level and the new HCE total annual compensation threshold are applied to the earnings of current EAP exempt workers.

[301] *See* 69 FR 22196–209; 81 FR 32453–60; 84 FR 51255–60. Where the proposal follows the methodology used to determine affected workers in the 2004, 2016, and 2019 final rules, citations to these rules are not always included.

2. Data

All estimates of numbers of workers used in this analysis were based on data from the CPS MORG, which is sponsored jointly by the U.S. Census Bureau and BLS.[302] The CPS is a large, nationally representative sample. Households are surveyed for 4 months, excluded from the survey for 8 months, surveyed for an additional 4 months, then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.[303] The data in this supplement contain the detailed information on earnings necessary to estimate a worker's exemption status. Responses are based on the reference week, which is always the week that includes the 12th day of the month.

Although the CPS MORG is a large-scale survey, administered to approximately 15,000 households monthly representing the entire nation, it is still possible to have relatively few observations when looking at subsets of employees, such as workers in a specific occupation employed in a specific industry, or workers in a specific geographic location. To increase the sample size, the Department pooled 3 years of CPS MORG data (2021-2023). Earnings for each observation from 2021 and 2022 were inflated to 2023 dollars using the Consumer Price Index

[302] In 2015, RAND released results from a survey conducted to estimate EAP exempt workers. However, this survey does not have the variables or sample size necessary for the Department to base its regulatory impact analysis (RIA) on this analysis. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[303] This is the outgoing rotation group (ORG); however, this analysis uses the data merged over 12 months and thus it is referred to as MORG.

for All Urban Consumers (CPI-U).[304] The weight of each observation was adjusted so that the total number of potentially affected EAP workers in the pooled sample remained the same as the number for the 2023 CPS MORG. Thus, the pooled CPS MORG sample uses roughly three times as many observations to represent the same total number of workers in 2023. The additional observations allow the Department to better characterize certain attributes of the potentially affected labor force. This pooled dataset is used to estimate all impacts of the final rule.

Some assumptions and adjustments were necessary to use these data as the basis for the analysis. For example, the Department eliminated workers who reported that their weekly hours vary and who provided no additional information on hours worked. This was done because the Department cannot estimate effects for these workers since it is unknown whether they work overtime and therefore unknown whether there would be any need to pay for overtime if their status changed from exempt to nonexempt. The Department reweighted the rest of the sample to account for this change (*i.e.*, to keep the same total employment estimates).[305] This adjustment assumes that the distribution of hours worked by workers whose hours do not vary is

[304] Previous rulemakings also adjusted salaries in the pooled data using the CPI-U, but the Department recognizes that the relationship between wage growth and inflation between 2021 and 2023 may not be consistent. During the pandemic, large employment losses in low-wage industries resulted in stronger wage growth at the aggregate level. In part of the 2021–2023 period, high inflation outpaced overall wage growth. Given these mixed effects, the Department decided to continue its prior practice of adjusting these observations using CPI-U.

[305] The Department also reweighted for workers reporting zero earnings. In addition, the Department eliminated, without reweighting, workers who reported both usually working zero hours and working zero hours in the past week.

representative of hours worked by workers whose hours vary. The Department believes that without more information, this is an appropriate assumption.[306]

3. Number of Workers Subject to the FLSA and the Department's Part 541 Regulations

As a starting point for the analysis, based on the CPS MORG data, the Department estimates that there would be 167.3 million wage and salary workers in Year 1. Figure 1 illustrates how the Department analyzed the U.S. civilian workforce through successive stages to estimate the number of affected workers.

Figure 1: Flow Chart of FLSA Exemptions and Estimated Number of Affected Workers

[306] This is justifiable because demographic and employment characteristics are similar across these two populations (*e.g.*, age, gender, education, distribution across industries, share paid nonhourly). The share of all workers who stated that their hours vary (but provided no additional information) is 4.4 percent. To the extent these excluded workers are exempt, if they tend to work more overtime than other workers, then transfer payments and costs may be underestimated. Conversely, if they work fewer overtime hours, then transfer payments and costs may be overestimated.

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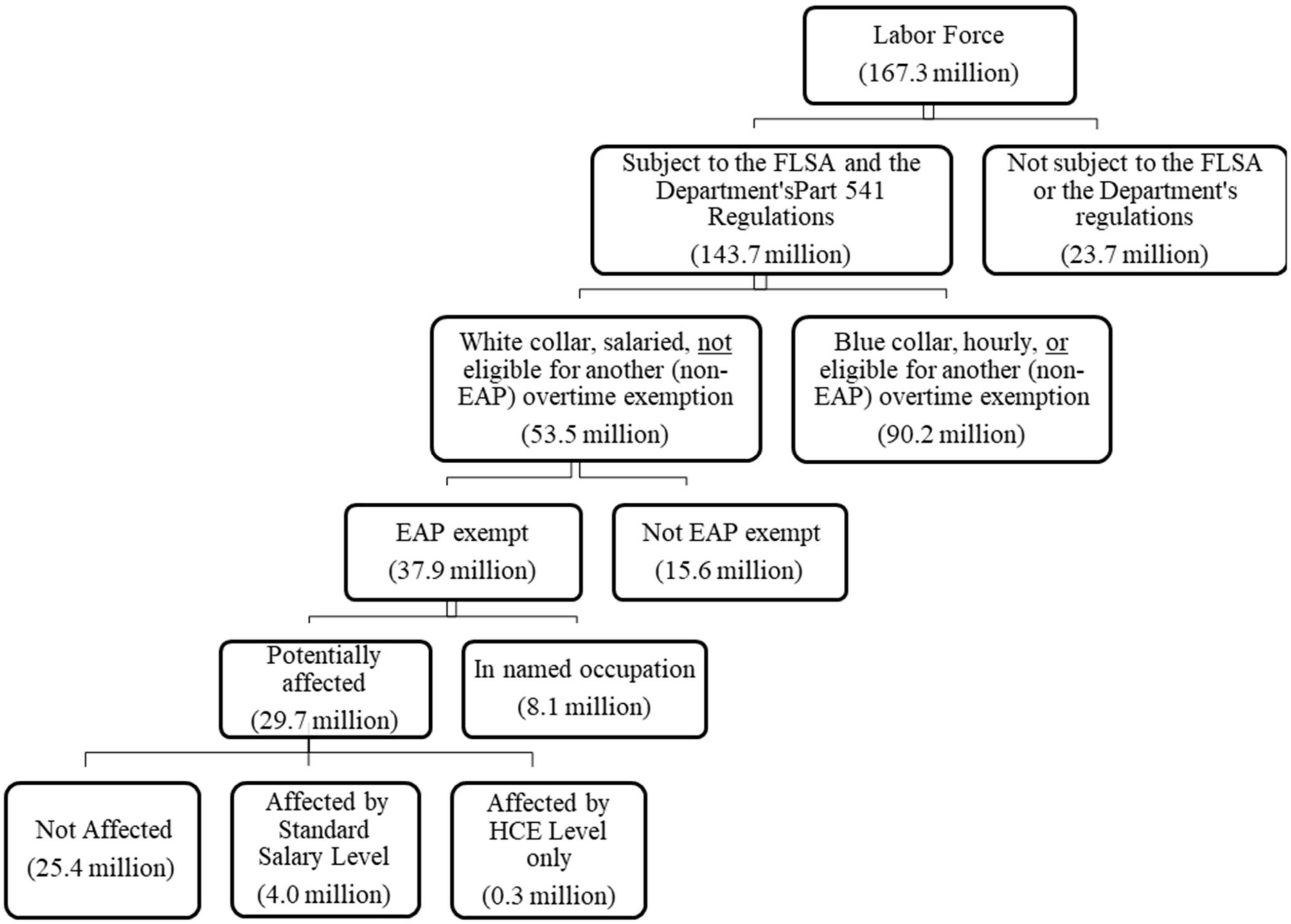

Note: The NPRM referred to the group in the top box as "Wage and salary workers." Because the estimate in this box includes the unemployed, it has been renamed to "Labor Force" for accuracy.

The Department first excluded workers who are unemployed, not subject to its regulations, or not covered by the FLSA from the overall total number of wage and salary workers. Excluded workers include military personnel, unpaid volunteers, self-employed individuals, clergy and other religious workers, and Federal employees (with a few exceptions described below).

Many of these workers are excluded from the CPS MORG, including members of the military on active duty and unpaid volunteers. Self-employed and unpaid workers are included in the CPS MORG, but have no earnings data reported and thus are excluded from the analysis. The Department identified religious workers by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060). Most employees of the Federal Government are covered by the FLSA but not the Department's part 541 regulations because the Office of Personnel Management (OPM) regulates their entitlement to minimum wage and overtime pay.[307] Exceptions exist for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees.[308] The analysis identified and included these covered Federal workers using occupation and/or industry codes and removed other Federal employees.[309]

The FLSA also does not cover employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce. The Department does not exclude them from the analysis, however, because there is no data set that would adequately inform an estimate of the size of this worker population, although the Department believes it is a small percentage of workers. The 2004, 2016, and 2019 final rules similarly did not adjust for these workers.

Of the 167.3 million wage and salary workers in the United States, the Department estimates that 143.7 million are covered by the FLSA and subject to the Department's regulations

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[307] *See* 29 U.S.C. 204(f). Federal workers are identified in the CPS MORG with the class of worker variable PEIO1COW.

[308] *See id.*

[309] Postal Service employees were identified with the Census industry classification for postal service (6370). Tennessee Valley Authority employees were identified as Federal workers employed in the electric power generation, transmission, and distribution industry (570) and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, or Virginia. Library of Congress employees were identified as Federal workers under Census industry 'libraries and archives' (6770) and residing in Washington DC.

(85.9 percent). The remaining 23.7 million workers are excluded from FLSA coverage for the reasons described above.

4. Number of Workers Who Are White-Collar, Salaried, Not Eligible for Another (Non-EAP) Overtime Exemption

After limiting the analysis to workers covered by the FLSA and subject to the Department's part 541 regulations, several other groups of workers were identified and excluded from further analysis since this final rule is unlikely to affect them. These include blue-collar workers,[310] workers paid on an hourly basis, and workers who are exempt under certain other (non-EAP) exemptions.

The Department excluded a total of 90.2 million workers from the analysis for one or more of these reasons, which often overlapped (*e.g.*, many blue-collar workers are also paid hourly). For example, the Department estimated that there are 49.1 million blue-collar workers. These workers were identified in the CPS MORG data following the methodology from the U.S. Government Accountability Office's (GAO) 1999 white-collar exemptions report[311] and the Department's 2004, 2016, and 2019 regulatory impact analyses.[312] Supervisors in traditionally blue-collar industries were classified as white-collar workers because their duties are generally managerial or administrative, and therefore they were not excluded as blue-collar workers. Using

[310] "The section 13(a)(1) exemptions and the regulations in [Part 541] do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy." § 541.3(a).
[311] GAO/HEHS. (1999). Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS-99-164, 40-41, https://www.gao.gov/assets/230/228036.pdf.
[312] *See* 69 FR 22240–44.

the CPS variable indicating a respondent's hourly wage status, the Department determined that 80.3 million workers were paid on an hourly basis in 2023.[313]

Also excluded from further analysis were workers who are exempt under certain other (non-EAP) exemptions. Although some of these workers may also be exempt under the EAP exemptions, they would independently remain exempt from the FLSA's minimum wage and/or overtime pay provisions based on the non-EAP exemptions. The Department excluded an estimated 3.7 million workers, including some agricultural and transportation workers, from further analysis because they are subject to another (non-EAP) overtime exemption. *See* Appendix A: Methodology for Estimating Exemption Status, contained in the rulemaking docket, for details on how this population was identified.

Agricultural and transportation workers are two of the largest groups of workers excluded from the population of potentially affected EAP workers in the current analysis, and with some exceptions, they were similarly excluded in other recent rulemakings. The 2004 rule excluded all workers in agricultural industries from the analysis,[314] while more recent analyses only excluded agricultural workers from specified occupational-industry combinations since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. This final rule followed the more recent analyses and only excluded agricultural workers in certain occupation-industry combinations.[315] The exclusion of transportation workers matched the method for the 2004, 2016, and 2019 final rules.[316] Transportation workers are defined as those who are subject

[313] CPS MORG variable PEERNHRY.
[314] 69 FR 22197.
[315] 84 FR 51257; 81 FR 32456, n.114.
[316] 84 FR 51257; 81 FR 32456–57; 69 FR 22197.

to the following FLSA exemptions: section 13(b)(1), section 13(b)(2), section 13(b)(3), section 13(b)(6), or section 13(b)(10). The Department excluded 1.0 million agricultural workers and 2.1 million transportation workers from the analysis.

In addition, the Department excluded another 22,700 workers who qualify for one or more other FLSA minimum wage and overtime exemptions (and are not either blue-collar or hourly). The criteria for determining exemption status for these workers are detailed in Appendix A.

After excluding workers not subject to the Department's FLSA regulations and workers who are unlikely to be affected by this final rule (*i.e.*, blue-collar workers, workers paid hourly, workers who are subject to another (non-EAP) overtime exemption), the Department estimated there are 53.5 million salaried white-collar workers for whom employers might claim either the standard EAP exemption or the HCE exemption.

5. Number of Current EAP Exempt Workers

To determine the number of workers for whom employers might currently claim the EAP exemption, the standard EAP test and HCE test were applied. Both tests include earnings thresholds and duties tests. Aside from workers in named occupations (which are not subject to an earnings requirement and are discussed in the next subsection), to be exempt under the standard EAP test, the employee generally must:

- be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test);[317]

[317] Some computer employees may be exempt even if they are not paid on a salary basis. Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt

- earn at least a designated salary amount (the standard salary level test, currently $684 per week); and
- primarily perform exempt work, as defined by the regulations (the standard duties test).

The HCE test allows certain highly paid employees to qualify for exemption if they customarily and regularly perform one or more exempt job duties (the HCE duties test). The current HCE annual compensation level is $107,432, including at least $684 per week paid on a salary or fee basis.

i. Salary Basis

The Department included only nonhourly workers in the analysis based on CPS data.[318] For this NPRM, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department notes that it made the same assumption regarding nonhourly workers in the 2004, 2016, and 2019 final rules.[319]

The CPS population of "nonhourly" workers includes salaried workers along with those who are paid a piece rate, day rate, or largely on bonuses or commissions. Data in the CPS are not available to distinguish between salaried workers and these other nonhourly workers.

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under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this rule (these workers were similarly excluded in the 2004, 2016, and 2019 analyses). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions and are included in the analysis since they will be impacted by this rule. Additionally, administrative and professional employees may be paid on a fee basis, as opposed to a salary basis. § 541.605(a). Although the CPS MORG does not identify workers paid on a fee basis, they are considered nonhourly workers in the CPS and consequently are correctly classified as "salaried" (as was done in previous rules).

[318] The CPS variable PEERNHRY identifies workers as either hourly or nonhourly.

[319] *See* 69 FR 22197; 81 FR 32414; 84 FR 51258.

However, the Panel Study of Income Dynamics (PSID) provides additional information on how nonhourly workers are paid.[320] In the PSID, respondents are asked how they are paid on their main job and are also asked for more detail if their response is other than salaried or hourly. Possible responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. The Department analyzed the PSID data and found that relatively few nonhourly workers were paid by methods other than salaried. The Department is not aware of any statistically robust source that more closely reflects salary as defined in its regulations.

ii. Salary Level

Weekly earnings are available in the CPS MORG data, which allowed the Department to estimate how many nonhourly workers pass the compensation thresholds.[321] However, the CPS earnings variable does not perfectly reflect the Department's definition of earnings. First, the CPS includes all nondiscretionary bonuses and commissions if they are part of usual weekly earnings. However, the regulation allows nondiscretionary bonuses and commissions to satisfy up to 10 percent of the standard salary level. This discrepancy between the earnings variable used and the regulatory definition of salary may cause a slight overestimation or underestimation of the number of workers estimated to meet the standard salary level and HCE compensation tests.[322] Second, CPS earnings data include overtime pay. The Department notes that employers

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[320] University of Michigan, Institute for Social Research. 2019 PSID. Data available at: https://simba.isr.umich.edu/data/data.aspx.

[321] The CPS MORG variable PRERNWA, which measures weekly earnings, is used to identify weekly salary.

[322] In some instances, this may include too much nondiscretionary bonuses and commissions (*i.e.*, when it is more than 10 percent of usual earnings). But in other instances, it may not include enough nondiscretionary bonuses and commissions (*i.e.*, when the respondent does not count them as usual earnings).

may factor into an employee's salary a premium for expected overtime hours worked. To the extent they do so, that premium would be reflected accurately in the data. Third, the earnings measure includes tips and discretionary commissions which do not qualify towards the required salary. The Department believes tips are an uncommon form of payment for these white-collar workers. Discretionary commissions tend to be paid irregularly and hence are unlikely to be counted as "usual earnings." Additionally, as noted above, most salaried workers do not receive commissions.

Lastly, the CPS annual earnings variable is topcoded at $150,000 through the March 2023 data.[323] Topcoding refers to how data sets handle observations at the top of the distribution and is performed to protect the confidentiality of data provided by CPS respondents. For the CPS annual earnings variable, workers earning above $2,884.61 ($150,000 ÷ 52 weeks) per week are reported as earning $2,884.61 per week. The Department imputed earnings for topcoded workers in the CPS data to adequately estimate impacts.[324]

iii. Duties

The CPS MORG data do not capture information about job duties. Therefore, the Department used probability estimates of passing the duties test by occupational title to estimate the number of workers passing the duties test. This is the same methodology used in recent part 541 rulemakings, and the Department believes it continues to be the best available methodology.

[323] Beginning in the April 2023 data, the CPS data are topcoded independently each month and represent the average earnings of the top 3 percent of earnings reported. *See* https://www.census.gov/content/dam/Census/programs-surveys/cps/updated-2022-cps-puf-changes.pdf for additional details.

[324] The Department used the standard Pareto distribution approach to impute earnings above the topcoded value as described in Armour, P. and Burkhauser, R (2013). Using the Pareto Distribution to Improve Estimates of Topcoded Earnings. Center for Economic Studies (CES).

The probabilities of passing the duties test are from an analysis performed by WHD in 1998 in response to a request from the GAO. Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, WHD was uniquely qualified to provide the analysis. The analysis was originally published in the GAO's 1999 white-collar exemptions report.[325]

WHD examined 499 occupational codes and determined that 251 occupational codes likely included EAP exempt workers.[326] For each, WHD assigned one of four probability codes reflecting the estimated likelihood, expressed as ranges, that a worker in that occupation would perform duties required to meet the EAP duties tests (Table 3). All occupations and their associated probability codes are listed in Appendix A. Just as in the 2004, 2016, and 2019 final rules, the Department has supplemented this analysis to account for the HCE exemption. The Department modified the four probability codes to reflect probabilities of passing the HCE duties test based on its analysis of the provisions of the highly compensated test relative to the standard duties test. To illustrate, WHD assigned exempt probability code 4 to the occupation "first-line supervisors/managers of construction trades and extraction workers" (Census code 6200), which indicates that a worker in this occupation has a 0 to 10 percent likelihood of meeting the standard EAP duties test. However, if that worker earned at least $100,000 annually (now $107,432

[325] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, *supra* note 311, at 40-41.

[326] WHD excluded nine that were not relevant to the analysis for various reasons. For example, one code was assigned to unemployed persons whose last job was in the Armed Forces, some codes were assigned to workers who are not FLSA covered, others had no observations.

annually), they were assigned a 15 percent probability of passing the more lenient HCE duties test.[327]

Table 3: Probability Worker in Category Passes the Duties Tests

Probability Code	The Standard EAP Test		The HCE Test	
	Lower Bound	Upper Bound	Lower Bound	Upper Bound
0	0%	0%	0%	0%
1	90%	100%	100%	100%
2	50%	90%	94%	96%
3	10%	50%	58.4%	60%
4	0%	10%	15%	15%

The occupations identified in GAO's 1999 report map to an earlier occupational classification scheme (the 1990 Census occupational codes).[328] For this final rule, the Department used occupational crosswalks to map the previous occupational codes to the 2018 Census occupational codes, which are used in the CPS MORG 2021 through 2023 data. If a new occupation comprises more than one previous occupation, then the new occupation's probability code is the weighted average of the previous occupations' probability codes, rounded to the closest probability code.

These codes provide information on the likelihood that an employee met the duties tests, but they do not identify which workers in the CPS MORG met the duties test. For example, for every ten public relations managers, between five and nine are assumed to meet the standard

[327] The HCE duties test is used in conjunction with the HCE total annual compensation requirement to determine eligibility for the HCE exemption. It is much less stringent than the standard and short duties tests to reflect that very highly paid employees are much more likely to be properly classified as exempt.
[328] Census occupation codes were also updated in 2002 and 2010. References to occupational codes in this analysis refer to the 2002 Census occupational codes. Crosswalks and methodology available at: https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html.

duties test (based on probability category 2). However, it is unknown which of these ten workers are exempt; therefore, for the purposes of producing an estimate, the Department must assign a status to these workers. Exemption status could be randomly assigned with equal probability, but this would ignore the earnings of the worker as a factor in determining the probability of exemption. The probability of qualifying for the exemption increases with earnings because higher paid workers are more likely to perform the required duties.[329]

The Department estimated the probability of qualifying for the standard exemption for each worker as a function of both earnings and the occupation's exempt probability category using a gamma distribution.[330] Based on these revised probabilities, each worker was assigned exempt or nonexempt status based on a random draw from a binomial distribution using the worker's revised probability as the probability of success. Thus, if this method is applied to ten workers who each have a 60 percent probability of being exempt, six workers would be expected to be designated as exempt.[331] For details, *see* Appendix A (in the rulemaking docket).

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[329] For the standard exemption, the relationship between earnings and exemption status is not linear and is better represented with a gamma distribution. For the HCE exemption, the relationship between earnings and exemption can be well represented with a linear function because the relationship is linear at high salary levels (as determined by the Department in the 2004 rule). Therefore, the gamma model and the linear model would produce similar results for highly compensated workers. *See* 69 FR 22204–08, 22215–16.

[330] The gamma distribution was chosen because, during the 2004 revision, this non-linear distribution best fit the data compared to the other non-linear distributions considered (*i.e.*, normal and lognormal). A gamma distribution is a general type of statistical distribution that is based on two parameters that control the scale (alpha) and shape (in this context, called the rate parameter, beta).

[331] A binominal distribution is frequently used for a dichotomous variable where there are two possible outcomes; for example, whether one owns a home (outcome of 1) or does not own a home (outcome of 0). Taking a random draw from a binomial distribution results in either a zero or a one based on a probability of "success" (outcome of 1). This methodology assigns exempt status to the appropriate share of workers without biasing the results with manual assignment.

As previously discussed in section V.B.5, some commenters challenged the Department's use of its probability codes to determine whether a worker meets the duties test. The Department acknowledges that the probability codes used to determine the share of workers in an occupation who are EAP exempt are 25 years old. However, the Department believes the probability codes continue to estimate exemption status accurately given the fact that the standard duties test is not substantively different from the former short duties tests reflected in the codes. For the 2016 rulemaking, the Department reviewed O*NET[332] to determine the extent to which the 1998 probability codes reflected current occupational duties. The Department's review of O*NET verified the continued appropriateness of the 1998 probability codes.[333] The 2019 final rule also used these probability codes and likewise found that these codes are the best available methodology to accurately estimate exemption status.[334]

The Department estimates that of the existing 53.5 million salaried white-collar workers considered in the analysis, 37.9 million currently qualify for the EAP exemption.

6. Potentially Affected Exempt EAP Workers

The Department excluded some of the current EAP exempt workers from further analysis because the final rule will not affect them. Specifically, the Department excluded workers in named occupations who are not required to pass the salary requirements (although they must still pass a duties test) and therefore whose exemption status does not depend on their earnings. These occupations include physicians (identified with Census occupation codes 3010, 3040, 3060,

[332] The O*NET database contains hundreds of standardized and occupation-specific descriptors. *See* https://www.onetcenter.org.
[333] 81 FR 32459.
[334] 84 FR 51259.

3120), lawyers (2100), teachers (occupations 2200–2550 and industries 7860 or 7870), academic administrative personnel (school counselors (occupation 2000 and industries 7860 or 7870) and educational administrators (occupation 0230 and industries 7860 or 7870)), and outside sales workers (a subset of occupation 4950). Out of the 37.9 million workers who were EAP exempt, 8.1 million, or 21.4 percent, were expected to be in named occupations. Thus, the changes to the standard salary level and HCE compensation tests would not affect these workers. The 29.7 million EAP exempt workers remaining in the analysis are referred to in this final rule as "potentially affected" (17.8 percent of all workers).

Based on analysis of the occupational codes and CPS earnings data (described above), the Department has concluded there are 29.7 million potentially affected EAP workers.[335]

Figure 2: Exemption Status and Number of Affected Workers

[335] Of these workers, approximately 16.5 million pass only the standard test, 12.8 million pass both the standard and the HCE tests, and 446,600 pass only the HCE test.

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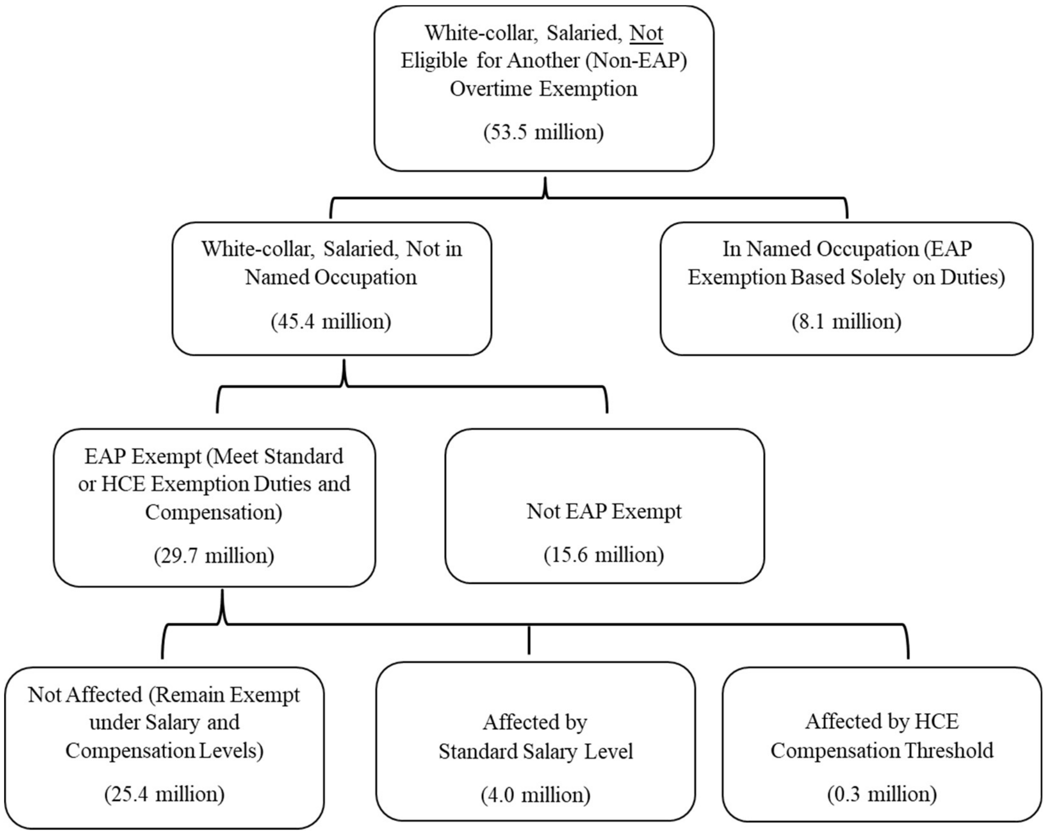


As shown in Figure 2 above, 8.1 million of the 53.5 million salaried white-collar workers are in named occupations and will not be affected by a change in the earnings requirements. The Department also estimates that of the remaining 45.4 million salaried white-collar workers, about 12.7 million earn below the Department's new standard salary level of $1,128 per week and about 32.7 million earn above the Department's new salary level. Thus, approximately 28 percent of salaried white-collar employees earn below the new salary level, whereas approximately 72 percent of salaried white-collar employees earn above the salary level and will have their exemption status turn on their job duties.

7. Number of Affected EAP Workers

The Department estimated that the increase in the standard salary level from $684 per week to $1,128 per week will affect 4.0 million workers in Year 1 (of these 4.0 million affected employees, 1.8 million earn less than the long test salary level ($942)).[336] The Department estimated that the increase in the HCE annual compensation level from $107,432 to $151,164 will impact 292,900 workers (Figure 3).[337] In total, the Department expects that 4.3 million workers out of the 29.7 million potentially affected workers will be affected in Year 1. This estimate of 4.3 million affected workers represents only approximately 10 percent of all salaried white-collar workers who are not in named occupations (45.4 million).

As illustrated in Figure 1 above, this final rule affects a specific and small portion of all employed workers. In particular, the number of affected workers is 2.6% of total employed workers in 2023 and represents about 8 percent of all white-collar salaried workers (including workers in named occupations). While Figure 1 provides a snapshot of the impacts of this rule in the context of the broader labor market of 2023, it may also be helpful to understand how the labor market has grown since the Department first introduced a one-test system in 2004. Broadly, since 2004 the size of the labor force and the white-collar workforce has grown considerably. Between 2004 and 2023, total employment grew by 21.8 million, with employment increasing by nearly 10 million since 2016 and 3.5 million since 2019.[338] Over this period, the size of the white-collar workforce has also increased considerably. In 2004, the total number of white-collar

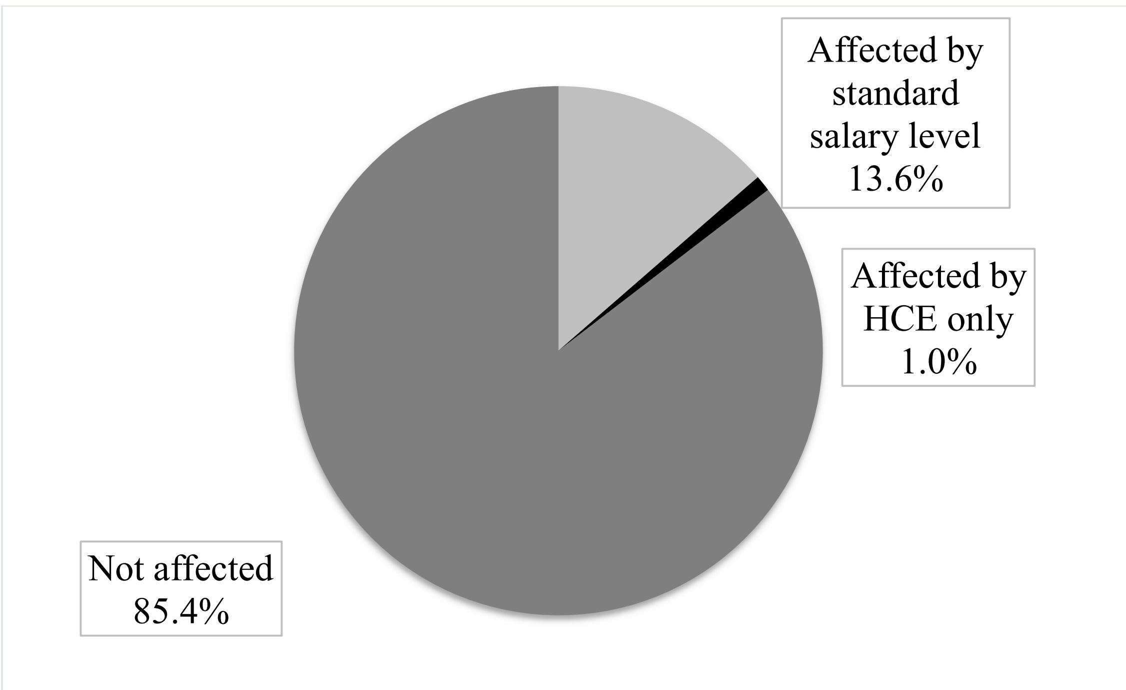
[336] *See* section VII.C.8 (Alternative 2). As discussed in section V.B, such employees were always excluded from the EAP exemption prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was equivalent to the long test salary level. The remaining 2.2 million of these affected employees earn between the long test salary level and the Department's new standard salary level.

[337] This group includes workers who may currently be nonexempt under more protective state EAP laws and regulations, such as some workers in Alaska, California, Colorado, Maine, New York, Washington, and Wisconsin.

[338] Employment status of the civilian noninstitutional population, 1953 to date. BLS Current Population Survey. https://www.bls.gov/cps/cpsaat01.htm

workers who were subject to the Part 541 regulations, including the salary level test, was 31.7 million. By 2016 it had reached 37.4 million; in 2019 it was 39.8 million; and in 2023 it was nearly 45.4 million.

Figure 3: Pie Chart of Potentially Affected Employees and Their Affected Status



Several commenters stated that the Department's estimates of affected workers were incorrect because of the application of the probability codes. For example, NCFC stated that "the Department's impact calculations rely on outdated and flawed data" because the "Department's predictions as to the probability of employees passing the duties test are based on a 1999 study . . . which itself relied upon information provided by DOL in the 1990s—more than three decades ago." AFPI further added that since the Department's probability codes were developed, "occupational codes have changed; the Part 541 duties tests have changed; and litigation has resulted in thousands of court decisions finding employees to be exempt or non-exempt."

Similarly, NRF included a report by Oxford Economics stating that there have been numerous economics changes since 1998, "includ[ing] increases in automation, virtual work, computerized scheduling, and the effects of a global pandemic."[339] The Oxford Economics report also stated that "if the relationship between salaried [status] and EAP exemption status is tighter than the [Department] . . . assumes," the number of affected workers could be as high as 7.2 million. AFPI asserted that approximately "7.5 million employees would be non-exempt for the first time based on salary alone[.]" Rachel Greszler stated that the correct figure is as high as 12.3 million workers.

The Department disagrees with commenters that challenged its use of its probability codes. The Department has used its probability codes to estimate the number of workers who meet the duties test in its 2004, 2016, and 2019 rules. The Department reiterates that these codes have been updated and mapped onto current occupational codes, as explained above. As also noted above, the standard duties test is not substantively different from the former short duties tests reflected in the codes. In consequence, the probability codes remain relevant and are currently the most accurate way to estimate the probability of a worker satisfying the duties test. Furthermore, while several occupations have changed over time, modifications affecting specific occupations would only affect the validity of these probability codes if they systematically

[339] The Oxford Economics report also noted that there has been a 6-percent rise in "the share of salaried workers in the economy . . . since 1998." However, any increase in the number of salaried workers does not have any bearing on the validity of the probability codes, which the Department uses to estimate whether a worker passes the duties test. Being paid on a salary basis is one of the three tests for exemption, *see* § 541.602(a), and is distinct from the duties test. Accordingly, the Department only applies the probability codes to nonhourly workers—whom, as discussed above, the Department considers to be an appropriate proxy for workers paid on a salary basis.

affected an occupation's probability of performing exempt tasks. In contrast, other changes, such as employees performing remotely the job duties they once performed in-person, do not affect the validity of these probabilities. Additionally, the probability codes can still effectively predict whether employees in new industries will meet the duties test insofar as these occupations existed in other industries. Finally, as previously noted, the Department used the O*NET database to confirm the appropriateness of the probability codes in 2016. Commenters did not provide a basis for concluding that the Department's 2016 evaluation is obsolete or that the probability codes no longer provide the most reasonable basis for estimating the population of affected workers.

The Department also does not agree with commenters that stated that it underestimated the number of affected workers in the NPRM. As discussed above, *see* section V.B.5.iii, commenters that asserted the number of affected workers could be much higher generally referenced estimates of the number of workers earning between the current salary level and the proposed salary level, regardless of whether they passed the duties test, and then posited that up to that many workers (e.g., 7.2 million, 7.5 million, or 12.3 million) could be affected. The position that all workers earning below the new salary level, regardless of their duties, will be affected by the new salary level fails to account for the fact that that millions of these workers are already nonexempt because they do not meet the duties test.

C. Effects of Revised Salary and Compensation Levels

1. Overview and Summary of Quantified Effects

The Department is setting the standard salary level using the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census region (currently the South) and setting the HCE compensation level at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide. In both cases the Department used 2023 CPS data to calculate the levels.[340]

Transfers both from employers to employees and between employees, and direct employer costs, will depend on how employers respond to this rulemaking. Employer response is expected to vary by the characteristics of the affected EAP workers. Assumptions related to employer responses are discussed below.

Table 4 presents the estimated number of affected workers, costs, and transfers associated with increasing the standard salary and HCE compensation levels. The Department estimated that the direct employer costs of this rule will total $1.4 billion in the first year, with 10-year annualized direct costs of $802.9 million per year using a 7 percent discount rate.

In addition to these direct costs, this rule will transfer income from employers to employees. Estimated Year 1 transfers will equal $1.5 billion, with annualized transfers of $1.5 billion per year using the 7 percent real discount rates and $1.6 billion using the 3 percent discount rate. Potential employer costs due to reduced profits and additional hiring were not quantified but are discussed in section VII.C.3.v. These estimates encompass in Year 1 both the impact of the initial update to the earnings thresholds and the change in those thresholds that will become applicable 6 months later.[341]

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[340] Full-time is defined as 35 or more hours per week.

[341] The Department estimates the initial update to the standard salary level will result in 959,000 affected workers earning between $684 and $844 per week. The Department estimates the adjustment and managerial costs for this update will be $202.3 million and transfers will be $204.3 million. For the initial update to the HCE total annual compensation threshold, the Department estimates that the update will result in 223,000 affected workers, $58.7 million in adjustment and managerial costs, and $164.5 million in transfer payments.

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Table 4: Summary of Affected Workers and Regulatory Costs and Transfers

Impact [a]	Year 1	Future Years [b]		Annualized Value	
		Year 2	Year 10	3% Real Discount Rate	7% Real Discount Rate
Affected Workers (1,000s)					
Standard	4,045	3,783	4,978	[c]	[c]
HCE	293	323	1,015	[c]	[c]
Total	4,337	4,106	5,993	[c]	[c]
Direct Employer Costs (Millions in $2023)					
Regulatory familiarization	$451.6	$0.0	$68.9	$71.8	$79.3
Adjustment [c]	$299.1	$9.4	$20.9	$44.6	$50.0
Managerial	$685.5	$632.1	$816.3	$677.6	$673.6
Total direct costs [d]	$1,436.2	$641.5	$906.1	$794.0	$802.9
Transfers from Employers to Workers (Millions in $2023) [e]					
Due to minimum wage	$87.5	$46.5	$22.6	$43.2	$44.8
Due to overtime pay	$1,421.7	$1,047.8	$2,467.5	$1,522.0	$1,489.3
Total transfers [f]	$1,509.2	$1,094.3	$2,490.1	$1,565.2	$1,534.1

[a] Additional costs and benefits of the rule that could not be quantified or monetized are discussed in the text.

[b] These costs/transfers represent a range over the nine-year span.

[c] Not annualized.

[d] Adjustment costs occur in all years when there are newly affected workers. Adjustment costs may occur in years without updated earnings thresholds because some workers' projected earnings are estimated using negative earnings growth.

[e] Components may not add to total due to rounding.

[f] This is the net transfer from employers to workers. There may also be transfers between workers.

2. Characteristics of Affected EAP Workers

Table 5 presents the number of affected EAP workers, the mean number of overtime hours they work per week, and their average weekly earnings. The Department considered two types of overtime workers in this analysis: regular overtime workers and occasional overtime workers.[342] Regular overtime workers typically worked more than 40 hours per week. Occasional overtime workers typically worked 40 hours or less per week, but they worked more than 40 hours in the week they were surveyed. The Department considered these two populations separately in the analysis because labor market responses to overtime pay requirements may differ for these two types of workers.

The 4.0 million workers affected by the combined effect of the initial update and the subsequent application of the new standard salary level work on average 1.6 usual hours of overtime per week and earn on average $948 per week.[343] However, most of these workers (about 86 percent) usually do not work overtime. The 14 percent of affected workers who usually work overtime average 11.1 hours of overtime per week. In a representative week, roughly 135,000 (or 3.3 percent) of the 4.0 million affected workers occasionally work overtime; they averaged 8.5 hours of overtime in the weeks they worked overtime.[344] Finally, 20,000 (or 0.5 percent) of all workers affected by the increase in the standard salary level earn less than the minimum wage.[345]

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[342] Regular overtime workers were identified in the CPS MORG with variable PEHRUSL1. Occasional overtime workers were identified with variables PEHRUSL1 and PEHRACT1.

[343] CPS defines "usual hours" as hours worked 50 percent or more of the time.

[344] This group represents the number of workers with occasional overtime hours in the week the CPS MORG survey was conducted. Because the survey week is a representative week, the Department believes the prevalence of occasional overtime in the survey week and the characteristics of these workers are representative of other weeks (even though a different group of workers would be identified as occasional overtime workers in a different week).

[345] A small proportion (0.5 percent) of all affected EAP workers earn implicit hourly wages that are less than the applicable minimum wage (the higher of the state or Federal minimum wage). The implicit hourly wage is calculated as total weekly earnings divided by total weekly hours worked. For example, workers earning the $684 per week standard salary level would earn less than the Federal minimum wage if they work 95 or more hours in a week ($684 ÷ 95 hours = $7.20 per hour).

The 292,900 workers affected by the change in the HCE compensation level average 2.9 hours of overtime per week and earn an average of $2,397 per week ($124,668 per year). About 73 percent of these workers do not usually work overtime, while the 27 percent who usually work overtime average 11.0 hours of overtime per week. Among the 2.6 percent who occasionally work overtime, they averaged 8.2 hours in the weeks that they worked overtime.

Although most affected workers who typically do not work overtime will be unlikely to experience significant changes in their daily work routine, those who regularly work overtime may experience significant changes. Moreover, affected EAP workers who routinely work overtime and earn less than the minimum wage will be most likely to experience significant changes. Impacts on employee hours and earnings are discussed further in section VII.C.4.

Table 5: Number of Affected EAP Workers, Mean Overtime Hours, and Mean Weekly Earnings, Year 1

Type of Affected EAP Worker	Affected EAP Workers [a]		Mean Overtime Hours	Mean Usual Weekly Earnings
	Number (1,000s)	% of Total		
Standard Salary Level				
All affected EAP workers	4,045	100%	1.6	$948
Earn less than the minimum wage [b]	20	0.5%	25.8	$828
Regularly work overtime	575	14.2%	11.1	$959
Occasionally work overtime [c]	135	3.3%	8.5	$955
HCE Compensation Level				
All affected EAP workers	293	100%	2.9	$2,397
Earn less than the minimum wage [b]	--	--	--	--
Regularly work overtime	78	26.7%	11.0	$2,406
Occasionally work overtime [c]	8	2.6%	8.2	$2,392

Note: Pooled CPS data for 2021–2023 adjusted to reflect 2023.
[a] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[b] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage. These workers all regularly work overtime and are also included in that row. HCE workers will not be affected by the minimum wage provision.

[c] Workers who do not usually work overtime but did in the CPS reference week. Mean overtime hours are actual overtime hours in the reference week. Other workers may occasionally work overtime in other weeks.

This section characterizes the population of affected workers by industry, occupation, employer type, location of residence, and demographics. The Department chose to provide as much detail as possible while maintaining adequate sample sizes.

Table 6 presents the distribution of affected EAP workers by industry and occupation, using Census industry and occupation codes. The industry with the most affected EAP workers is professional and business services (827,000), while the industry with the highest percentage of EAP workers affected is leisure and hospitality (about 24 percent). The occupational category with the most affected EAP workers is management, business, and financial (2.0 million), while the occupation category with the highest percentage of EAP workers affected is farming, fishing, and forestry (about 45 percent).

Potentially affected workers in private-sector nonprofits are more likely to be affected than workers in private-sector for-profit firms (18.9 percent compared with 13.6 percent). However, as discussed in section VII.B.3, the estimates of workers subject to the FLSA include workers employed by enterprises that are not subject to the FLSA under the law's enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population in order to exclude them from these estimates. Although failing to exclude workers who work for non-covered enterprises would only affect a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for workers in nonprofits because when determining FLSA enterprise coverage only revenue derived from business operations, not charitable activities, is included.

Table 6: Estimated Number of Workers and Whether They Will be Affected by the New Earnings Thresholds, by Industry and Occupation, Year 1

Industry / Occupation / Nonprofit	Workers subject to FLSA (Millions)	Potentially Affected EAP Workers (Millions) [a]	Not-Affected (Millions) [b]	Affected (Millions) [c]	Affected as Share of Potentially Affected
Total	143.68	29.75	25.41	4.34	14.6%
By Industry [d]					
Agriculture, forestry, fishing, & hunting	1.31	0.06	0.05	0.01	22.8%
Mining	0.59	0.16	0.14	0.02	11.8%
Construction	9.31	1.27	1.08	0.18	14.6%
Manufacturing	15.52	4.06	3.71	0.35	8.6%
Wholesale trade	3.16	0.85	0.74	0.11	13.2%
Retail trade	15.65	1.97	1.59	0.38	19.2%
Transportation & utilities	8.90	1.07	0.92	0.15	14.3%
Information	2.71	1.08	0.95	0.13	12.2%
Financial activities	9.93	4.35	3.79	0.56	13.0%
Professional & business services	17.46	7.13	6.30	0.83	11.6%
Education	14.29	1.20	0.96	0.24	20.3%
Healthcare & social services	21.03	3.75	3.01	0.74	19.8%
Leisure & hospitality	12.53	0.94	0.71	0.23	24.3%
Other services	5.53	0.76	0.60	0.16	21.5%
Public administration	5.75	1.10	0.88	0.23	20.6%
By Occupation [d]					
Management, business, & financial	24.74	15.32	13.33	1.99	13.0%
Professional & related	35.90	10.72	9.23	1.49	13.9%
Services	22.85	0.15	0.10	0.04	28.7%
Sales and related	12.66	2.41	1.96	0.46	18.9%
Office & administrative support	15.98	0.93	0.61	0.32	34.4%
Farming, fishing, & forestry	0.91	0.00	0.00	0.00	44.7%
Construction & extraction	6.97	0.03	0.02	0.01	21.9%

Installation, maintenance, & repair	4.58	0.05	0.04	0.01	15.3%
Production	8.18	0.09	0.08	0.01	10.8%
Transportation & material moving	10.91	0.05	0.04	0.01	24.8%
By Nonprofit and Government Status					
Nonprofit, private	10.17	2.44	1.98	0.46	18.9%
For profit, private	114.56	24.95	21.56	3.39	13.6%
Government (state, local, and Federal)	18.95	2.35	1.86	0.48	20.6%

Note: Pooled CPS data for 2021–2023 adjusted to reflect 2023.
[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers earning below the new salary level do not have their weekly earnings increased to the new level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[d] Census industry and occupation categories.

Table 7 presents the distribution of affected EAP workers based on Census Regions and Divisions, and metropolitan statistical area (MSA) status. The region with the most affected workers will be the South (1.9 million), but the South's percentage of potentially affected workers who are estimated to be affected is relatively small (17.9 percent). Although 90 percent of affected EAP workers will reside in MSAs (3.92 of 4.34 million), so do a corresponding 88 percent of all workers subject to the FLSA.[346]

Employers in low-wage industries, regions, and in non-metropolitan areas may be more affected because they typically pay lower wages and salaries. The Department believes the salary level included in this rule is appropriate for these lower-wage sectors, in part because the

[346] Identified with CPS MORG variable GTMETSTA.

methodology uses earnings data from the lowest-wage census region. Moreover, the duties test will continue to determine exemption status for the vast majority of workers in low-wage regions and industries under the rule. For example, as displayed in Table 7, 82.1 percent of potentially affected EAP workers in the South Census Region earn more than the new salary levels and thus will not be affected by the rule (8.59 ÷ 10.46). Effects by region and industry are considered in section VII.C.7.

Table 7: Estimated Number of Workers and Whether They Will be Affected by the New Earnings Thresholds, by Region, Division, and MSA Status, Year 1

Region / Division / Metropolitan Status	Workers subject to FLSA (Millions)	Potentially Affected EAP Workers (Millions) [a]	Not-Affected (Millions) [b]	Affected (Millions) [c]	Affected as Share of Potentially Affected
Total	143.68	29.75	25.25	4.49	15.1%
By Region / Division					
Northeast	25.51	6.04	5.30	0.74	12.3%
New England	7.01	1.80	1.61	0.20	11.0%
Middle Atlantic	18.50	4.23	3.69	0.54	12.8%
Midwest	31.14	6.08	5.15	0.93	15.4%
East North Central	21.06	4.14	3.52	0.62	14.9%
West North Central	10.08	1.94	1.63	0.32	16.3%
South	53.18	10.46	8.59	1.87	17.9%
South Atlantic	27.71	5.80	4.77	1.03	17.7%
East South Central	7.92	1.24	0.99	0.25	20.4%
West South Central	17.54	3.42	2.83	0.59	17.2%
West	33.85	7.17	6.38	0.79	11.0%
Mountain	11.12	2.21	1.89	0.32	14.4%
Pacific	22.73	4.95	4.48	0.47	9.5%
By Metropolitan Status					
Metropolitan	126.89	27.91	23.98	3.92	14.1%
Non-metropolitan	15.74	1.70	1.32	0.38	22.3%
Not identified	1.05	0.14	0.11	0.03	23.8%

Note: Pooled CPS data for 2021–2023 adjusted to reflect 2023.

[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers earning below the new salary level do not have their weekly earnings increased to the new level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

Table 8 presents the distribution of affected EAP workers by demographics. Potentially affected women, Black workers, Hispanic workers, young workers, and workers with less education are all more likely to be affected than other worker types. This is because EAP exempt workers with these characteristics are more likely to earn within the affected standard salary range than EAP exempt workers without these characteristics. For example, of potentially affected workers, women tend to have lower salaries and are therefore more likely to be in the affected range. Median weekly earnings for potentially affected women are $1,709 compared to $2,108 for men.

Among potentially affected workers, certain demographic groups—women, Black workers, Hispanic workers, young workers, and workers with less education—have an increased likelihood of being affected by this rulemaking, even though workers in these demographic groups are less likely to be EAP exempt in the first place. Therefore, as a share of all workers, not just potentially affected workers, workers in these demographic groups may not be more likely to be affected. For example, when looking at potentially affected workers, 21.7 percent of potentially affected Black workers are affected, while only 14.5 percent of potentially affected white workers are affected. However, when looking at total workers, about the same shares of total Black and total white workers would be affected (2.9 percent of Black workers and 3.0 percent of white workers).

Table 8: Estimated Number of Workers and Whether They Will be Affected by the New Earnings Thresholds, by Demographics, Year 1

Demographic	Workers subject to FLSA (Millions)	Potentially Affected EAP Workers (Millions) [a]	Not-Affected (Millions) [b]	Affected (Millions) [c]	Affected as Share of All Workers	Affected as Share of Potentially Affected
Total	143.68	29.75	25.41	4.34	3.0%	14.6%
By Sex						
Male	74.37	17.38	15.46	1.92	2.6%	11.0%
Female	69.31	12.37	9.95	2.42	3.5%	19.6%
By Race						
White only	109.96	22.95	19.63	3.32	3.0%	14.5%
Black only	18.47	2.48	1.94	0.54	2.9%	21.7%
All others	15.25	4.32	3.83	0.48	3.2%	11.2%
By Ethnicity						
Hispanic	27.02	2.80	2.25	0.55	2.0%	19.5%
Not Hispanic	116.66	26.95	23.15	3.79	3.3%	14.1%
By Age						
16-25	22.34	1.37	0.96	0.40	1.8%	29.6%
26-35	34.25	7.51	6.20	1.30	3.8%	17.4%
36-45	30.91	7.96	6.97	0.99	3.2%	12.4%
46-55	27.89	7.00	6.13	0.87	3.1%	12.4%
56+	28.30	5.92	5.15	0.77	2.7%	13.1%
By Education						
No degree	10.77	0.15	0.09	0.06	0.5%	39.7%
High school diploma	59.52	4.75	3.55	1.19	2.0%	25.1%
Associate's degree	15.09	2.01	1.56	0.45	3.0%	22.5%
Bachelor's degree	37.05	14.30	12.43	1.86	5.0%	13.0%
Master's degree	16.08	7.11	6.46	0.65	4.0%	9.1%
Professional degree	2.06	0.40	0.36	0.04	2.0%	10.4%
PhD	3.11	1.03	0.95	0.08	2.6%	7.8%

Note: Pooled CPS data for 2021–2023 adjusted to reflect 2023.

[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary level (assuming affected workers' weekly earnings do not increase to the new salary level).
[c] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary level).

3. Costs

i. Summary

The Department quantified three direct costs to employers in this analysis: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. These are the same costs quantified in the 2016 and 2019 rulemakings. The Department estimated that in Year 1, regulatory familiarization costs will be $451.6 million, adjustment costs will be $299.1 million, and managerial costs will be $685.5 million (Table 9). Total direct employer costs in Year 1 will be $1.4 billion. Recurring costs are projected in section VII.C.10. The Department discusses costs that are not quantified in section VII.C.3.v.

Table 9: Summary of Year 1 Direct Employer Costs (Millions)

Direct Employer Costs	Standard Salary Level	HCE Compensation Level	Total
Regulatory familiarization [a]	--	--	$451.6
Adjustment	$279.0	$20.1	$299.1
Managerial	$626.3	$59.2	$685.5
Total direct costs	$905.4	$79.2	$1,436.2

[a] Regulatory familiarization costs are assessed jointly for the change in the standard salary level and the HCE compensation level.

ii. Regulatory Familiarization Costs

This rulemaking will impose direct costs on firms by requiring them to review the regulation. To estimate these "regulatory familiarization costs," three pieces of information must be estimated: (1) the number of affected establishments; (2) a wage level for the employees reviewing the rule; and (3) the amount of time spent reviewing the rule. The Department generally used the same methodology for calculating regulatory familiarization costs that it used in the NPRM and recent rulemakings.

Regulatory familiarization costs can be calculated at an establishment level or at a firm level. The Department assumed that regulatory familiarization occurs at a decentralized level and used the number of establishments in its cost estimate; this results in a higher estimate than would result from using the number of firms. The most recent data on private sector establishments and firms at the time this rule was drafted are from the 2021 Statistics of U.S. Businesses (SUSB), which reports 8.15 million establishments with paid employees.[347] Additionally, there were an estimated 90,126 state and local governments in 2017, the most recent data available.[348] The Department thus estimated 8.24 million entities (the term "entities" is used to refer to the combination of establishments and governments).

The Department assumes that all entities will incur some regulatory familiarization costs, even if they do not employ exempt workers, because all entities will need to confirm whether this rulemaking affects their employees. Entities with more affected EAP workers will likely spend more time reviewing the regulation than entities with fewer or no affected EAP workers

[347] Statistics of U.S. Businesses 2021, https://www.census.gov/programs-surveys/susb.html.
[348] 2017 Census of Governments. Table 1, https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.

(since a more careful reading of the regulation will probably follow the initial decision that the entity is affected). However, the Department did not know the distribution of affected EAP workers across entities, so it used an average cost per entity.

The Department believes an average of 1 hour per entity is appropriate because the regulated community is likely to be familiar with the content of this rulemaking. EAP exemptions have existed in one form or another since 1938, and a final rule was published as recently as 2019. Furthermore, employers who use the exemptions must apply them every time they hire an employee whom they seek to classify as exempt. Thus, employers should be familiar with the exemptions. The most significant changes in this rulemaking are setting a new standard salary level and a new HCE compensation level for exempt workers and establishing a mechanism for keeping these thresholds up to date. The changed regulatory text is only a few pages, and the Department will provide summaries and other compliance assistance materials that will help inform employers that are implementing the final rule. The Department thus believes, consistent with its approach in the 2016 and 2019 rules, that 1 hour is an appropriate average estimate for the time each entity will spend reviewing the changes made by this rulemaking. Additionally, the estimated 1 hour for regulatory familiarization represents an assumption about the average for all entities in the U.S., even those without any affected or exempt workers, which are unlikely to spend much time reviewing the rulemaking. Some businesses, of course, will spend more than 1 hour, and some will spend less.

The Department's analysis assumes that compensation, benefits, and job analysis specialists (SOC 13-1141) with a median wage of $32.59 per hour will review the rulemaking.[349,]

[349] OEWS 2022. Available at: https://www.bls.gov/oes/current/oes131141.htm.

[350] The Department also assumed that benefits are paid at a rate of 45 percent of the base wage[351] and overhead costs are paid at a rate of 17 percent of the base wage,[352] resulting in an hourly rate of $54.82 in 2023 dollars.[353] The Department thus estimates regulatory familiarization costs in Year 1 would be $451.6 million ($54.82 per hour × 1 hour × 8.24 million entities).

The Department also conducted a sensitivity analysis. First, as previously noted, the Department used the number of establishments rather than the number of firms, which results in a higher estimate of the regulatory familiarization cost. Using the number of firms, 6.4 million, would result in a reduced regulatory familiarization cost estimate of $350.0 million in Year 1.

Some commenters representing employer interests stated that rule familiarization costs are underestimated. *See, e.g.*, ABC; IEC; Job Creators Network Foundation; NSBA; SBA Office of Advocacy. For instance, ABC commented that "compliance with the proposal will not be as simple as reviewing the salary level and making a one-time decision" and that "82% of recently surveyed ABC members . . . responded that reviewing the final rule would take three hours or longer, with 47% saying it would take five hours or more."

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[350] Previous related rulemakings used the CPS to estimate wage rates. The Department is using OEWS data now to conform with standard practice for the Department's economic analyses.

[351] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation (ECEC) data using variables CMU1020000000000D and CMU1030000000000D. This fringe benefit rate includes some fixed costs such as health insurance. As of when this final rule was drafted, 2023 ECEC data were available only through the third quarter, so the Department continued to use the 2022 full-year data to calculate the benefits share.

[352] The Department believes that the overhead costs associated with this rulemaking are small because existing systems maintained by employers to track currently hourly employees can be used for newly overtime-eligible workers. However, acknowledging that there might be additional overhead costs, the Department has included an overhead rate of 17 percent.

[353] The 2022 fully-loaded hourly wage was adjusted to 2023 using the CPI-U.

While the Department acknowledges that some employers will spend more than an hour reviewing the rule, the estimate of 1 hour for rule familiarization is an assumption about the average representing all establishments, even those without any affected or exempt workers. Those establishments will likely not need to spend any time reviewing the rule. Employers in industries with more affected workers may spend more time reviewing the rule, but across all industries, the Department believes that 1 hour continues to be appropriate. The Department used the same 1 hour estimate in its 2016 and 2019 rules,[354] and the Department did not receive comments with concrete data that is representative across all industries from which to conclude that its average estimate of one hour is incorrect. The Department continues to believe that businesses are already familiar with this rulemaking. The EAP exemptions have existed for a long time, and recent rules were published in 2016 and 2019. This rulemaking sets a new standard salary level and a new HCE compensation level for exempt workers and establishes a mechanism for keeping these thresholds up to date. However, this rulemaking does not fundamentally change the existing method for determining whether an employee qualifies for the EAP exemption. To the extent commenters' familiarization cost concerns related to time needed to comply with the rule, these costs are addressed separately under the Department's managerial and adjustment cost estimates. As for concerns relating to the hourly wage rate used to calculate rule familiarization costs, the Department notes that it relies on the standard occupation used in previous WHD and DOL rulemakings.

[354] 81 FR 32474; 84 FR 51266.

iii. Adjustment Costs

This rulemaking will also impose direct costs on establishments by requiring them to evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems. For each affected worker who works overtime, an employer will need to decide whether they will increase their salary, adjust their hours, or some combination of the two. The Department believes the size of these "adjustment costs" will depend on the number of affected EAP workers and will occur in any year when exemption status is changed for any workers. To estimate adjustment costs, three pieces of information must be estimated: (1) a wage level for the employees making the adjustments; (2) the amount of time spent making the adjustments; and (3) the estimated number of newly affected EAP workers. The Department again estimated that the average wage with benefits and overhead costs for a mid-level human resource worker is $54.82 per hour (as explained above).

The Department estimated that it will take establishments an average of 75 minutes per affected worker to make the necessary adjustments. This is the same time estimate as used in the 2016 and 2019 rulemakings, as well as in the NPRM. Little applicable data were identified from which to estimate the amount of time required to make these adjustments. The estimated number of affected EAP workers in Year 1 due to the change in the standard salary level to $1,128 per week and the HCE level to $151,164 per year is 4.3 million (as discussed in section VII.B.7). However, because the compensation thresholds will undergo an initial update on July 1, 2024 and then an increase using the new methodologies 6 months later, employers may have additional adjustment costs when the standard salary level is initially updated to $844 per week and the HCE level is initially updated to $132,964.

Some employers may make two adjustments for affected workers – one at the initial update to the standard salary level and then again with the salary level adjustment 6 months later. To estimate the costs associated with multiple adjustments, the Department assumed that at the initial update, some employers could experience additional adjustment costs for the affected workers who will have their weekly earnings increased to $844 per week. In order to estimate the number of affected workers who would have their weekly earnings increased to $844 per week, the Department looked at EAP exempt workers earning at least $684 per week but less than $844 per week. Using the methodology laid out in the transfer analysis in section VII.C.4.iii, the Department then estimated the share of these workers who regularly work overtime and would remain exempt, because it is less expensive for the employer to pay the updated salary level than to pay overtime (described in that section as Type 4 workers). The Department estimated that there would be 27,692 workers who earn between $684 and $844 and would have their earnings increased at the initial update. The Department does not have data to determine how many employers would increase earnings twice for workers earnings between $684 and $844. For these workers, unless they are working large numbers of overtime hours, it is likely to be more economically beneficial for employers to make other changes in response to the rule instead of increasing their salary to $1,128 a week, such as limiting overtime hours worked. Despite this, in case there are limited cases in which workers do have their earnings increased twice, the Department has included these additional adjustment costs in the total adjustment cost estimate.

Therefore, total estimated Year 1 adjustment costs would be $299.1 million ($54.82 × 1.25 hours × (4,337,469 + 27,692 workers)).

The Department used a time estimate per affected worker, rather than per establishment, because the distribution of affected workers across establishments is unknown. However, it may be helpful to present the total time estimate per establishment based on a range of affected workers. If an establishment has five affected workers, the time estimate for adjustment costs is 6.25 hours. If an establishment has 25 affected workers, the time estimate for adjustment costs is 31.25 hours. And if an establishment has 50 affected workers, the time estimate for adjustment costs is 62.5 hours.

A reduction in the cost to employers of determining employees' exemption status may partially offset adjustment costs. Currently, to determine whether an employee is exempt, employers must apply the duties test to salaried workers who earn $684 or more per week. However, under the final rule, firms will no longer be required to apply the duties test to the 8.7 million employees earning above the current standard salary level of $684 and less than the new standard salary level of $1,128. While this will be a clear cost savings to employers for these employees, the Department did not estimate the potential size of this cost savings.

Some commenters representing employer interests stated that the Department underestimated adjustment costs. *See, e.g.*, NAHB; NSBA; PPWO. NAHB, for instance, stated that "the Department's economic analysis," including its estimate of "75 minutes per affected worker for adjustment," "dramatically understate[d] the . . . cost burden on employers," and PPWO stated that adjustment costs (and regulatory familiarization and managerial costs) were "all dramatically understated." SBA Advocacy and Seyfarth Shaw asserted that the Department underestimated adjustment costs for small businesses, with both commenters stating that smaller employers would be more likely than larger ones to hire outside assistance to make needed adjustments. *See also* NFIB ("The NPRM underestimates compliance costs for small businesses[.]"). Some commenters asserted that the Department failed to account for adjustment costs that employers would need to incur beyond the first year the rule is in effect, such as costs associated with determining whether an employee remains exempt, reclassifying newly-exempt employees as hourly, and making other adjustments to time and attendance systems, given that the earnings thresholds for exemption will be updated on a triennial basis. *See* PPWO; The 4As. Additionally, some commenters expressed particular concern with adjustment costs stemming from the proposed increase in the HCE compensation level, noting that for workers who were previously exempt under the HCE test but earn below the proposed HCE compensation level, employers would need to evaluate the worker's duties to determine whether they remain exempt under the standard test. *See, e.g.,* HR Policy Association; NAM; PPWO. NAM stated that "[a]cross the manufacturing sector, the change in the HCE threshold may be as difficult and consequential as the proposed increases to the standard salary threshold."

The Department is retaining its estimate of adjustment costs as 75 minutes per affected worker in the final rule. This estimate is consistent with the Department's estimate in the 2016 and 2019 rules.[355] The Department notes that the 75-minute-per-worker average time estimate is an assumption about the average across all workers, and it believes this estimate takes into account adjustment time for workers affected by the new standard salary level and the smaller portion of workers affected by the new HCE total compensation threshold. This estimate

[355] *See* 84 FR 51267; 81 FR 32475.

assumes that the time is focused on analyzing more complicated situations. For example, employers are likely to incur relatively low adjustment costs for some workers, such as the 69 percent of affected workers who work no overtime (described below as Type 1 workers). This leaves more time for employers to spend on adjustment costs for the 31 percent of affected workers who work overtime either occasionally or regularly. To demonstrate, if the aggregate time spent on adjustments (75 min × 4.37 million workers) was spread out over only workers who work overtime, then the time estimate is 4.0 hours per worker. Lastly, the Department did not receive any comments with data providing a different estimate for the Department to rely on.

Contrary to commenters that stated that the Department failed to take into account adjustment costs beyond the first year the rule is in effect, the Department's estimated adjustment costs include costs in all years for newly affected workers. The Department limits adjustment costs in projected years to newly affected workers because there is no need to "adjust" for workers who are already overtime eligible (due to a prior adjustment of the salary level) when the salary level is updated again. Table 26 provides adjustment (and other) cost projections in future years due to the updating mechanism.

iv. Managerial Costs

If an employee becomes nonexempt due to the changes in the salary levels, then firms may incur ongoing managerial costs because the employer may spend more time developing work schedules and closely monitoring an employee's hours to minimize or avoid paying that employee overtime. For example, the manager of a newly nonexempt worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium. Additionally, the manager may have to spend more time monitoring the employee's work and productivity since the marginal cost of employing the worker per hour has increased. Unlike regulatory familiarization and adjustment costs, which occur primarily in Year 1, managerial costs are incurred more uniformly every year.

The Department applied managerial costs to workers who (1) become nonexempt, overtime-protected and (2) either regularly work overtime or occasionally work overtime, but on a predictable basis—an estimated 911,000 workers (*see* Table 13 and accompanying explanation). Consistent with its approach in its 2019 rule and the NPRM, the Department assumed that management would spend an additional ten minutes per week scheduling and monitoring each affected worker expected to become nonexempt, overtime-eligible as a result of this rule, and whose hours would be adjusted.

As discussed in detail below, most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt. For that group of workers, management will have little or no need to increase their monitoring of hours worked; therefore, these workers are not included in the managerial cost calculation. Under these assumptions, the additional managerial hours worked per week will be 151,800 hours ((10 minutes ÷ 60 minutes) × 911,000 workers).

The median hourly wage in 2022 for a manager was $51.62.[356] Together with a 45 percent benefits rate and a 17 percent overhead cost, this totals $86.82 per hour in 2023

[356] OEWS 2022. Available at: https://www.bls.gov/oes/current/oes110000.htm. This may be an overestimate of the wage rate for managers who monitor workers' hours because (1) it includes very highly paid employees such as CEOs, and (2) some lower-level supervisors are not counted as managers in the data.

dollars.[357] Thus, the estimated Year 1 managerial costs total $685.5 million (151,835 hours per week × 52 weeks[358] × $86.82/hour). Although the exact magnitude will vary each year with the number of affected EAP workers, the Department anticipates that employers would incur managerial costs annually.

Some commenters expressed concerns that the regulation will increase managerial costs, with some specifically asserting that the Department's estimate was too low, *see, e.g.*, PPWO, SBA Advocacy, NCFC, IEC. Commenter concerns with managerial costs were often tied to the additional costs they asserted would result from tracking the work hours of newly nonexempt employees. *See, e.g.*, 16 Republication Representatives; APLU. Commenters specifically asserted tracking hours of currently exempt employees would increase human resources paperwork and technology costs for their companies. *See, e.g.*, The Chamber of Commerce for Greater Philadelphia; John C. Campbell Folk School.

The Department continues to believe that 10 minutes per worker per week is an appropriate managerial cost estimate. Currently, EAP exempt employees account for about 24 percent of total employment; as such, the Department expects that many employers of EAP exempt workers also employ nonexempt workers. Those employers already have in place recordkeeping systems and standard operating procedures for ensuring employees only work

[357] The benefits ratio is derived from BLS' 2022 Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. The fully-loaded hourly wage rate was inflated to 2023 dollars using the BLS CPI-U.

[358] Fifty-two weeks may be an overestimate of the amount of time that an employer would incur management costs in Year 1. For affected workers who earn below $1,128, but at least $844, their employers may not incur additional managerial costs until January 1, 2025 if they decide to wait to make changes in response to the rule. Therefore, these managerial costs would not occur for the full 52 weeks of the year. Because the Department does not know when employers would make changes in response to the rule, this estimate of 52 weeks is used for the entire population.

overtime under employer-prescribed circumstances. Thus, such systems generally do not need to be created or acquired for managing formerly exempt EAP employees. The Department also notes that under the FLSA recordkeeping regulations in part 516, employers determine how to make and keep an accurate record of hours worked by employees. For example, employers may tell their workers to write their own time records and any timekeeping plan is acceptable if it is complete and accurate. Additionally, if the nonexempt employee works a fixed schedule, *e.g.*, 9:00 a.m. – 5:30 p.m. Monday – Friday, the employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate exceptions to that schedule.[359] The Department believes its estimate, which tracks the approach taken in its 2019 rule, accurately predicts management costs, including costs firms may incur for monitoring and managing the hours of formerly exempt employees.

v. Other Potential Costs

In addition to the costs discussed above, commenters raised other potential costs that could not be quantified. These potential costs are discussed qualitatively below.

(a) Reduced Scheduling Flexibility

Several commenters claim that this rule would restrict employee workplace flexibility, such as remote work and flexible scheduling. *See, e.g.*, HR Policy Association; NAM; NRF; SBA; Chamber. For example, the Chamber stated, "workers will lose their ability to work from home and the flexibility that they have enjoyed in salaried positions, particularly since the COVID-19 pandemic changed the face of the American workplace in 2020." However,

[359] *See* Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act, available at: https://www.dol.gov/agencies/whd/fact-sheets/21-flsa-recordkeeping.

commenters did not provide any specific evidence to support this claim. The Department notes that even those workers that are paid on an hourly basis can still take advantage of workplace flexibilities such as remote work. According to the CPS data, of all workers who reported working at home any time in the past week, 74.2 percent of them were categorized as hourly workers.

To the extent that some employers spend more time monitoring nonexempt workers' hours than exempt workers' hours, some employers could respond to this rule by limiting the ability of newly nonexempt workers to adjust their schedules. However, employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes and so monitoring their hours as newly nonexempt workers should not be unduly burdensome. A study by Lonnie Golden found, using data from the General Social Survey (GSS), that "[i]n general, salaried workers at the lower (less than $50,000) income levels don't have noticeably greater levels of work flexibility that they would 'lose' if they become more like their hourly counterparts."[360] Because there is little data or literature on these potential costs, the Department did not quantify potential costs regarding scheduling flexibility.

Organizations such as the American Beverage Licensees and educational institutions in CUPA-HR and APLU, also asserted that the rule would reduce employer flexibility to allocate work hours based on schedules that include non-traditional work hours. The Hinton Rural Life Center said that the rule would make it financially unfeasible for nonexempt employees to attend

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[360] Golden, L. (2014). Flexibility and Overtime Among Hourly and Salaried Workers. Economic Policy Institute. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597174.

specific activities such as "overnight training sessions or marketing events." NCFC stated that because of the increased attention that must be paid to the hours worked by nonexempt employees, they are likely to be at a competitive disadvantage with exempt employees in the same role. Under this assumption, they asserted that "many training opportunities" would now require additional compensation if "those opportunities would put the nonexempt employee into an overtime situation," and therefore "access to those opportunities may be limited" for nonexempt employees. The Department notes that if an employer believes that training opportunities are sufficiently important, it can ensure employees attend the trainings during their 40-hour workweek or pay the overtime premium where training attendance causes the employee to work over 40 hours in a workweek. Given this, and because there is no data and literature to quantify any potential costs to workers, the Department did not quantify these costs.

(b) Preference for Salaried Status

Many commenters contended that the employers of some of the workers who will become nonexempt as a result of the rule could change their pay basis to hourly status despite the employee preferring to remain salaried. *See, e.g.*, AHLA; NSBA; SIGMA. Some commenters, such as SIGMA, stated that conversion of employees to hourly status that will negatively affect morale, as employees may perceive the change as a demotion or a loss of status because of, among other reasons, the lost flexibility associated with salaried status. Conversely, commenters such as the Coalition of State AGs and the Family Caregiving Coalition asserted that the proposed rule would increase employee satisfaction and retention, improve work-life balance, reduce stress and health problems, and make jobs more attractive to qualified applicants primarily because employees will now be compensated for hours worked beyond a standard workweek. Notably, a strong majority of the individual commenters who said they would be personally affected by the proposed rule expressed support for the rule.

If a worker does prefer to be salaried rather than hourly, then the employer changing them from salaried to hourly may impact the worker. However, the Department believes that for most employees their feelings of importance and worth come not from their FLSA exemption status, but from the increased pay, flexibility, fringe benefits, and job responsibilities that traditionally have accompanied exempt status, and that these factors are not incompatible with overtime eligibility. And while research has shown that salaried workers (who are not synonymous with exempt workers, but whose status is correlated with exempt status) are more likely than hourly workers to receive certain benefits, as discussed below, such research generally does not control for differences between salaried and hourly workers such as education, job title, or earnings.

(c) Reduction in Employer-Provided Benefits

Several commenters stated that in response to the proposed salary level employers would likely decrease employee benefits. *See, e.g.*, PPWO; Rachel Greszler. These and similar comments were mostly general statements, often listing types of benefits employees may lose. Others stated that employees would lose benefits due to being reclassified as hourly workers. *See, e.g.*, Independent Women's Forum (IWF); NRF. Some commenters stated that these employees would have reductions in their ability to earn bonuses or other types of incentive payments, but these commenters generally did not discuss the net impact on these employees' earnings. *See, e.g.*, NRF. These comments did not provide information that would allow the Department to estimate the purported impact of the final rule on employee benefits.

Research has shown that salaried workers are more likely than hourly workers to receive benefits such as paid vacation time and health insurance[361] and are more satisfied with their benefits.[362] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

If workers become nonexempt and the employer chooses to pay them on an hourly rather than salary basis, this may result in the employer reducing the workers' benefits. These newly nonexempt workers may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent premium on that employee's regular rate for any overtime hours each week.[363] Similarly, employers may continue to provide these workers with the same level of benefits as before, whether paid on an hourly or salary basis. Lastly, the nature of the market mechanism may be such that employers cannot reduce benefits without risking workers leaving, resulting in turnover costs to employers. The Department did not quantify potential costs regarding reduction in workers' benefits.

(d) Increased Prices

Several commenters such as AAHOA, the Chamber, CUPA-HR, Indiana Chamber of Commerce, NAHB, and the National Association of Wholesaler-Distributors stated that the

[361] Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities. Washington, D.C.: Urban Institute Press.
[362] Balkin, D. B., & Griffeth, R. W. (1993). The Determinants of Employee Benefits Satisfaction. Journal of Business and Psychology, 7(3), 323-339.
[363] 29 CFR 778.113–114.

regulation will result in increased prices due to increased employee salaries and other costs to employers. Some of these commenters assert that employers increasing their workers' salaries to maintain their exempt status would induce a general price increase if anticipated wage increases do not result in productivity increases. *See, e.g.*, Chamber; NAW. NAHB conducted a survey among its members about the proposal, and 50 percent of survey respondents stated that finalizing the salary level as proposed would lead them to raise home prices, while 25 percent of respondents stated that the change would make some projects unprofitable.

The Department acknowledges that, as discussed in the transfers section below, businesses may be able to help mitigate increased labor costs following this rulemaking by rebalancing the hours that employees are working. Businesses that are unable to rebalance these hours and do incur increased labor costs might pass along these increased labor costs to consumers through higher prices for goods and services. However, because costs and transfers will be, on average, small relative to payroll and revenues, the Department does not expect the rule to have a significant effect on prices. The Department estimated that, on average, costs and transfers make up less than 0.04 percent of payroll and 0.006 percent of revenues, although for specific industries and firms this percentage may be larger (*see* Table 24). Therefore, any potential change in prices related to costs and transfers from this rulemaking would be modest, and the Department notes that commenter predictions (such as those in the NAHB survey described above) reflect speculation about what will occur in the future and thus may not reflect actual economic responses by employers. Further, any significant price increases would not represent a separate category of effects from those estimated in this economic analysis. Rather, such price increases (where they occur) would be the channel through which consumers, rather than employers or employees, bear rule-induced costs (including transfers).

While economic theory suggests that an increase in labor costs in excess of productivity gains would lead to increases in prices, much of the empirical literature has found that wage inflation does not predict price inflation.[364] For example, Peneva et al. (2015) explore the relationship between labor costs and price inflation between 1965 and 2012, finding that the influence of labor costs on prices has decreased over the past several decades and have made a relatively small contribution to price inflation in recent years.[365]

(e) Reduced Services

Some commenters expressed concern that, by reducing the number of exempt employees, this rulemaking will negatively impact the amount or quality of services that employers can provide. *See, e.g.*, ANCOR; Boy Scouts of America; Catholic Charities USA; YMCA. The National Association of Counties raised similar concerns with respect to county governments. A number of colleges, universities, and other higher-education stakeholders, such as APLU and CUPA-HR, similarly asserted that the proposed rule would negatively affect support services for students. The Department appreciates that employers in some industries have less flexibility than

[364] Church, J.D. and Akin, B. (2017). "Examining price transmission across labor compensation costs, consumer prices, and finished-goods prices," *Monthly Labor Review*, U.S. Bureau of Labor Statistics; Emery, K. & Chang, C. (1996). Do Wages Help Predict Inflation?, Federal Reserve Bank of Dallas, Economic Review First Quarter 1996. https://www.dallasfed.org/~/media/documents/research/er/1996/er9601a.pdf; Jonsson, M. & Palmqvist, S. (2004). Do Higher Wages Cause Inflation? Sveriges Riksbank Working Paper Series 159. http://archive.riksbank.se/Upload/WorkingPapers/WP_159.pdf.

[365] Pevena, E. V. and Rudd, J. B. (2015). "The Passthrough of Labor Costs to Price Inflation," Finance and Economics Discussion Series 2015-042. Washington: Board of Governors of the Federal Reserve System. https://dx.doi.org/10.17016/FEDS.2015.042.

others to account for new labor costs and that the services provided by such employers could be negatively affected. However, the Department believes the effect of the rule on public services will be small. The Department acknowledges that some newly nonexempt employees who currently work overtime providing public services may see a reduction in hours as an effect of the rulemaking. But if the services are in demand, the Department believes additional workers may be hired, as funding availability allows, to make up some of these hours, and productivity increases may offset some reduction in services. In addition, the Department expects some employers will adjust base wages downward to some degree so that even after paying the overtime premium, overall pay and hours of work for many employees will be relatively minimally impacted. Additionally, many nonprofits are noncovered enterprises because when determining enterprise coverage only revenue derived from business operations, not charitable activities, is included.

(f) Reduced Profits

Some commenters asserted that the rule would lead to decreased profits. *See e.g.,* Quad Cities Chamber of Commerce, ESEI, DT-Trak Consulting. The Department acknowledges that the increased employer costs and transfer payments as a result of this rule may reduce the profits of business firms, although (1) some firms may offset some of these costs and transfers by making payroll adjustments, and (2) some firms may mitigate their reduced profits due to these costs and transfers through increased prices. Because costs and transfers are, on average, small relative to payroll revenues, the Department does not expect this rulemaking to have a significant effect on profits.

(g) Hiring Costs

To the extent that firms respond to this rule by reducing overtime hours, they may do so by spreading hours to other workers, including current workers employed for fewer than 40 hours per week by that employer, current workers who remain exempt, and newly hired workers. If new workers are hired to absorb these transferred hours, then the associated hiring costs would be a cost of this rule. (However, new employees would likely only be hired if their wages, onboarding costs, and training costs are less than the cost of overtime pay for the newly nonexempt workers.) The Department does not know how many new employees would be hired and thus did not estimate this cost.

(h) Hours-Related Worker Effects

Some employer representatives highlighted the possibility that some workers might work more hours as a consequence of this rulemaking. For example, Construction Industry Roundtable commented that employers responding to the increased salary level might "require the remaining exempt employees to absorb some of the duties of the newly non-exempt employees—which would be viewed as an unfair burden by the remaining exempt employees who are at or near capacity already." *See also* SIGMA (providing similar statements).

The Department acknowledges that for some affected workers, if their employers respond to the rule by increasing their salary to keep their exemption status, the change may also be accompanied by an increase in assigned hours. Additionally, some employers might respond to this regulation by reducing the overtime hours of affected workers and transferring those hours to other workers who remain exempt. The Department believes that while some workers may see an increase in hours, others may see their hours decline (discussed further in the Benefits section below).

(i) Wage Compression

Some commenters contended that the update to the salary threshold in this rule would lead to wage compression. For example, PPWO stated that the Department did not account for this potential cost, stating, "Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed." *See also, e.g.,* Seyfarth Shaw.

However, as discussed in section VII.C.4.iii.f., the Department estimates that only 2.2 percent of affected workers will have their earnings increased to the updated salary level. Thus, in the overwhelming majority of cases wage compression concerns should not arise. The Department recognizes that there may be some cases in which employers that raise the pay of affected employees to the new salary level will also choose to increase the earnings of more highly paid employees to avoid wage compression, but the Department does not have data to estimate this impact.

4. Transfers

i. Overview

Transfer payments occur when income is redistributed from one party to another. The Department has quantified two transfers from employers to employees that will result from the rule: (1) transfers to ensure compliance with the FLSA minimum wage provision; and (2) transfers to ensure compliance with the FLSA overtime pay provision. Transfers in Year 1 due to the minimum wage provision were estimated to be $87.5 million. The increase in the HCE compensation level does not affect minimum wage transfers because workers eligible for the HCE exemption earn well above the minimum wage. The Department estimates that transfers due to the applicability of the FLSA's overtime pay provision will be $1.4 billion: $1.2 billion from the increased standard salary level and $255.6 million from the increased HCE compensation level. Total Year 1 transfers are estimated at $1.5 billion (Table 10).

Table 10: Total Annual Change in Earnings for Affected EAP Workers by Provision, Year 1 (Millions)

Provision	Total	Standard Salary Level	HCE Compensation Level
Total	$1,509.2	$1,253.6	$255.6
Minimum wage only	$87.5	$87.5	--
Overtime pay only [a]	$1,421.7	$1,166.1	$255.6

Because the overtime premium depends on the employee's regular rate of pay, the estimates of minimum wage transfers and overtime transfers are linked. This can be considered a two-step approach. The Department first identified affected EAP workers with an implicit regular hourly wage lower than the minimum wage, and then calculated the wage increase necessary to reach the minimum wage. Then, the Department estimated overtime payments.

ii. Transfers Due to the Minimum Wage Provision

For this analysis, the hourly rate of pay was calculated as usual weekly earnings divided by usual weekly hours worked. To earn less than the Federal or most state minimum wages, this set of workers must work many hours per week. For example, a worker paid $684 per week must work 94.3 hours per week to earn less than the Federal minimum wage of $7.25 per hour ($684 ÷

$7.25 = 94.3).[366] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage as of January 1, 2023. Most affected EAP workers already receive at least the minimum wage; only an estimated 0.5 percent (19,900 in total) earn an implicit hourly rate of pay less than the Federal minimum wage. The Department estimated transfers due to payment of the minimum wage by calculating the change in earnings if wages rose to the minimum wage for workers who become nonexempt.[367]

In response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers' hours. In theory, since the quantity of labor hours demanded is inversely related to wages, a higher mandated wage would, all things being equal, result in fewer hours of labor demanded. However, the weight of the empirical evidence finds that increases in the minimum wage that are similar in magnitude to what would be caused by this regulatory provision have caused little or no significant job loss.[368] Thus, in the case of this regulation, the Department believes that any disemployment effect due to the minimum wage provision will be negligible. This is partially due to the small number of workers affected by this provision.

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[366] The Federal minimum wage has not increased since 2009. Workers in states with minimum wages higher than the Federal minimum wage could earn less than the state minimum wage working fewer hours.

[367] Because these workers' hourly wages will be set at the minimum wage after this rule, their employers will not be able to adjust their wages downward to offset part of the cost of paying the overtime pay premium (which will be discussed in the following section). Therefore, these workers will generally receive larger transfers attributed to the overtime pay provision than other workers.

[368] Wolfson, Paul J. and Belman, Dale, 15 Years of Research on U.S. Employment and the Minimum Wage (December 10, 2016). Tuck School of Business Working Paper No. 2705499. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705499. Dube, Arindrajit, Impacts of Minimum Wages: Review of the International Evidence (November 2019). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844350/impacts_of_minimum_wages_review_of_the_international_evidence_Arindrajit_Dube_web.pdf.

According to the Wolfson and Belman (2016) meta-analysis cited above, the consensus range for labor demand elasticity was -0.05 to -0.12. However for Year 1 of this analysis, the Department estimated the potential disemployment effects (*i.e.*, the estimated reduction in hours) of the transfer attributed to the minimum wage by multiplying the percent change in the regular rate of pay by a labor demand elasticity of −0.2 (years 2 – 10 use a long run elasticity of −0.4).[369, 370] The Department chose this labor demand elasticity because it was used in the 2019 final rule and is consistent with the labor demand elasticity estimates used when estimating other transfers further below.

At the new standard salary level, the Department estimated that 19,900 affected EAP workers will, on average, see an hourly wage increase of $1.57, work 2.1 fewer hours per week and receive an increase in weekly earnings of $84.73 as a result of coverage by the minimum wage provisions (Table 11). The total change in weekly earnings due to the payment of the minimum wage was estimated to be $1.7 million per week ($84.73 × 19,900) or $87.5 million in Year 1.

Table 11: Minimum Wage Only: Mean Hourly Wages, Usual Weekly Hours and Weekly Earnings for Affected EAP Workers, Year 1

Time Period	Hourly Wage [a]	Usual Weekly Hours	Usual Weekly Earnings	Total Weekly Transfer (1,000s)
Before rule	$12.85	65.8	$827.66	--
After rule	$14.42	63.6	$912.39	--
Change	$1.57	-2.1	$84.73	$1,683

Note: Pooled data for 2021 – 2023 adjusted to reflect 2023.

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369 Labor demand elasticity is the percentage change in labor hours demanded in response to a one percent change in wages.

370 This elasticity estimate represents a short run demand elasticity for general labor, and is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[a] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage.

iii. Transfers Due to the Overtime Pay Provision

(a) Introduction

The FLSA requires covered employers to pay an overtime premium to nonexempt covered workers who work in excess of 40 hours per week. For workers who become nonexempt, the rulemaking will result in a transfer of income to the affected workers, increasing the marginal cost of labor, which employers may try to offset by adjusting the wages and/or hours of affected workers. The size of the transfer will depend largely on how employers choose to respond to the updated salary levels. Employers may respond by: (1) paying overtime premiums to affected workers; (2) reducing overtime hours of affected workers and potentially transferring some of these hours to other workers; (3) reducing the regular rate of pay for affected workers working overtime (provided that the reduced rates still exceed the minimum wage); (4) increasing affected workers' salaries to the updated salary or compensation level to preserve their exempt status; or (5) using some combination of these responses. How employers will respond depends on many factors, including the relative costs of each of these alternatives. In turn, the relative costs of each of these alternatives are a function of workers' earnings and hours worked.

(b) Literature on Employer Adjustments

Two conceptual models are useful for thinking about how employers may respond to when certain employees become eligible for overtime: (1) the "fixed-wage" or "labor demand" model, and (2) the "fixed-job" or "employment contract" model.[371] These models make different assumptions about the demand for overtime hours and the structure of the employment agreement, which result in different implications for predicting employer responses.

The fixed-wage model assumes that the standard hourly wage is independent of the statutory overtime premium. Under the fixed-wage model, a transition of workers from overtime exempt to overtime nonexempt would cause a reduction in overtime hours for affected workers, an increase in the prevalence of a 40-hour workweek among affected workers, and an increase in the earnings of affected workers who continue to work overtime.

In contrast, the fixed-job model assumes that the standard hourly wage is affected by the statutory overtime premium. Thus, employers can neutralize any transition of workers from overtime exempt to overtime nonexempt by reducing the standard hourly wage of affected workers so that their weekly earnings and hours worked are unchanged, except when minimum wage laws prevent employers from lowering the standard hourly wage below the minimum wage. Under the fixed-job model, a transition of workers from overtime exempt to overtime nonexempt would have different effects on minimum-wage workers and above-minimum-wage workers. Similar to the fixed-wage model, minimum-wage workers would experience a reduction in overtime hours, an increase in the prevalence of a 40-hour workweek at a given employer (though not necessarily overall), and an increase in earnings for the portion of minimum-wage workers who continue to work overtime for a given employer. Unlike the fixed-wage model, however, above-minimum-wage workers would experience no change.

[371] *See* Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. American Economic Review, 81(4), 719–740, and Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. Industrial and Labor Relations Review, 64(1), 128-142.

The Department conducted a literature review to evaluate studies of how labor markets adjust to a change in the requirement to pay overtime. These studies are generally supportive of the fixed-job model of labor market adjustment, in that wages adjust to offset the requirement to pay an overtime premium as predicted by the fixed-job model, but do not adjust enough to completely offset the overtime premium as predicted by the model.

As in the 2016 and 2019 rules, the Department believes the two most important papers in this literature are the studies by Trejo (1991) and Barkume (2010). Analyzing the economic effects of the overtime pay provisions of the FLSA, Trejo (1991) found "the data analyzed here suggest the wage adjustments occur to mitigate the purely demand-driven effects predicted by the fixed-wage model, but these adjustments are not large enough to neutralize the overtime pay regulations completely." Trejo noted, "In accordance with the fixed job model, the overtime law appears to have a greater impact on minimum-wage workers." He also stated, "[T]he finding that overtime-pay coverage status systematically influences the hours-of-work distribution for nonminimum-wage workers is supportive of the fixed-wage model. No significant differences in weekly earnings were discovered between the covered and non-covered sectors, which is consistent with the fixed-job model." However, "overtime pay compliance is higher for union than for nonunion workers, a result that is more easily reconciled with the fixed wage model." Trejo's findings are supportive of the fixed-wage model whose adjustment is incomplete largely due to the minimum-wage requirement.[372]

[372] Trejo, S. J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. American Economic Review, 81(4), 719-740.

A second paper by Trejo (2003) took a different approach to testing the consistency of the fixed-wage adjustment models with overtime coverage and data on hours worked.[373] In this paper, he examined time-series data on employee hours by industry. After controlling for underlying trends in hours worked over 20 years, he found changes in overtime coverage had no impact on the prevalence of overtime hours worked. This result supports the fixed-job model. Unlike the 1991 paper, however, he did not examine impacts of overtime coverage on employees' weekly or hourly earnings, so this finding in support of the fixed-job model only analyzes one implication of the model.

Barkume (2010) built on the analytic method used in Trejo (1991).[374] However, Barkume observed that Trejo did not account for "quasi-fixed" employment costs (*e.g.*, benefits) that do not vary with hours worked, and therefore affect employers' decisions on overtime hours worked. After incorporating these quasi-fixed costs in the model, Barkume found results consistent with those of Trejo (1991): "though wage rates in otherwise similar jobs declined with greater overtime hours, they were not enough to prevent the FLSA overtime provisions from increasing labor costs." Barkume also determined that the 1991 model did not account for evidence that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining. Barkume found that how much

[373] Trejo, S. J. (2003). Does the Statutory Overtime Premium Discourage Long Workweeks? Industrial and Labor Relations Review, 56(3), 375-392.
[374] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. Industrial and Labor Relations Review, 64(1), 128-142.

wages and hours worked adjusted in response to the overtime pay requirement depended on what overtime pay would be in absence of regulation.

In addition, Bell and Hart (2003) examined the standard hourly wage, average hourly earnings (including overtime), the overtime premium, and overtime hours worked in Britain.[375] Unlike the United States, Britain does not have national labor laws regulating overtime compensation. Bell and Hart found that after accounting for overtime, average hourly earnings are generally uniform in an industry because firms paying below-market level straight-time wages tend to pay above-market overtime premiums and firms paying above-market level straight-time wages tend to pay below-market overtime premiums. Bell and Hart concluded "this is consistent with a model in which workers and firms enter into an implicit contract that specifies total hours at a constant, market-determined, hourly wage rate. Their research is also consistent with studies showing that employers may pay overtime premiums either in the absence of a regulatory mandate (*e.g.*, Britain), or when the mandate exists but the requirements are not met (*e.g.*, United States).[376]

On balance, consistent with its 2016 and 2019 rulemakings, the Department finds strong support for the fixed-job model as the best approximation for the likely effects of a transition of above-minimum-wage workers from overtime exempt to overtime nonexempt and the fixed-wage model as the best approximation of the likely effects of a transition of minimum-wage workers from overtime exempt to overtime nonexempt. In addition, the studies suggest that

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[375] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, Industrial and Labor Relations Review, 56(3), 470-480.
[376] Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163.

although observed wage adjustment patterns are consistent with the fixed-job model, this evidence also suggests that the actual wage adjustment might, especially in the short run, be less than 100 percent as predicted by the fixed-job model. Thus, the hybrid model used in this analysis may be described as an incomplete fixed-job adjustment model.

To determine the magnitude of the adjustment, the Department accounted for the following findings. Earlier research had demonstrated that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[377] Barkume (2010) found that the measured adjustment of wages and hours to overtime premium requirements depended on what overtime premium might be paid in absence of any requirement to do so. Thus, when Barkume assumed that workers would receive an average voluntary overtime pay premium of 28 percent in the absence of an overtime pay regulation, which is the average overtime premium that Bell and Hart (2003) found British employers paid in the absence of any overtime regulations, the straight-time hourly wage adjusted downward by 80 percent of the amount that would occur with the fixed-job model.[378] When Barkume assumed workers would receive no voluntary overtime pay premium in the absence of an overtime pay regulation, the results were more consistent with Trejo's (1991) findings that the adjustment was a smaller percentage. The Department modeled an adjustment

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[377] Barzel, Y. (1973). The Determination of Daily Hours and Wages. The Quarterly Journal of Economics, 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R. A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.
[378] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. Industrial and Labor Relations Review, 64(1), 128-142.

process between these two findings. Although it seemed reasonable that some premium was paid for overtime in the absence of regulation, Barkume's assumption of a 28 percent initial overtime premium is likely too high for the salaried workers potentially affected by a change in the salary and compensation level requirements for the EAP exemptions because this assumption is based on a study of workers in Britain. British workers were likely paid a larger voluntary overtime premium than American workers because Britain did not have a required overtime pay regulation and so collective bargaining played a larger role in implementing overtime pay.[379] In the sections that follow, the Department uses a method between these two papers to model transfers.

(c) Comments Regarding Transfers

Many commenters representing employer interests indicated that employers would respond to the changes proposed in the NPRM by making a variety of adjustments to wages, hours worked, or both. Some commenters responded with results from surveys of their constituents. Although these surveys may be helpful as background information, they generally cannot be used in a quantitative analysis due to issues such as insufficient or uncertain sample sizes, missing sampling methodology, and missing magnitudes. For example, NAHB referenced results from a survey of an unknown number of its members, asserting that 38 percent of respondents indicated they would respond to the proposed increase in the salary level by "[m]inimiz[ing] overtime hours." The Department agrees that firms may reduce the hours of some workers and has included this in the quantitative analysis below; however, the modeling

[379] Bell, D. N. F. and Hart, R. A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, Industrial and Labor Relations Review, 56(3), 470-480.

question is to what degree employers will adjust hours.[380] As discussed below, the Department estimates that employers will reduce hours for Type 2B and Type 3 workers, which together make up 21% of all affected workers. The Department's model is based on worker-specific adjustments and does not assume that a firm would respond the same way for all affected workers that they employ. Moreover, such surveys were often sector-specific, making it difficult to extrapolate economy-wide trends, because the distribution of affected workers varies across sectors. Also, these surveys were often based not on actual economic responses, but rather on expressions of intentions. *See, e.g.*, AHLA; ANCOR; NAIS and NBOA; NDA.

Despite the inability to incorporate these survey results into the analysis, select results are presented here. For instance, according to AHLA, of the members it surveyed, "70% anticipat[ed] reclassifying workers, 60% anticipat[ed] reducing hours and career development opportunities to reduce potential overtime costs, and 51% anticipat[ed] position consolidation." ANCOR found that "approximately 61 percent of [its constituents] would employ a mitigation strategy of converting currently exempt salaried workers to hourly workers," "[f]ifty-six percent . . . would increase the salary of full-time exempt workers to meet the projected threshold," "49 percent . . . would prohibit or significantly restrict" permitted overtime, and "33 percent indicated the necessity of reducing salaried full-time employees." NAIS and NBOA stated that 13 percent of schools that responded to its survey said they would "raise salaries of those exempt

[380] Illustrating the limitations of commenter-provided surveys for this quantitative analysis, the responses to NAHB's survey have inconsistencies that make them hard to interpret. For example, concerning the 2019 rule, NAHB reported that 94 percent of respondents stated that the rule's increase in the salary level to $35,568 did not affect anyone on their payroll. Nevertheless, of the same respondents, 20% stated that they responded to the 2019 rule by minimizing overtime hours and 18% stated that they raised salaries above the threshold.

employees who do not meet the new threshold," 27 percent said they would "convert employees to non-exempt and limit hours where possible," 11 percent said they would "convert employees to non-exempt and pay overtime if hours worked are over 40 in a week" and "47% of schools said they will enact some combination of the available options." NAHB stated that, if the proposed salary threshold were implemented, 38 percent of respondents reported they would "[m]inimize overtime hours," as noted above; 24 percent would "[r]aise salaries above the threshold"; and 9 percent would "[r]educe salaries to compensate for overtime" (among other changes). And NDA stated that 66 percent of respondents "said they would have to reclassify exempt employees as hourly employees and restructure jobs if DOL raised the minimum salary threshold" as proposed in the NPRM.

Regarding the transfer calculations in the NPRM, SBA Advocacy expressed concern about the Department's estimates that affected small business establishments would have, on average, $360 to $2,683 in additional payroll costs in the first year of the proposed rule. SBA Advocacy stated that "an Arkansas restaurant with four locations stated it would cost almost $200,000 to increase manager salaries to make them compliant," and that "small amusement businesses reported estimated salary increases for their businesses" ranging from $57,000 to $250,000. It also provided hypothetical examples of potential salary increases that restaurants in two states would need to make to comply with the proposed rule based on various assumptions, including different salaries and amounts of overtime performed. These anecdotal reports and hypothetical examples do not have any information on the actual amount of overtime work being performed by newly nonexempt workers at these businesses. The Department expects that businesses that would be faced with large increases in payroll costs if they were to increase salaries to the new threshold would instead find other responses more economically beneficial, such as limiting the number of overtime hours worked by workers who become nonexempt or paying such workers the overtime premium for hours in excess of 40 per week. Furthermore, this comment does not explain what methodological approach the Department should use to estimate transfers; what error(s), if any, the Department made in its transfer estimate in its NPRM; or how much the Department underestimated such transfers.

Some commenters indicated that employers may follow the fixed-job model rather than the incomplete fixed-job model used by the Department in the NPRM. *See, e.g.,* AFPI; Americans for Prosperity. AFPI, for instance, stated that "[r]esearch shows employers primarily respond to expanded overtime eligibility by reducing base earnings to reflect expected overtime—leaving total earnings unchanged." Americans for Prosperity similarly asserted that "[o]ver time, the natural response of business enterprises of all types to the higher wage costs occasioned by the proposed rule will be an adjustment in base pay and fringe benefits lower so that total compensation (base pay, benefits, overtime) does not rise."[381]

The Oxford Economics report included with NRF's comment pointed to a study by Quach (2022),[382] which analyzed the effects of the rescinded 2016 rule and the 2019 rule, along

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[381] In support, AFPI and Americans for Prosperity both cited to reports regarding the NPRM for the 2016 rule. *See* James Sherk, *Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay,* Heritage Foundation Backgrounder No. 3031, July 2, 2015. https://thf_media.s3.amazonaws.com/2015/pdf/BG3031.pdf (cited by AFPI); Donald J. Boudreaux & Liya Palagashvili, *An Economic Analysis of Overtime Pay Regulations 17–21* (Apr. 2016), available at https://www.mercatus.org/hayekprogram/research/working-papers/economic-analysis-overtime-pay-regulations (cited by Americans for Prosperity).

[382] Simon Quach, *The Labor Market Effects of Expanding Overtime Coverage.* This is a working paper that was published in both 2022 and 2024. The 2024 version can be found linked on Simon Quach's website:

with the impact of state-level increases to the overtime exemption threshold. According to Oxford Economics, "Quach finds evidence that overtime coverage decreases employment and increases earnings polarization" and "strong evidence of employee reclassifications from salaried to hourly status[.]" The Department notes that the revised 2024 version of the working paper did not find that increasing overtime exemption thresholds decreases employment. In fact, when summarizing his findings, he says, "I estimate that expansions in overtime coverage actually have little effect on employment." He also notes, "while the DOL accurately predicted that average weekly earnings would rise, they calculated an income effect of only 0.7%, whereas I show that earnings increased by nearly twice that amount for salaried workers." While the Department also reviewed the 2022 study, as discussed further below, it has not incorporated this study into its analysis as it has multiple limitations, including a reliance on a non-representative selection of employers, which makes it inappropriate as a model of aggregate effects across the economy. The Oxford Economics report also claimed that the Department's analysis in the NPRM demonstrated "a tendency to assume that which workers are paid on a salaried basis is determined by an exogenous occupational structure and to ignore the role that the DOL's overtime regulations themselves play in determining this."

The Department's review of the literature cited above supports a result between the fixed-job model and the fixed-wage model and thus the results were modeled accordingly. Specifically, the Department believes the incomplete fixed-job model is most appropriate and consistent with

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https://raw.githubusercontent.com/SimonQuach1/Papers/main/Quach_OT.pdf?token=AH2DVMEDLJGBAWFAVXXUNMDAYGGDQ. The Department believes that Oxford Economics was citing to the 2022 version of the paper, which is Quach, S. (2022). The Labor Market Effects of Expanding Overtime Coverage. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608506.

the literature. Therefore, the analysis has not been changed. The Department further notes that its estimates of transfers are informed by its projection that employers will respond to the final rule in many ways. If, for example, an employer simply pays each affected employee the overtime premium for each hour worked in excess of 40 hours per week, without making any adjustments to wages, hours, or duties, such an approach would maximize transfers from employers to employees. However, as discussed above, the Department believes that employers will respond to the final rule by adjusting wages, hours, and duties to minimize the cost of the rule. Accordingly, the actual amount of transfers will fall well short of the transfers that would result if employers simply paid each affected employee overtime premiums without adjusting wages, hours, or duties.

(d) Identifying Types of Affected Workers

The Department identified four types of workers whose work characteristics affect how it modeled employers' responses to the changes in both the standard salary level and HCE compensation level:

- Type 1: Workers who do not work overtime.
- Type 2: Workers who do not regularly work overtime but occasionally work overtime.
- Type 3: Workers who regularly work overtime and become overtime eligible (nonexempt).
- Type 4: Workers who regularly work overtime and remain exempt, because it is less expensive for the employer to pay the updated salary level than to pay overtime and incur additional managerial costs.

The Department began by identifying the number of workers in each type. After modeling employer adjustments, it estimated transfer payments. Type 3 and Type 4 workers were identified as those who regularly work overtime (CPS variable PEHRUSL1 greater than 40). To distinguish Type 3 workers from Type 4 workers, the Department first estimated each worker's weekly earnings if they became nonexempt, to which it added weekly managerial costs for each affected worker of \$14.47 (\$86.82 per hour × (10 minutes ÷ 60 minutes)).[383] Then, the Department identified as Type 4 those workers whose expected nonexempt earnings plus weekly managerial costs exceeds the updated standard salary level, and, conversely, as Type 3 those whose expected nonexempt earnings plus weekly managerial costs are less than the new standard salary. The Department assumed that firms will include incremental managerial costs in their determination of whether to treat an affected employee as a Type 3 or Type 4 worker because those costs are only incurred if the employee is a Type 3 worker.

Identifying Type 2 workers involved two steps. First, using CPS MORG data, the Department identified those who do not usually work overtime but did work overtime in the survey week (the week referred to in the CPS questionnaire, variable PEHRACT1 greater than 40). Next, the Department supplemented the CPS data with data from the Survey of Income and Program Participation (SIPP) to look at likelihood of working some overtime during the year. Based on 2021 data, the most recent available, the Department found that 31.3 percent of non-hourly workers worked overtime at some point in a year. Therefore, the Department classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week, as Type 2 workers such that a total of approximately 31.3 percent of affected

[383] *See* section VII.C.3.iv (managerial costs).

workers were Type 2, 3, or 4. Type 2 workers are subdivided into Types 2A and 2B later in the analysis (Table 12).

Table 12: Types of Affected Workers

Type of Worker	Percent of Total
Type 1	69%
Type 2A	8%
Type 2B	8%
Type 3	13%
Type 4	2%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

*Type 1: Workers who do not work overtime and gain overtime protection.

*Type 2: Workers who work occasional overtime and gain overtime protection.

- Type 2A: Those who work <u>unexpected</u> overtime hours.
- Type 2B: Those who work <u>expected</u> overtime.

*Type 3: Workers who work regular overtime and gain overtime protection.

*Type 4: Workers who work regular overtime and remain exempt (*i.e.*, earnings increase to the updated salary or compensation level).

(e) Modeling Changes in Wages and Hours

The incomplete fixed-job model predicts that employers will adjust wages of regular overtime workers but not to the full extent indicated by the fixed-job model, and thus some employees will receive a small increase in weekly earnings due to overtime pay coverage. The Department used the average of two estimates of the incomplete fixed-job model adjustments to model impacts of this rule:[384]

[384] Both studies considered a population that included hourly workers. Evidence is not available on how the adjustment towards the fixed-job model differs between salaried and hourly workers. The fixed-job model may be more likely to hold for salaried workers than for hourly workers since salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage. Thus, applying the partial adjustment to the fixed-job model as estimated by these studies may overestimate the transfers from employers to salaried workers.

- Trejo's (1991) estimate that the overtime-induced wage change is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and
- Barkume's (2010) estimate that the wage change is 80 percent of the predicted adjustment assuming an initial 28 percent overtime pay premium.

This is approximately equivalent to assuming that salaried overtime workers implicitly receive the equivalent of a 14 percent overtime premium in the absence of regulation (the midpoint between 0 and 28 percent).

Modeling changes in hourly wages, hours, and earnings for Type 1 and Type 4 workers was relatively straightforward. Type 1 affected EAP workers will become overtime-eligible, but because they do not work overtime, they will see no change in their wages, hours, or weekly earnings. Type 4 workers will remain exempt because their earnings will be raised to at least the updated EAP level (either the standard salary level or HCE compensation level). These workers' earnings will increase by the difference between their current earnings and the amount necessary to satisfy the new salary or compensation level. It is possible employers will increase these workers' hours in response to paying them a higher salary, but the Department did not have enough information to model this potential change.[385]

Modeling changes in wages, hours, and earnings for Type 2 and Type 3 workers was more complex. The Department distinguished those who regularly work overtime (Type 3

[385] Cherry, Monica, "Are Salaried Workers Compensated for Overtime Hours?" Journal of Labor Research 25(3): 485–494, September 2004, found that exempt full-time salaried employees earn more when they work more hours, but her results do not lend themselves to the quantification of the effect on hours of an increase in earnings.

workers) from those who occasionally work overtime (Type 2 workers) because employer adjustment to the rule may differ accordingly. Employers are more likely to adjust hours worked and wages for regular overtime workers because their hours are predictable. Conversely, in response to a transient, perhaps unpredicted, shift in market demand for the good or service such employers provide, employers are more likely to pay for occasional overtime rather than adjust hours worked and pay.

The Department treated Type 2 affected workers in two ways due to the uncertainty of the nature of these occasional overtime hours. The Department assumed that 50 percent of these occasional overtime workers worked unexpected overtime hours (Type 2A) and the other 50 percent worked expected overtime (Type 2B). Workers were randomly assigned to these two groups. Workers with expected occasional overtime hours were treated like Type 3 affected workers (incomplete fixed-job model adjustments). Workers with unexpected occasional overtime hours were assumed to receive a 50 percent pay premium for the overtime hours worked and receive no change in base wage or hours (full overtime premium model).[386] When modeling Type 2 workers' hour and wage adjustments, the Department treated those identified as Type 2 using the CPS data as representative of all Type 2 workers.[387] The Department estimated employer adjustments and transfers assuming that the patterns observed in the CPS reference

[386] The Department uses the term "full overtime premium" to describe the adjustment process as modeled. The full overtime premium model is a special case of the general fixed-wage model in that the Department assumes the demand for labor under these circumstances is completely inelastic. That is, employers make no changes to employees' hours in response to these temporary, unanticipated changes in demand.

[387] As explained in the previous section, to estimate the population of Type 2 workers, the Department supplemented workers who report working overtime in the CPS reference week with some workers who do not work overtime in the reference week to reflect the fact that different workers work occasional overtime in different weeks.

week are representative of an average week in the year. Thus, the Department assumes total transfers for the year are equal to 52 times the transfers estimated for a representative week for which the Department has CPS data. However, these transfers are spread over a larger group including those who occasionally work overtime but did not do so in the CPS reference week.[388]

Since employers will pay more for the same number of labor hours, for Type 2 and Type 3 EAP workers, the quantity of labor hours demanded by employers will decrease. The reduction in hours is calculated using the elasticity of labor demand with respect to wages. The Department used a short-term demand elasticity of −0.20 to estimate the percentage decrease in hours worked in Year 1 and a long-term elasticity of −0.4 to estimate the percentage decrease in hours worked in Years 2–10. These elasticity estimates are based on the Department's analysis of Lichter et al. (2014).[389, 390] Brown and Hamermesh (2019) estimated the elasticity of overtime hours for EAP-exempt workers.[391] This estimate is based on a difference-in-differences in hours for two groups

[388] If a different week was chosen as the survey week, then some of these workers would not have worked overtime. However, because the data are representative of both the population and all twelve months in a year, the Department believes the share of Type 2 workers identified in the CPS data in the given week is representative of an average week in the year.

[389] Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[390] Some researchers have estimated larger impacts on the number of overtime hours worked. For example, Hamermesh and Trejo (2000) conclude the price elasticity of demand for overtime hours is at least -0.5. The Department decided to use a general measure of elasticity applied to the average change in wages since the increase in the overtime wage is somewhat offset by a decrease in the non-overtime wage as indicated in the fixed-job model.
Hamermesh, D. and S. Trejo. (2000)). The Demand for Hours of Labor: Direct Evidence from California. The Review of Economics and Statistics, 82(1), 38–47.

[391] Brown, Charles C., and Daniel S. Hamermesh. (2019). "Wages and Hours Laws: What Do We Know? What Can Be Done?" RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 68–87. DOI: 10.7758/RSF.2019.5.5.04.

of workers between two time periods. However, some groups of workers are incorrectly defined, so the Department has not used these estimates.[392]

For Type 3 affected workers, and the 50 percent of Type 2 affected workers who worked expected overtime, the Department estimated adjusted total hours worked after making wage adjustments using the incomplete fixed-job model. To estimate adjusted hours worked, the Department set the percent change in total hours worked equal to the percent change in average wages multiplied by the wage elasticity of labor demand.[393] Figure 4 is a flow chart summarizing the four types of affected EAP workers. Also shown are the effects on exempt status, weekly earnings, and hours worked for each type of affected worker.

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[392] For example, the authors defined the "non-exempt 1987-1989" group as workers earning above $223 but below $455 during this period. Because the salary level for the long test was $155 or $170 and was $250 for the short test, *see* section VII.A.1 (Table 1), some of these workers would be exempt.

[393] In this equation, the only unknown is adjusted total hours worked. Since adjusted total hours worked is in the denominator of the left side of the equation and is also in the numerator of the right side of the equation, solving for adjusted total hours worked requires solving a quadratic equation.

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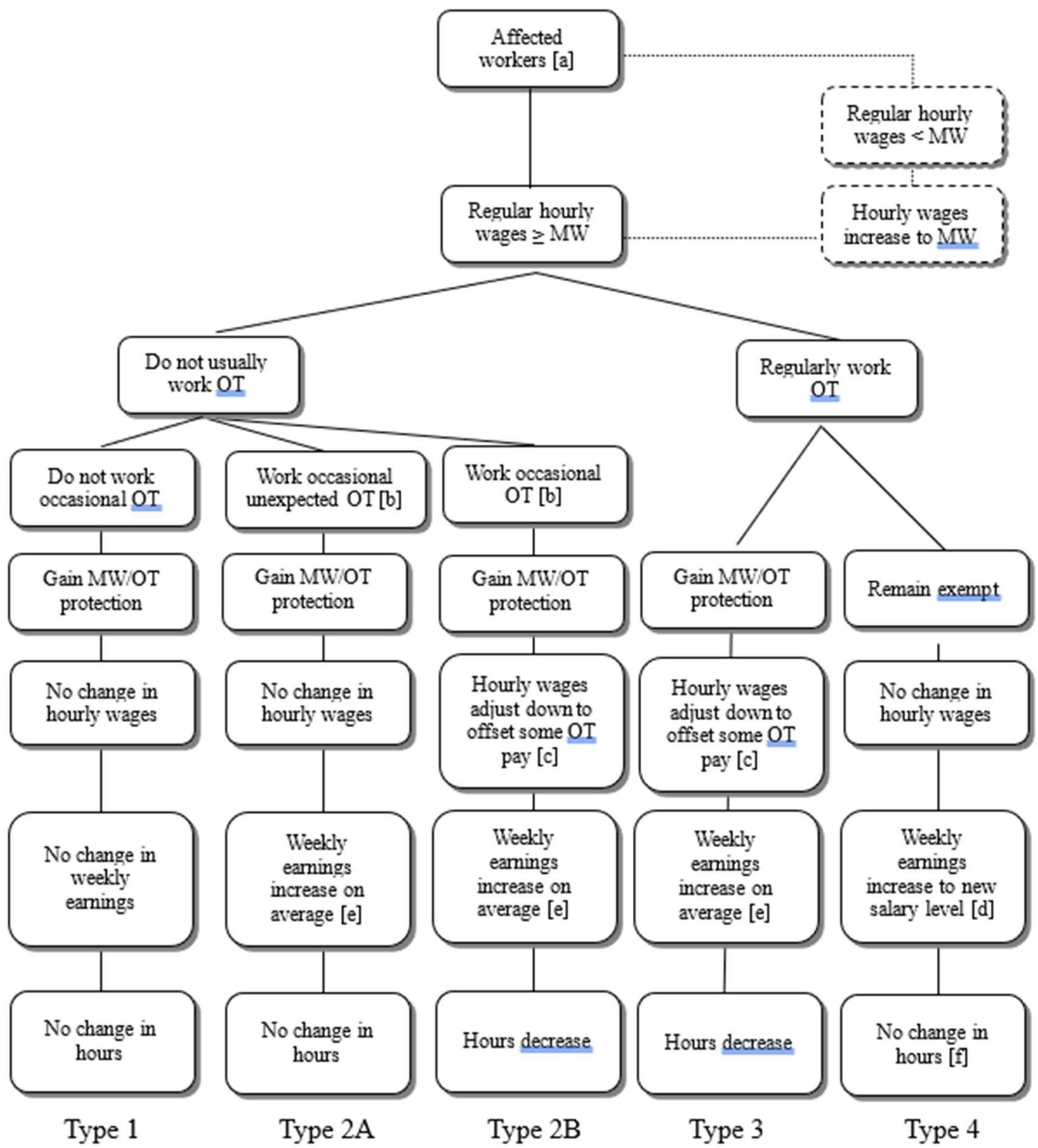
Figure 4: Flow Chart of the Rule's Effect on Earnings and Hours Worked



[a] Those who are exempt under the current EAP exemptions and will gain minimum wage and overtime protection or receive a raise to the increased salary or compensation level.
[b] The Department used two methods to identify occasional overtime workers. The first includes workers who report they usually work 40 hours or fewer per week (identified with variable PEHRUSL1 in CPS MORG), but in the reference week worked more than 40 hours (variable PEHRACT1 in CPS MORG). The second includes reclassifying some additional workers who usually work 40 hours or fewer per week, and in the reference week worked 40

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hours or fewer, to match the proportion of workers measured in other data sets who work overtime at any point in the year.
[c] The amount wages are adjusted downwards depends on whether the fixed-job model or the fixed-wage model holds. The Department's primary method uses a combination of the two. Employers reduce the regular hourly wage rate somewhat in response to overtime pay requirements, but the wage is not reduced enough to keep total compensation constant.
[d] Based on hourly wage and weekly hours it is more cost efficient for the employer to increase the worker's weekly salary to the updated salary level than to pay overtime pay.
[e] On average, the Department's modeling of regulatory effects yields a result in which employees' overall weekly earnings will increase despite a small decrease in average hours worked. In some limited cases, employers might decrease employees' hours enough to cause those employees' weekly earnings to decrease.
[f] The Department assumed hours would not change; however, it is possible employers will increase these workers' hours in response to paying them a higher salary or to avoid paying overtime premiums to newly nonexempt coworkers.

(f) Estimated Number of and Effects on Affected EAP Workers

The Department estimated the rule will affect 4.3 million workers (Table 13), of which 3.0 million are Type 1 workers (68.7 percent of all affected EAP workers), 704,000 were estimated to be Type 2 workers (16.2 percent), 558,800 were Type 3 workers (12.9 percent), and 94,100 were estimated to be Type 4 workers (2.2 percent).

Table 13: Affected EAP Workers by Type (1,000s), Year 1

EAP Test	Total	No Overtime (T1)	Occasional Overtime (T2)	Regular Overtime	
				Newly Nonexempt (T3)	Remain Exempt (T4)
Standard salary level	4,044.6	2,778.7	691.3	486.7	87.9
HCE compensation level	292.9	201.4	13.2	72.1	6.2
Total	4,337.5	2,980.2	704.4	558.8	94.1

Note: Pooled CPS data for 2021 – 2023 adjusted to reflect 2023.
*Type 1: Workers who do not work overtime and gain overtime protection.
*Type 2: Workers who work occasional overtime and gain overtime protection.
*Type 3: Workers who work regular overtime and gain overtime protection.
*Type 4: Workers who work regular overtime and remain exempt (*i.e.*, earnings increase to the updated salary level).

The rule will affect some affected workers' hourly wages, hours, and weekly earnings. Predicted changes in implicit wage rates are outlined in Table 14, changes in hours in Table 15, and changes in weekly earnings in Table 16. How these will change depends on the type of worker, but on average the Department projects that weekly earnings will be unchanged or increase while hours worked will be unchanged or decrease.

Type 1 workers will have no change in wages, hours, or earnings due to the overtime pay provision because these workers do not work overtime.[394]

For Type 2A workers, the Department assumed employers will be unable to adjust the hours or regular rate of pay for these occasional overtime workers whose overtime is irregularly scheduled and unpredictable. These workers will receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, and so average weekly earnings would increase.[395]

For Type 3 workers and Type 2B workers (the 50 percent of Type 2 workers who regularly work occasional overtime, an estimated 969,100 workers), the Department used the incomplete fixed-job model to estimate changes in the regular rate of pay. These workers will see a decrease in their average regular hourly wage and a small decrease in hours. However, because

[394] It is possible that these workers may experience an increase in hours and weekly earnings because of transfers of hours from other newly nonexempt workers who do usually work overtime. Due to the high level of uncertainty in employers' responses regarding the transfer of hours, the Department did not have credible evidence to support an estimation of the number of hours transferred to other workers.

[395] Type 2 workers will not see increases in regular earnings to the new salary or compensation levels (as Type 4 workers do) even if their new earnings in this week exceed those new levels. This is because the estimated new earnings only reflect their earnings in those weeks when overtime is worked; their earnings in typical weeks when they do not work overtime do not exceed the salary or compensation level.

these workers will receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, their average weekly earnings will increase. The reduction in hours is relatively small and is due to a decrease in labor demand from the increase in the average hourly wage as predicted by the incomplete fixed-job model (Table 15).

Type 4 workers' implicit hourly rates of pay and weekly earnings will increase to meet the updated standard salary level or HCE annual compensation level. Type 4 workers' hours may increase to offset the additional earnings, but due to lack of data, the Department assumed hours would not change.

Table 14: Average Regular Rate of Pay by Type of Affected EAP Worker, Year 1

Time Period	Total	No Overtime (T1)	Occasional Overtime (T2)	Regular Overtime	
				Newly Nonexempt (T3)	Remain Exempt (T4)
Standard Salary Level					
Before rule	$24.26	$25.23	$24.61	$18.85	$20.62
After rule	$24.14	$25.23	$24.49	$17.90	$21.21
Change ($)	-$0.12	$0.00	-$0.12	-$0.95	$0.59
Change (%)	-0.5%	0.0%	-0.5%	-5.0%	2.9%
HCE Compensation Level					
Before rule	$57.97	$61.80	$59.78	$47.44	$52.13
After rule	$57.25	$61.80	$58.09	$44.74	$52.92
Change ($)	-$0.72	$0.00	-$1.69	-$2.70	$0.78
Change (%)	-1.2%	0.0%	-2.8%	-5.7%	1.5%

Note: Pooled CPS data for 2021 – 2023 adjusted to reflect 2023.
*Type 1: Workers who do not work overtime and gain overtime protection.
*Type 2: Workers who work occasional overtime and gain overtime protection.
*Type 3: Workers who work regular overtime and gain overtime protection.
*Type 4: Workers who work regular overtime and remain exempt (*i.e.*, earnings increase to the updated salary level).

Table 15: Average Weekly Hours by Type of Affected EAP Worker, Year 1

Time Period	Total			Regular OT

		No Overtime Worked (T1)	Occasional OT (T2)	Newly Nonexempt (T3)	Remain Exempt (T4)
Standard Salary Level [a]					
Before rule	41.0	38.9	40.7	50.4	54.7
After rule	40.9	38.9	40.7	50.0	54.7
Change (hours)	-0.1	0.0	0.0	-0.4	0.0
Change (%)	-0.1%	0.0%	-0.1%	-0.8%	0.0%
HCE Compensation Level [a]					
Before rule	42.7	39.4	44.7	50.5	56.4
After rule	42.6	39.4	44.6	50.2	56.4
Change (hours)	-0.1	0.0	-0.1	-0.3	0.0
Change (%)	-0.2%	0.0%	-0.3%	-0.6%	0.0%

Note: Pooled CPS data for 2021 – 2023 adjusted to reflect 2023.
[a] Usual hours for Types 1, 3, and 4 but actual hours for Type 2 workers identified in the CPS MORG.
*Type 1: Workers who do not work overtime and gain overtime protection.
*Type 2: Workers who work occasional overtime and gain overtime protection.
*Type 3: Workers who work regular overtime and gain overtime protection.
*Type 4: Workers who work regular overtime and remain exempt (*i.e.*, earnings increase to the updated salary level).

Table 16: Average Weekly Earnings by Type of Affected EAP Worker, Year 1

Time Period	Total	No Overtime (T1)	Occasional Overtime (T2)	Regular Overtime	
				Newly Nonexempt (T3)	Remain Exempt (T4)
Standard Salary Level [a]					
Before rule	$947.71	$936.67	$982.87	$934.77	$1,091.89
After rule	$953.67	$936.67	$994.47	$961.31	$1,128.00
Change ($)	$5.96	$0.00	$11.60	$26.53	$36.11
Change (%)	0.6%	0.0%	1.2%	2.8%	3.3%
HCE Compensation Level [a]					
Before rule	$2,397.46	$2,375.43	$2,683.04	$2,366.73	$2,864.13
After rule	$2,414.25	$2,375.43	$2,719.10	$2,424.68	$2,907.00
Change ($)	$16.79	$0.00	$36.06	$57.94	$42.87
Change (%)	0.7%	0.0%	1.3%	2.4%	1.5%

Note: Pooled CPS data for 2021 – 2023 adjusted to reflect 2023.
[a] The mean of the hourly wage multiplied by the mean of the hours does not necessarily equal the mean of the weekly earnings because the product of two averages is not necessarily equal to the average of the product.

*Type 1: Workers who do not work overtime and gain overtime protection.
*Type 2: Workers who work occasional overtime and gain overtime protection.
*Type 3: Workers who work regular overtime and gain overtime protection.
*Type 4: Workers who work regular overtime and remain exempt (*i.e.*, earnings increase to the updated salary level).

At the new standard salary level, the average weekly earnings of affected workers will increase $5.96 (0.6 percent), from $947.71 to $953.67. Multiplying the average change of $5.96 by the 4.0 million EAP workers affected by the combination of the initial update and the subsequent application of the new standard salary level and 52 weeks equals an increase in earnings of $1.3 billion in the first year. For workers affected by the change in the HCE compensation level, average weekly earnings will increase by $16.79. When multiplied by 292,900 affected workers and 52 weeks, the national increase will be $255.6 million in the first year. Thus, total Year 1 transfer payments attributable to this rule will equal $1.5 billion.

The Department is only aware of one paper that modeled the impacts of the 2019 rule's increases in the salary and compensation levels. Quach (2024)[396] used administrative payroll data from May 2008 to July 2021 to estimate the impacts of the rescinded 2016 rule and the 2019 rule on employment, earnings, and salary status.[397] The paper has not been published in a peer-reviewed journal and has significant limitations, including that its use of administrative payroll

[396] Quach, S. (2024). The Labor Market Effects of Expanding Overtime Coverage. https://raw.githubusercontent.com/SimonQuach1/Papers/main/Quach_OT.pdf?token=AH2DVMEDLJGBAWFAVXXUNMDAYGGDQ.

[397] The Department notes that the effective date of the 2019 final rule was in January 2020, so using data from this month may not fully capture the effects of the 2019 rule.

data from ADP means that the findings are not representative as ADP customers do not represent a random sample of the workplace.

In terms of its findings, concerning employment, the author found that expansions in overtime coverage actually had little effect on employment. He also found that average weekly earnings rose by about 1.4% for salaried workers, and found no evidence that firms reduced base pays in response to changes in the overtime threshold. Concerning salary status, he found that approximately 2.6% of affected workers are re-classified from salaried to hourly status. The Department has not adjusted its methodology in response to this paper given the concerns listed above.

Additionally, it can be informative to look at papers which predict the impact of rulemakings. For example, Rohwedder and Wenger (2015) analyzed the effects of increasing the standard salary level from the then baseline level of $455 per week.[398] They compared hourly and salaried workers in the CPS using quantile treatment effects. This methodology estimates the effect of a worker becoming nonexempt by comparing similar workers who are hourly and salaried. They found no statistically significant change in hours or wages on average. However, their point estimates, averaged across all affected workers, show small increases in earnings and decreases in hours, similar to the Department's analysis. For example, using a salary level of $750, they estimated weekly earnings may increase between $2 and $22 and weekly hours may decrease by approximately 0.4 hours.

[398] Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

iv. Potential Transfers Not Quantified

This rule could lead to additional transfers that the Department is unable to quantify. For example, in response to this rule, some employers may decrease the hours of newly nonexempt workers who usually work overtime. These hours may be transferred to other workers, such as non-overtime workers and exempt workers who are not affected by the rule. Depending on how these hours are transferred, it could lead to either a reduction or increase in earnings for other workers. Employers may also offset increased labor costs by reducing bonuses or benefits instead of reducing base wages or hours worked. If this occurs, an employee's overall compensation may not be affected.

The rule could also reduce reliance on social assistance programs for some workers who may receive a transfer of income resulting from this rule. For low-income workers, this transfer could result in a reduced need for social assistance programs such as Medicaid, the Earned Income Tax Credit (EITC), the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and free or reduced-priced school meals. A worker earning the current salary level of $684 per week earns $35,568 annually, which is roughly equivalent to the Federal poverty level for a family of five and makes the family eligible for multiple social assistance programs.[399] Thus, transferring income to these workers could reduce eligibility for government social assistance programs. This could lead to an increase or a reduction in a family's total resources, depending on the relative size of the increase in earnings

[399] Department of Health and Human Services (2023). Federal Poverty Level. https://www.healthcare.gov/glossary/Federal-poverty-level-fpl/.

and the value of the decrease in assistance. Regardless, reduced eligibility for social assistance programs would reduce government expenditures at the Federal, State, and/or local level.

5. Benefits and Cost Savings

The Department expects that this rule could lead to multiple benefits, which were discussed qualitatively in the NPRM. These potential benefits and commenter feedback about them are addressed below.

The revised salary level will strengthen the overtime protection of salaried, white-collar employees who do not pass the standard duties test and who earn between the current salary standard salary level and the new standard salary level. These employees are nonexempt but, because they satisfy the current salary level threshold, employers must apply the duties test to determine their exemption status. At the new salary level, the number of white-collar salaried employees who earn between the current and the new salary levels and fail the duties test would decrease by 4.7 million. Because these nonexempt employees no longer meet the salary level, employers will be able to determine their exemption status based solely on the salary test. If any of these employers previously spent significant time evaluating the duties of these workers to determine exemption status, the change to determining exemption status based on the salary level could lead to some cost savings. Also, as many commenters observed, the new salary level will strengthen the right to overtime pay for nonexempt workers who earn between the current and new standard salary levels. *See, e.g.*, Coalition of State AGs; Coalition of Gender Justice and Civil Rights Organizations; Washington Dept. of Labor & Industries. Similarly, to the extent that some of these 4.7 million employees are currently misclassified as exempt, the new salary level will make it more clear for workers and employers that such workers are not EAP exempt.[400] Thus, this aspect of the rule is responsive to commenter concerns that the current salary level is too low to prevent the misclassification of salaried employees who fail the duties test. *See e.g.*, AFSCME; EPI; NELP; Sanford Heisler Sharp.

Commenters disagreed over whether the proposed rule would improve or hinder the productivity of affected workers. Some commenters, such as the AFL-CIO, agreed with the analysis provided in the NPRM that this rulemaking could increase productivity "by reducing turnover, incentivizing workers to work harder, and increasing marginal productivity as fewer hours are worked." In contrast, a number of employer representatives asserted that the rule would hinder worker productivity. For example, PPWO asserted that affected workers who become nonexempt "will now need to account for their time in a way they have not had to previously, and in a way that their exempt co-workers do not." *See also, e.g.*, AFPI.

The Department continues to believe that the rule could potentially lead to increased worker productivity if workers receive an increase in compensation. Increased productivity could occur through numerous channels, such as employee retention and level of effort. A strand

[400] *See* Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population. RAND conducted a survey to identify the number of workers who may have failed the standards duties test and yet are classified as EAP exempt. The survey, a special module to the American Life Panel, asked respondents: (1) their hours worked, (2) whether they are paid on an hourly or salary basis, (3) their typical earnings, (4) whether they perform certain job responsibilities that are treated as proxies for whether they would justify exempt status, and (5) whether they receive any overtime pay. Using these data, Rohwedder and Wenger found that "11.5 percent of salaried workers were classified as exempt by their employer although they did not meet the criteria for being so." This survey was conducted when the salary level was $455. The exact percentage may no longer be applicable, but the concern that in some instances the duties test may be misapplied remains.

of economic research, commonly referred to as "efficiency wage" theory, considers how an increase in compensation may be met with greater productivity.[401] Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.[402] Other research on increases in the minimum wage have demonstrated a positive relationship between increased compensation and worker productivity. For example, Kim and Jang (2019) showed that wage raises increase productivity for up to two years after the wage increase.[403] They found that in both full and limited-service restaurants productivity increased due to improved worker morale after a wage increase. Additionally, research demonstrates a correlation between increased earnings and reduced employee turnover.[404, 405] Reducing turnover, in turn, may increase productivity because longer-tenured employees have more firm-specific skills and knowledge and thus could be more productive and require less supervision and training.[406] Reduced turnover could also reduce firms' hiring and training costs. As a result, even though marginal

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401 Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. The Quarterly Journal of Economics, 97(4), 543–569.

402 Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

403 Kim, H.S., & Jang, S. (2019). Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry. Tourism Management 71, 378–388. https://doi.org/10.1016/j.tourman.2018.10.029.

404 Howes, Candace. (2005). Living Wages and Retention of Homecare Workers in San Francisco. *Industrial Relations,* 44(1), 139–163. Dube, A., Lester, T.W., & Reich, M.. (2014). Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRLE Working Paper #149–13.

405 This literature tends to focus on changes in earnings for a specific sector or subset of the labor force. The impact on turnover when earnings increase across sectors (as would be the case with this regulation) may be smaller.

406 Argote, L., Insko, C. A., Yovetich, N., & Romero, A. A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. *Journal of Applied Social Psychology,* 25(6), 512–529. Shaw, J. D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. *Organizational Psychology Review,* 1(3), 187–213.

labor costs rise, they may rise by less than the amount of the wage change because the higher wages may be offset by increased productivity and reduced hiring costs for firms.

This rulemaking could also result in an increase in personal time for some affected workers. Worker advocacy organizations and individual commenters asserted that employees would generally enjoy more personal time as a consequence of the rule. For example, SEIU commented that "[w]hen workers are exempted from overtime pay protections, it disincentivizes employers from being efficient with [employees'] time." Due to the increase in marginal cost for overtime hours for newly overtime-eligible workers, employers could demand fewer hours from some of the workers affected by this rulemaking. If these workers' pay remains the same, they could benefit from increased personal time and improved work-life balance. Empirical evidence shows that workers in the United States typically work more than workers in other comparatively wealthy countries.[407] Workers in executive, administrative, and professional occupations tend to work longer hours.[408] They also have the highest percentage of workers who would prefer to work fewer hours compared to other occupational categories.[409] Therefore, the Department believes that this rule may result in reduced time spent working overtime for a group of workers, some of whom may prefer such an outcome.

[407] For more information, see OECD series, average annual hours actually worked per worker, available at: https://stats.oecd.org/index.aspx?DataSetCode=ANHRS.
[408] Boushey, H. and Ansel, B. (2016). Overworked America, The economic causes and consequences of long work hours. Washington Center for Equitable Growth. https://equitablegrowth.org/research-paper/overworked-america/?longform=true.
[409] Hamermesh, D.S., Kawaguchi, D., Lee, J. (2014). Does Labor Legislation Benefit Workers? Well-Being after an Hours Reduction. IZA DP No. 8077.
Golden, L., & Gebreselassie, T. (2007). Overemployment Mismatches: The Preference for Fewer Work Hours. *Monthly Labor Review,* 130(4), 18–37.
Hamermesh, D.S. (2014). Not Enough Time? *American Economist,* 59(2).

6. Sensitivity Analysis of Transfer Payments

Because the Department cannot predict employers' precise reactions to the rule, the Department calculated bounds on the size of the estimated transfers from employers to workers, relative to the primary estimates in this RIA. For the upper bound, the Department assumed that the full overtime premium model is more likely to occur than in the primary model. For the lower bound, the Department assumed that the complete fixed-job model is more likely to occur than in the primary model. Based on these assumptions, estimated transfers may range from $631.1 million to $2.9 billion, with the primary estimate equal to $1.5 billion.

For a reasonable upper bound on transfer payments, the Department assumed that all occasional overtime workers and half of regular overtime workers would receive the full overtime premium (*i.e.*, such workers will work the same number of hours but be paid 1.5 times their implicit initial hourly wage for all overtime hours) (Table 17). The full overtime premium model is a special case of the fixed-wage model where there is no change in hours. For the other half of regular overtime workers, the Department assumed in the upper-bound method that they would have their implicit hourly wage adjusted as predicted by the incomplete fixed-job model (wage rates fall and hours are reduced but total earnings continue to increase, as in the primary method). In the primary model, the Department assumed that only 50 percent of occasional overtime workers and no regular overtime workers would receive the full overtime premium.

The plausible lower bound on transfer payments also depends on whether employees work regular overtime or occasional overtime. For those who regularly work overtime hours and half of those who work occasional overtime, the Department assumed the employees' wages would fully adjust as predicted by the fixed-job model.[410] For the other half of employees with occasional overtime hours, the lower bound assumes they would be paid one and one-half times their implicit hourly wage for overtime hours worked (full overtime premium).

Table 17: Summary of the Assumptions Used to Calculate the Lower Estimate, Primary Estimate, and Upper Estimate of Transfers

Lower Transfer Estimate	Primary Estimate	Upper Transfer Estimate
Occasional Overtime Workers (Type 2)		
50% fixed-job model 50% full overtime premium	50% incomplete fixed-job model 50% full overtime premium	100% full overtime premium
Regular Overtime Workers (Type 3)		
100% fixed-job model	100% incomplete fixed-job model	50% incomplete fixed-job model 50% full overtime premium

* Full overtime premium model: Regular rate of pay equals the implicit hourly wage prior to the regulation (with no adjustments); workers are paid 1.5 times this base wage for the same number of overtime hours worked prior to the regulation.
* Fixed-job model: Base wages are set at the higher of: (1) a rate such that total earnings and hours remain the same before and after the regulation; thus the base wage falls, and workers are paid 1.5 times the new base wage for overtime hours (the fixed-job model) or (2) the minimum wage.
* Incomplete fixed-job model: Regular rates of pay are partially adjusted to the wage implied by the fixed-job model.

7. Effects by Regions and Industries

This section compares the number of affected workers, costs, and transfers across regions and industries. Although impacts will be more pronounced in some regions or industries, the Department has concluded that in no region or industry are the costs overly burdensome. The proportion of total costs and transfers in each region will be fairly consistent with the proportion

[410] The straight-time wage adjusts to a level that keeps weekly earnings constant when overtime hours are paid at 1.5 times the straight-time wage. In cases where adjusting the straight-time wage results in a wage less than the minimum wage, the straight-time wage is set to the minimum wage.

of total workers in each region. Affected workers are overrepresented in some industries, but costs and transfers will still be manageable as a share of payroll and of total revenue (*See* Table 21 for regions and Table 24 for industries).

The Department also compared costs and transfers relative to total payrolls and revenues. This provides a common method of assessing the relative effects of the rule on different regions or industries, and the magnitude of adjustments the rule may require on the part of enterprises in each region or industry. The relative costs and transfers expressed as a percentage of payroll are particularly useful measures of the relative size of adjustment faced by organizations in a region or industry because they benchmark against the cost category directly associated with the labor force. Average estimated costs and transfers from this rule are very small relative to current payroll or current revenue—less than a tenth of a percent of payroll and of revenue in each region and in each industry.

Salaries vary across the U.S. geographically. To ensure the new standard salary level would not be too high in any region of the country, the Department has used only wages in the lowest-wage region, the South[411], to set the salary level. However, because wages are lower in the South and the Midwest[412] than the Northeast[413] and the West[414], impacts may be larger in

[411] The South Census region is comprised of the following states: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.
[412] The Midwest Census region is comprised of the following states: Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.
[413] The Northeast Census region is comprised of the following states: Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont.
[414] The West Census region is comprised of the following states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming.

these two lower-wage regions. This section considers impacts across the four Census regions to ensure the impacts in the lower-wage regions would be manageable. The South has by far the most affected workers (1.9 million), though it also has the most workers of any Census region (Table 18). As a share of potentially affected workers in the region, the South will have somewhat more affected workers relative to other regions (17.9 percent are affected compared with 11.0 to 15.4 percent in other regions). However, as a share of all workers in the region, the South will not be particularly affected relative to other regions (3.5 percent are affected compared with 2.3 to 3.0 percent in other regions).

Table 18: Potentially Affected and Affected Workers, by Region, Year 1

Region	Workers Subject to FLSA (Millions)	Potentially Affected Workers (Millions) [a]	Affected Workers (Millions) [b]	Affected Workers as a Precent of Potentially Affected Workers	Affected Workers as a Percent of All Workers
All	143.7	29.7	4.3	14.6%	3.0%
Northeast	25.5	6.0	0.7	12.3%	2.9%
Midwest	31.1	6.1	0.9	15.4%	3.0%
South	53.2	10.5	1.9	17.9%	3.5%
West	33.8	7.2	0.8	11.0%	2.3%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.
[a] EAP exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Total transfers in the first year were estimated to be $1.5 billion (Table 19). As expected, the transfers in the South will be the largest portion because the largest number of affected workers would be in the South. However, transfers per affected worker will be less in the South than in other Census regions. Annual transfers per affected worker will be $291 in the South, and between $346 and $462 in other regions.

Table 19: Annual Transfers by Region, Year 1

Region	Total Annual Change in Earnings (Millions)	Annual Transfer Per Affected Worker	Annual Transfers per Entity	Percent of Total Transfers by Region
All	$1,509.2	$348	$183	100.0%
Northeast	$256.4	$346	$172	17.0%
Midwest	$343.6	$368	$202	22.8%
South	$543.6	$291	$181	36.0%
West	$365.6	$462	$178	24.2%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

Table 20: Annual Costs by Region, Year 1

Region	Total Direct Costs (Millions)	Total Direct Costs per Entity	Percent of Total Direct Costs by Region
All	$1,436.2	$174	100.0%
Northeast	$240.7	$162	16.8%
Midwest	$323.5	$190	22.5%
South	$581.7	$194	40.5%
West	$1,436.2	$174	100.0%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

Direct employer costs are composed of regulatory familiarization costs, adjustment costs, and managerial costs. The Department estimates that total direct employer costs will be the highest in the South ($581.7 million) and lowest in the Northeast ($240.7 million). Transfers and direct employer costs in each region, as a percentage of the total transfers and direct costs, would range from 16.9 percent in the Northeast to 38.2 percent in the South. These proportions are almost the same as the proportions of the total workforce in each region: 17.8 percent in the

Northeast and 37.0 percent in the South. Costs and transfers per establishment would be slightly higher in the Midwest ($392) than on average, but still small (Table 21).

Another way to compare the relative effects of this rule by region is to consider the transfers and costs as a proportion of payroll and revenues (Table 21).[415] Nationally, employer costs and transfers will be approximately 0.031 percent of payroll. By region, direct employer costs and transfers as a percent of payroll will be approximately the same (between 0.025 and 0.036 percent of payroll). Employer costs and transfers as a percent of revenue will be 0.006 percent nationally and range between 0.005 and 0.006 percent in each region.

Table 21: Annual Transfers and Costs as Percent of Payroll and of Revenue by Region, Year 1

Region	Transfers and Costs per Entity	Payroll (Billions) [a]	Revenue (Billions) [a]	Costs and Transfers	
				As Percent of Payroll	As Percent of Revenue
All	$358	$9,471	$50,655	0.031%	0.006%
Northeast	$334	$2,010	$9,902	0.025%	0.005%
Midwest	$392	$1,947	$11,276	0.034%	0.006%
South	$375	$3,137	$17,812	0.036%	0.006%
West	$320	$2,377	$11,666	0.028%	0.006%

[a] Payroll and revenue data exclude the Federal Government.

Sources: Costs and transfers based on pooled CPS data for 2021-2023 adjusted to reflect 2023. Private sector payroll and revenue data from 2017 SUSB. State and local payroll and revenue data from State and Local Government Finances 2020. Inflated to $2023 using GDP deflator.

Impacts may be more pronounced in some industries. In particular, lower-wage industries where more workers may earn between $684 and the new salary level may be impacted more. Additionally, industries where EAP workers are more prevalent may experience larger impacts.

[415] The Department uses 2017 data here because although payroll data are available for more recent years, the most recent revenue data are for 2017.

To gauge the effect of the rule on industries, the Department estimated affected workers, costs, and transfers for the 13 major industry groups. The Department also compared estimates of combined costs and transfers as a percent of payroll and revenue across industries.

Table 22 presents the number of affected workers by industry. The industry with the most affected workers is professional and business services (827,400). The industry with the largest share of workers affected is financial activities (5.7 percent). This is because the financial activities industry is heavily composed of salaried white-collar workers. As a share of potentially affected workers, the industry with the highest share affected is leisure and hospitality (24.3 percent), followed by agriculture, forestry, fishing, & hunting (22.8 percent).

Table 22: Potentially Affected and Affected Workers, by Industry, Year 1

Industry	Workers Subject to FLSA (1,000s)	Potentially Affected Workers (1,000s) [a]	Affected Workers (1,000s) [b]	Affected Workers as a Percent of Potentially Affected Workers	Affected Workers as a Percent of All Workers
All	143,677.6	29,746.7	4,337.5	14.6%	3.0%
Agriculture, forestry, fishing, & hunting	1,312.6	58.5	13.3	22.8%	1.0%
Mining	587.4	156.6	18.5	11.8%	3.1%
Construction	9,305.3	1,266.9	184.6	14.6%	2.0%
Manufacturing	15,521.5	4,062.0	350.6	8.6%	2.3%
Wholesale trade	3,164.1	852.5	112.3	13.2%	3.5%
Retail trade	15,649.0	1,966.1	377.4	19.2%	2.4%
Transportation & utilities	8,902.5	1,072.9	152.9	14.3%	1.7%
Information	2,711.7	1,082.4	132.4	12.2%	4.9%
Financial activities	9,925.6	4,349.8	564.5	13.0%	5.7%
Professional & business services	17,462.0	7,126.2	827.4	11.6%	4.7%

Education	14,294.5	1,202.7	244.1	20.3%	1.7%
Healthcare & social services	21,025.7	3,745.2	740.2	19.8%	3.5%
Leisure & hospitality	12,529.3	940.3	228.5	24.3%	1.8%
Other services	5,532.2	761.7	163.5	21.5%	3.0%
Public administration	5,754.2	1,103.0	227.2	20.6%	3.9%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.
[a] EAP exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Both transfers and costs will be the largest in the professional and business services industry because this industry is large and heavily composed of salaried white-collar workers (Table 23). Combined, in Year 1, these total $564.7 million and represent 19.2 percent of nationwide transfers and costs. Transfers and costs are also large in the healthcare and social services industry, at least partially due to the large size of this industry. However, transfers per affected worker will be relatively low in this industry, $229 in the first year compared with $348 nationally. A third industry with relatively large total transfers and costs is the retail trade industry.

Table 23: Annual Transfers and Costs by Industry, Year 1

Industry	Transfers (Millions)	Transfer Per Affected Worker	Direct Costs (Millions) [a]	Transfers and Costs (Millions)	Percent of Total Transfers and Costs by Industry
All	$1,509.2	$348	$1,435.7	$2,944.9	100.0%
Agriculture, forestry, fishing, & hunting	$2.4	$178	$4.3	$6.6	0.2%

Mining	$5.2	$284	$4.5	$9.8	0.3%
Construction	$63.5	$344	$87.5	$151.1	5.1%
Manufacturing	$142.9	$408	$101.4	$244.3	8.3%
Wholesale trade	$52.2	$465	$50.7	$102.9	3.5%
Retail trade	$192.8	$511	$166.9	$359.7	12.2%
Transportation & utilities	$59.8	$391	$50.7	$110.5	3.8%
Information	$49.7	$375	$35.8	$85.5	2.9%
Financial activities	$184.2	$326	$168.0	$352.2	12.0%
Professional & business services	$303.9	$367	$260.8	$564.7	19.2%
Education	$48.3	$198	$53.4	$101.6	3.5%
Healthcare & social services	$169.6	$229	$197.4	$367.0	12.5%
Leisure & hospitality	$138.6	$607	$121.3	$259.9	8.8%
Other services	$48.1	$294	$82.7	$130.8	4.4%
Public administration	$47.9	$211	$50.3	$98.2	3.3%

Sources: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

[a] Regulatory familiarization costs exclude 10,440 establishments whose industry is "not classified."

To measure the impact on businesses, a comparison of transfers and costs to payroll, revenue, or profit is more helpful than looking at the absolute size of transfers and costs per industry. As a percent of payroll, transfers and costs would be highest in agriculture, forestry, fishing, and hunting; retail trade; leisure and hospitality; and education (Table 24). However, the magnitude of the relative shares will be small, representing less than 0.1 percent of payroll costs in all industries. The Department's estimates of transfers and costs as a percent of revenue by industry also indicated a very small effect of less than 0.03 percent of revenues in any industry. The industries with the largest transfers and costs as a percent of revenue will be education; leisure and hospitality; and professional and business services. Table 24 illustrates that the differences in costs and transfers relative to revenues will be quite small across industry groupings.

The overall magnitude of costs and transfers as a percentage of profits represents less than 1.0 percent of overall profits in each industry.[416, 417] By industry, the value of total costs and transfers as a percent of profits ranges from a low of 0.02 percent (wholesale trade) to a high of 0.62 percent (agriculture, forestry, fishing, and hunting). Benchmarking against profits is potentially helpful in the sense that it provides a measure of the rule's effect against returns to investment. However, this metric must be interpreted carefully as it does not account for differences across industries in risk-adjusted rates of return which are not readily available for this analysis. The ratio of costs and transfers to profits also does not reflect differences in the firm-level adjustment to profit impacts reflecting cross-industry variation in market structure.[418]

Table 24: Annual Transfers, Total Costs, and Transfers and Costs as Percent of Payroll, Revenue, and Profit by Industry, Year 1

Industry	Costs and Transfers per Entity	Payroll (Billions) [a]	Revenue (Billions) [a]	Costs and Transfers As Percent of:		
				Payroll [a]	Revenue [a]	Profit [a]

[416] Internal Revenue Service. (2023). SOI Tax Stats - Corporation Income Tax Returns Complete Report (Publication 16). Available at: https://www.irs.gov/statistics/soi-tax-stats-corporation-income-tax-returns-complete-report-publication-16.

[417] Table 1 of the IRS report provides total receipts, net income, and deficits by industry. For each industry, the Department calculated the profit-to-revenue ratio as net income (column (7)) less any deficit (column (8)) divided by total receipts (column (3)). Profits were then calculated as revenues multiplied by profit-to-revenue ratios. Profits could not be used directly because they are limited to only active corporations.

[418] In particular, a basic model of competitive product markets would predict that highly competitive industries with lower rates of return would adjust to increases in the marginal cost of labor arising from the rule through an overall, industry-level increase in prices and a reduction in quantity demanded based on the relative elasticities of supply and demand. Alternatively, more concentrated markets with higher rates of return would be more likely to adjust through some combination of price increases and profit reductions based on elasticities as well as interfirm pricing responses.

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All	$357.9	$9,470.5	$50,655.8	0.031%	0.006%	0.060%
Agriculture, forestry, fishing, & hunting	$284.9	$8.6	$42.5	0.077%	0.016%	0.617%
Mining	$424.2	$61.9	$493.6	0.016%	0.002%	[b]
Construction	$193.6	$488.1	$2,430.8	0.031%	0.006%	0.107%
Manufacturing	$863.3	$834.6	$6,755.6	0.029%	0.004%	0.034%
Wholesale trade	$263.3	$531.0	$10,656.1	0.019%	0.001%	0.022%
Retail trade	$346.9	$543.4	$5,980.4	0.066%	0.006%	0.186%
Transportation & utilities	$369.5	$382.2	$1,781.5	0.029%	0.006%	0.329%
Information	$527.6	$436.3	$1,927.0	0.020%	0.004%	0.027%
Financial activities	$376.7	$928.5	$6,091.6	0.038%	0.006%	0.027%
Professional & business services	$386.2	$1,956.4	$3,575.3	0.029%	0.016%	0.141%
Education	$911.2	$174.9	$501.7	0.058%	0.020%	0.316%
Healthcare & social services	$387.4	$1,217.5	$3,093.5	0.030%	0.012%	0.159%
Leisure & hospitality	$288.1	$438.6	$1,480.7	0.059%	0.018%	0.214%
Other services	$167.3	$221.2	$881.1	0.059%	0.015%	0.220%
Public administration	$1,089.8	$1,247.4	$4,964.4	0.008%	0.002%	[c]

Sources: Pooled CPS data for 2021-2023 adjusted to reflect 2023. Private sector payroll and revenue data from 2017 SUSB. State and local payroll and revenue data from State and Local Government Finances 2020 are used for the Public Administration industry. Profit-to-revenue data from the Internal Revenue Service 2019. Inflated to $2023 using GDP deflator.

[a] Payroll and revenue data exclude the Federal Government. Profit-to-revenue data limited to active corporations. Regulatory familiarization costs, payrolls, and revenues exclude 10,440 establishments whose industry is "not classified." Because transfer payments include all workers, the estimates of costs and transfers as a share of payroll or revenue are slightly overestimated.

[b] Profits were negative in this industry in this year.

[c] Profit is not applicable for public administration.

8. Regulatory Alternatives

The Department considered a range of alternatives before selecting its methods for setting the standard salary level and the HCE compensation level. As seen in Table 25, the Department has calculated the salary/compensation levels, the number of affected workers, and the associated costs and transfers for these alternative levels.

The Department is increasing the standard salary level using earnings for the 35th percentile of full-time salaried workers in the South Census Region, $1,128 per week. The alternative methods considered for setting the standard salary level are:

- Alternative 1: 2004/2019 method – $844 per week – 20th percentile of earnings of nonhourly full-time workers in the South Census region and/or in the retail industry nationally.
- Alternative 2: Kantor long test method – $942 per week – 10th percentile of earnings of likely exempt workers.
- Alternative 3: 2016 method – $1,196 per week – 40th percentile of earnings of nonhourly full-time workers in the South Census region
- Alternative 4: Kantor short test method – $1,404 per week – Kantor long test level multiplied by 149 percent (the historical average relationship between the long and short test levels).

The Department considered using the 2004 methodology (the 20th percentile of full-time salaried white-collar workers in the lowest-wage Census region (currently the South) and/or in retail nationally), which is currently $844 per week ($43,888 per year). This is also the methodology that the Department used in the 2019 rule.[419] However, the salary level produced by the 2004 methodology is below the current equivalent long test salary level ($942 per week), which the Department considers to be a key parameter for determining an appropriate salary level.

The Department also considered setting the standard salary level at the long test level ($942 per week or $48,984 per year). Doing so would ensure the initial screening function of the salary level by restoring overtime protections to those employees who were consistently excluded from the EAP exemption under each iteration of the regulations prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was set equivalent to the long test salary level.[420] However, as explained above, setting the standard salary level at the long test level would not address the impact of the change from a two-test to a one-test system.

The Department also considered setting the standard salary level at the 40th earnings percentile of salaried white-collar workers in the lowest-wage Census Region (currently the South) ($1,196 per week or $62,192 per year). However, the Department is concerned that this approach could be seen by courts as making salary level determinative of exemption status for too large a portion of employees, as this salary level would make the salary paid by the employer determinative of exemption status for more than half (55 percent) of white-collar employees who earn between the long and short test salary levels. The Department is also concerned that this approach would generate the same concerns that led to the district court decision invalidating the 2016 rule (which adopted the same methodology).

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[419] 84 FR 51260.

[420] *See* section V.B.4.ii.

Finally, the Department considered setting the standard salary level at the current equivalent of the short test salary level ($1,404 per week or $73,008 per year). This would ensure that all employees who earn between the long and short test salary levels and perform substantial amounts of nonexempt work would be entitled to overtime compensation. However, by making exemption status for all employees who earn between the long and short test levels depend on the salary paid by the employer, this approach would prevent employers from being able to use the EAP exemption for employees earning between these salary levels who do not perform substantial amounts of nonexempt work and thus were historically exempt under the long test.

As described above, the Department is setting the HCE compensation level using earnings for the 85th percentile of all full-time salaried workers nationally, $151,164 per year. The Department also evaluated the following alternative methods to set the HCE compensation levels:

- HCE alternative 1: 2019 method[421] – $132,964 annually – 80th percentile of earnings of nonhourly full-time workers nationally.
- HCE alternative 2: 2016 method[422] – $179,972 annually – 90th percentile of earnings of nonhourly full-time workers nationally.

The Department believes that HCE alternative 1 does not produce a threshold high enough to reserve the HCE test for employees who would "almost invariably pass the standard duties test." The Department also considered setting the HCE threshold at the 90th percentile; however, the Department is concerned that the resulting level ($179,972) would restrict the use

[421] *See* 84 FR 51250.
[422] *See* 81 FR 32429.

of the HCE exemption for employers in low-wage regions and industries. The Department believes its proposal to adjust the HCE total annual compensation threshold to reflect the 85th percentile of earnings of nonhourly full-time workers nationally strikes the appropriate balance and ensures that the HCE test continues to serve its intended function as a streamlined alternative for employees who are highly likely to pass the standard duties test.

Table 25: Updated Standard Salary and HCE Compensation Levels and Alternatives, Affected EAP Workers, Costs, and Transfers, Year 1

Alternative	Salary Level	Affected EAP Workers (1,000s)	Year 1 Effects (Millions)	
			Adj. & Managerial Costs	Transfers
Standard Salary Level (Weekly)				
Alt. #1: 2004/2019 method [a]	$844	959	$202.3	$204.3
Alt #2: Kantor long test [b]	$942	1,806	$385.9	$432.0
Final rule: 35th pct South [c]	$1,128	4,045	$905.4	$1,253.6
Alt. #3: 2016 method - 40th pct South [d]	$1,196	4,993	$1,116.1	$1,642.9
Alt. #4: Kantor short test [e]	$1,404	7,961	$1,860.0	$3,035.1
HCE Compensation Level (Annually)				
HCE alt. #1: 2019 method - 80th pct [f]	$132,964	223	$58.7	$164.5
Final rule: 85th pct [g]	$151,164	293	$79.2	$255.6
HCE alt. #2: 2016 method - 90th pct [h]	$179,972	340	$97.6	$359.2

Note: Regulatory familiarization costs are excluded because they do not vary based on the selected values of the salary levels. Additionally, they cannot be disaggregated by exemption type (i.e., standard versus HCE). The Department did not receive comments on how to refine familiarization cost estimates in a manner that distinguishes among regulatory alternatives.

[a] 20th percentile earnings of nonhourly full-time workers in the South Census region or retail industry (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). Pooled CPS data for 2021-2023 adjusted to reflect 2023.

[b] 10th percentile earnings of likely exempt workers. Pooled CPS data for 2021-2023 adjusted to reflect 2023.

[c] 35th percentile of earnings of nonhourly full-time workers in the South Census region. CPS 2023. Available at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.

[d] 40th percentile of earnings of nonhourly full-time workers in the South Census region. CPS 2023 data. Available at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.
[e] Kantor short test is set as the long test level multiplied by 149 percent. This is the historical average relationship between the two levels.
[f] 80th percentile of earnings of nonhourly full-time workers nationally (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). Pooled CPS data for 2021-2023 adjusted to reflect 2023.
[g] 85th percentile of earnings of nonhourly full-time workers nationally. CPS 2023 data. Available at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm.

[h] 90th percentile of earnings of nonhourly full-time workers nationally CPS 2023 data. Available at https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm

9. Triennial Updates to the Standard Salary and Annual Compensation Thresholds

Between updates to the standard salary and HCE compensation levels, nominal wages typically increase, resulting in an increase in the number of workers qualifying for the EAP exemption, even if there has been no change in their real earnings. Thus, workers whom Congress intended to be covered by the minimum wage and overtime pay provisions of the FLSA may lose those protections. The mechanism the Department established in this rulemaking for updating the salary and compensation levels allows these thresholds to keep pace with changes in earnings and continue to serve as an effective dividing line between potentially exempt and nonexempt workers. Furthermore, the updating mechanism will provide employers more certainty in knowing that these levels will change by smaller amounts on a regular basis, rather than the more disruptive increases caused by much larger changes after longer, uncertain increments of time. This will allow firms to better predict short- and long-term costs and employment needs. In addition to the changes being made to the standard salary level and HCE compensation threshold, the Department is including in this rule a mechanism for updating the salary and compensation levels initially on July 1, 2024 and every 3 years thereafter to reflect current earnings.

i. Initial Update

As discussed in section IV, the new standard salary level and HCE total annual compensation threshold methodologies do not become applicable until approximately 8 months after publication of this final rule. Therefore, the initial update on July 1, 2024 will use the methodologies in place at the time of the update (i.e., the 2019 rule methodologies), which results in a $844 per week standard salary level and a $132,964 HCE total annual compensation threshold. Consistent with the 2019 rule, the Department used pooled CPS data for the most recent 3 years (2021, 2022, 2023), adjusted to reflect 2023, for the initial updates to the standard salary and annual compensation thresholds.

As previously discussed, the Department's affected worker, cost, and transfer estimates for Year 1 have accounted for the initial update and the new standard salary and annual compensation thresholds that become applicable 6 months after the initial update. Just looking at the initial update, the Department estimated the initial update to the standard salary level will affect workers who earn between $684 and $844 per week. The Department estimates that this update will result in 959,000 affected workers. Of these affected workers, 68.7 percent of them do not work overtime. The Department estimated the Year 1 adjustment and managerial costs for just this update would be $202.3 million and transfer payments would be $204.3 million. For the initial update to the HCE total annual compensation threshold, the Department estimated that just the update would result in 223,000 affected workers, $58.7 million in adjustment and managerial costs, and $164.5 million in transfer payments in Year 1.

ii. Future Updates

The Department is establishing future updates to the standard salary level and HCE total annual compensation threshold with current earnings data beginning 3 years after the date of the initial update, and every 3 years thereafter, using the methodologies in place at the time of the updates. For purposes of this analysis, the Department assumes that the future triennial updates to the standard salary level will be based on the same methodology that the Department used to set the new standard salary level in this rule: the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Likewise, the Department assumes that future triennial updates to the HCE total annual compensation level will be based on the same methodology the Department used to set this earnings threshold in this rulemaking: the annualized weekly earnings of 85th percentile of full-time salaried workers nationally.

As previously discussed, future triennial updates will set the earnings thresholds using the most recent available 4 quarters of CPS data preceding the Department's notice with the updated thresholds. To estimate future thresholds in years when the salary and compensation levels will be updated, the Department used the historic geometric growth rate between 2012 and 2022 in (1) the 35th earnings percentile of full-time salaried workers in the South for the standard salary level and (2) the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally for the HCE compensation level. For example, between 2012 and 2022, the annual growth rate in the 35th percentile of full-time salaried workers in the South has increased by 3.17 percent. To estimate the first future triennial update salary level of $1,239, the Department multiplied $1,128 by 1.0317 to the power of three. Figure 5 shows the projected future triennial update levels for the first 10 years. Note that these projections are illustrative estimates based on past wage growth; the actual level at the time of the update will depend on the wage growth that occurs between now and the update date. Figure 6 shows the standard salary levels in both nominal and 2023 dollars.

Figure 5: Projected Future Salary and Compensation Levels, Nominal Dollars

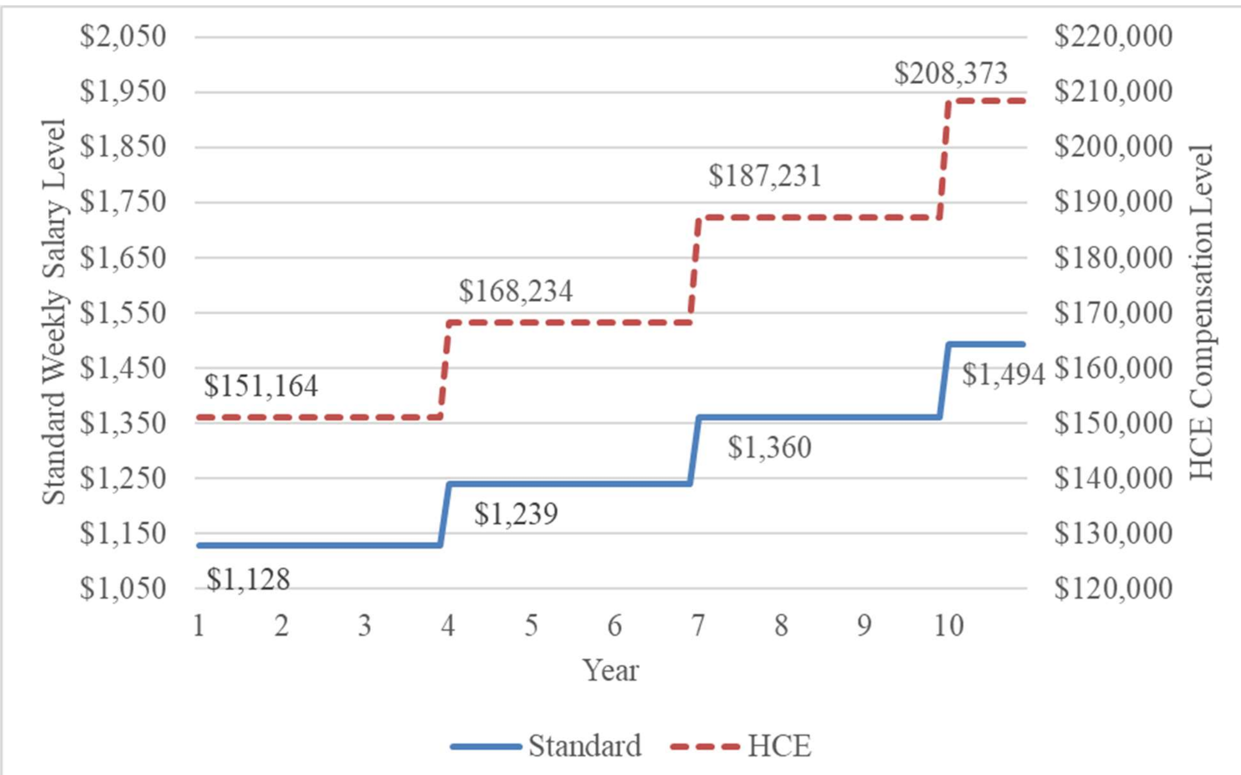

Figure 6: Projected Future Standard Salary Levels, Nominal and Real (Constant 2023 Dollars)

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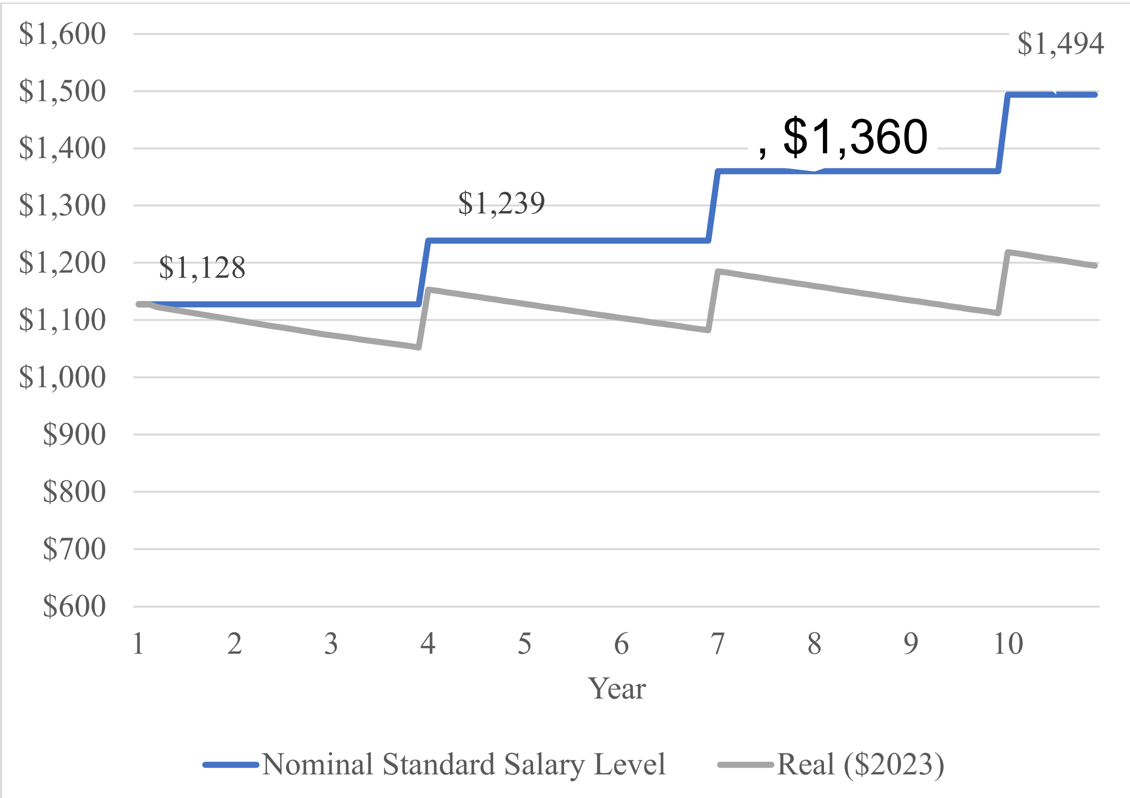

iii. Concerns with Use of Fixed Earnings Percentile as Updating Methodology

As discussed in detail in section V.A.3.iii, some commenters expressed concern that triennially updating the salary level using a fixed percentile of earnings would result in the salary levels growing at too quick a rate. *See, e.g.*, Chamber; National Lumber and Building Material Dealers Association; NRF; Seyfarth Shaw.

These commenters stated that updating the standard salary level using a fixed percentile of earnings of full-time salaried workers will cause some or all of the newly nonexempt workers to be converted to hourly status and thus removed from the data set, and earnings at the 35th percentile of salaried workers will quickly rise solely due to the exclusion of these hourly workers (an effect some commenters referred to as “ratcheting”). Commenters asserted that this may cause growth in the 35th percentile of full-time salaried workers to no longer reflect prevailing economic conditions.

Claims that an updating mechanism using the fixed percentile approach will lead to the rapid escalation of the salary level are based primarily on the assumption that employers will respond to this rulemaking by converting newly nonexempt workers to hourly pay status. However, the Department believes these concerns are overstated because many affected EAP workers who are reclassified as nonexempt are likely to remain salaried as: (1) An analysis of the 2004 rule's salary level update did not indicate significant numbers of workers were converted to hourly pay; and (2) an analysis of updates in California's higher EAP exemption salary level (under state law) did not indicate significant numbers of workers were reclassified as hourly. In any event, the Department's modeling of the impact of updating shows that any potential "ratcheting" effect that may occur would be small, largely because newly nonexempt workers compose a small percentage of the pool of full-time nonhourly workers in the dataset used to establish the salary level.

The analyses discussed below are based on CPS MORG data. As acknowledged in the NPRM and above in section VII.B.5.i, salary status for CPS respondents cannot definitively be determined because workers who indicate they are paid on a salary basis or on some basis other than hourly are all classified as "nonhourly." To consider the possibility this biases our results, the Department looked at the Panel Study of Income Dynamics (PSID). The PSID provides additional information concerning salaried versus other nonhourly workers. In the PSID, respondents are asked how they are paid on their main job and are asked for more detail if their response is in some way other than salaried or hourly.[423] The available responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. None of these options are ones to which employers are likely to change their salaried workers. The share of workers who are not paid on either an hourly or salaried basis is relatively small, about 10 percent of workers in the PSID. Accordingly, grouping nonhourly workers with salaried workers does not negate the following comparisons and conclusions based on CPS data.

(a) Workers May Remain Salaried Even if Nonexempt

The Department disagrees with commenters that suggested that employers will likely (or automatically) convert large numbers of newly nonexempt employees to hourly pay status. In some instances such conversion may occur; for example, if an employee regularly works overtime and the employer is able to adjust his or her regular rate. However, for the majority of affected employees, there will be no incentive for employers to convert them to hourly pay because they do not work more than 40 hours in a workweek. Also, employers may have other incentives to maintain workers' salaried status; for example, they may offer salaried positions to attract talent. Some commenters representing employer interests highlighted that employees value job characteristics associated with salaried pay—such as earnings predictability—and so employers may pay nonexempt employees on a salary basis to preserve these benefits. Using the CPS MORG data pooled for 2021-2023 and projected to 2023, the Department estimated that 29.4 percent of white-collar workers earning below $684 per week are nonhourly; based on findings from the PSID, the Department believes most of these nonhourly workers are salaried.

[423] University of Michigan, Institute for Social Research. 2019 PSID. Data available at: https://simba.isr.umich.edu/data/data.aspx.

This data shows that even for some current nonexempt workers, employers are choosing to keep them as salaried instead of hourly. Furthermore, some nonhourly workers above the current salary threshold fail the duties test, and are therefore nonexempt, which is further evidence that employers already employ nonexempt workers who are paid on a salary basis.

(b) Previous Salary Level Updates Did Not Indicate a Significant Number of Workers Being Converted to Hourly

The "ratcheting" concerns raised in the comments are very similar to comments on this alleged effect that were received during the 2016 rulemaking. In that rule the Department analyzed employer responses to the 2004 rule and to a series of revisions to California's salary level test for exemption under state law in order to better estimate whether workers who become nonexempt are more likely to be paid on an hourly basis.[424] These analyses allow the identification of potential regulatory impact while controlling for time trends and a broad range of other relevant factors (education, occupation, industry, geographic location, etc.).

In the 2016 rule the Department analyzed the effect of the Federal 2004 salary level increase from $250 per week (short test salary level) to $455 (standard salary level) on the share of full-time, white-collar workers paid hourly. The analysis considered two types of differences: pre- versus post-rulemaking; and workers exempt before, but not after the rule compared to workers exempt both before and after the rule. As noted in the discussion of this analysis in the 2016 rule, if the salary level increase in the 2004 rule led employers to convert significant numbers of workers to hourly status (as commenters assert will result from the current rulemaking), then the Department would have expected to see a notable increase in the share of

[424] *See* 81 FR 32441, 32507.

workers earning just below the new threshold at the time ($455) who are paid hourly relative to the share of workers earning just above the new threshold who are paid hourly. Instead, the Department found that between the first quarter of 2004 and the first quarter of 2005, the share of full-time white-collar workers who are paid hourly decreased marginally in the group of potentially affected workers (those earning $250 to $455), whereas in the group earning above the salary level (those earning more than $455 but less than $600) it increased by 2.6 percentage points. These results do not suggest that the 2004 salary level increase caused an increase in the share of workers paid hourly below the new threshold, and thus provide no evidence that salary level increases due to triennial updates will result in employers converting significant numbers of affected EAP workers to hourly pay status.

The Department did not replicate this analysis for the salary level increase in the 2019 final rule, because it would require comparing a quarter in 2019 before the effective date of the rule with a quarter in 2020 after the effective date. The economic effects of the COVID-19 pandemic would make it impossible to isolate the impact of the 2019 rule.

In the 2016 rule the Department also analyzed the effect of changes to California statutes that set exempt salary levels at a level equal to twice the state minimum wage for 40 hours worked per week. The analysis considered two types of differences: pre- versus post-rulemaking; workers exempt before, but not after the rule compared to workers exempt both before and after the rule; and California workers versus workers in other states where the salary level was not increased. The analysis of two updates found that the share of full-time white-collar workers in California being paid hourly decreased from 73.4 percent to 73.1 percent compared to an increase of 66.2 percent to 67.5 percent in states where the salary level did not change after the

2007-2008 update, while there was an increase from 72.0 percent to 74.0 percent in California compared to an increase of 68.2 to 69.4 percent in other states after the 2014 update.

The Department found no evidence that changes in the salary level for exemption resulted in a statistically significant increase in the percent of full-time white-collar workers paid on an hourly basis following either the 2004 rule or the California salary level updates.

(c) The Department's Modeling of Possible "Ratcheting" Indicates Effect Would Be Negligible

In a study referenced by PPWO, Edgeworth Economics estimated the impact that an updating mechanism using the fixed percentile approach would have on the salary level. They found that "the DOL's automatic update mechanism would increase the salary threshold by approximately 9.1% to the current 40th percentile [which Edgeworth Economics estimated was equivalent to the 35th percentile of the resulting distribution after workers are reclassified] within three years even if there was not ANY wage growth." Their estimate was based on the assumption that all affected workers in the South Census Region who earn between $684 and $1,059 per week and who are expected to pass the duties test, which they estimate to be 1.4 million, would be reclassified to hourly employees, thus falling out of the distribution of workers that are part of the 35th percentile in the Census Region. However, as discussed above, the Department has found no evidence that previous changes in the salary level for exemption have resulted in a statistically significant increase in the percent of full-time white-collar workers paid on an hourly basis.

NRF submitted a 2023 study by Oxford Economics that also considered how converting salaried workers to hourly status could influence future triennial updates. The Oxford study states that DOL's updating methodology "suffers from the same technical flaw as its NPRM analysis of the effects of the proposed regulation suffers from: the failure to model newly nonexempt affected workers losing salaried status." The study presents a visual analysis showing a share of workers who earn below the overtime threshold losing their salaried status, and a higher threshold for 2027 after this rule than in the scenario where there is no change to the standard salary level. Like Edgeworth Economics, Oxford Economics erroneously assumes that a large share of all affected workers will lose their salaried status. As discussed previously, the Department has found no evidence that previous changes in the salary level for exemption have resulted in a statistically significant increase in the percent of full-time white-collar workers paid on an hourly basis.

In 2016, the Department conducted a similar analysis, using what the Department believes are more realistic assumptions, and found a significantly smaller potential impact. The Department considered which affected workers are most likely to be converted from salaried to hourly pay as a result of that rulemaking. Type 4 workers, those whose salaries are increased to the new standard salary level, remain exempt and their method of pay will not change. Type 3 workers, who regularly work overtime and become nonexempt, and Type 2 workers, those who occasionally work overtime and become nonexempt, are the most likely to have their pay status changed. Type 1 workers (who, at the time, made up more than 60 percent of the affected workers) were assumed to not work overtime, and employers thus have little incentive to convert them to hourly pay. For this analysis, the Department assumed all Type 2 and Type 3 workers were converted to hourly status to generate a realistic upper bound of the magnitude of any possible ratcheting effect. The Department estimated that in 2026, after three updates over 10 years, the salary level as set in the final rule (based on weekly earnings of full-time salaried workers in the South) could be approximately 2.5 percent higher than expected due to this effect. This figure is significantly smaller than the estimates provided by the commenters. Furthermore, the Department believes its estimate is an overestimate because it assumed employers convert all Type 2 and Type 3 workers to hourly status, which, for the reasons discussed above and in section V.A.3.iii of the preamble, the Department believes is a highly unlikely outcome. The Department did not replicate this analysis for the salary level increase in the 2019 final rule, because the economic effects of the COVID-19 pandemic make it difficult to compare periods before and after the effective date of the 2019 final rule and isolate the effect of the rule.

10. Projections

The Department estimated that in Year 1, 4.3 million EAP workers will be affected, with about 292,900 of these attributable to the revised HCE compensation level (Table 26). In Year 10, the number of affected EAP workers was estimated to equal 6.0 million with 1.0 million attributable to the updated HCE compensation level. Average annualized costs are $802.9 million and transfers are $1.5 billion using a 7 percent real discount rate. These projections involved several steps.

1. Use past growth in the earnings distribution to estimate future salary and compensation levels (*see* section VII.C.9).
2. Predict workers' earnings, absent a change in the salary levels.
3. Compare workers' predicted earnings to the predicted salary and compensation levels to estimate affected workers.
4. Project future employment levels.

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5. Estimate employer adjustments to hours and pay.

6. Calculate costs and transfers.

Figure 7: 10-Year Projected Number of Affected Workers

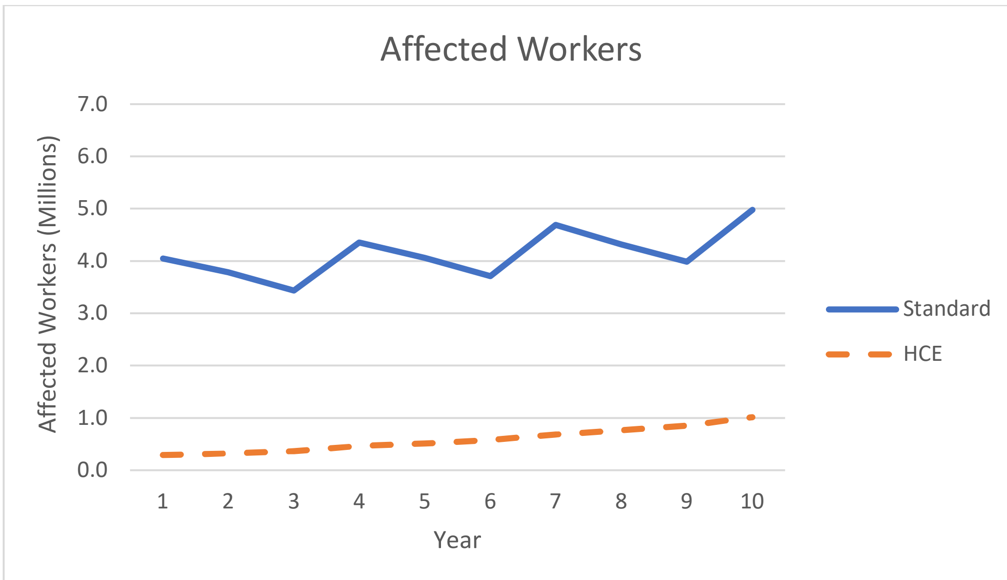

Figure 8: 10-Year Projected Costs and Transfers (Millions $2023)

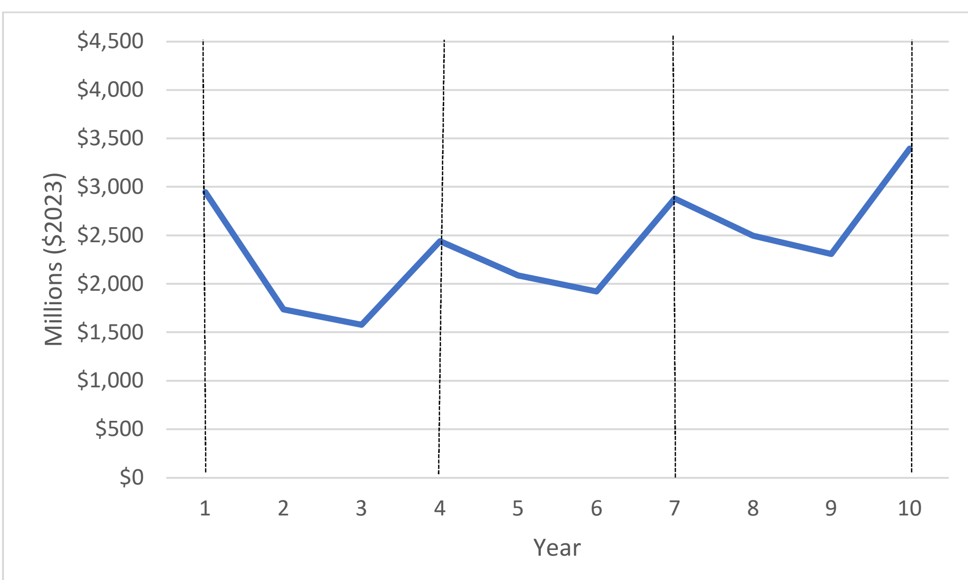

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Table 26: Projected Costs and Transfers, Standard Salary and HCE Compensation Levels

Year	Affected EAP Workers (Millions)	Costs (Millions $2023)				Transfers (Millions $2023)		
		Regulatory Familiar-ization [a]	Adjust-ment [a]	Manag-erial	Total	Due to MW	Due to OT	Total
Year 1	4.3	$451.6	$299.1	$685.5	$1,436.2	$87.5	$1,421.7	$1,509.2
Year 2	4.1	$0.0	$9.4	$632.1	$641.5	$46.5	$1,047.8	$1,094.3
Year 3	3.8	$0.0	$8.9	$571.9	$580.8	$45.0	$953.7	$998.7
Year 4	4.8	$73.1	$14.2	$702.2	$789.5	$42.2	$1,609.4	$1,651.6
Year 5	4.6	$0.0	$8.7	$647.8	$656.5	$42.2	$1,386.5	$1,428.7
Year 6	4.3	$0.0	$9.5	$624.7	$634.2	$39.9	$1,246.0	$1,285.9
Year 7	5.4	$71.0	$18.6	$747.7	$837.2	$36.1	$2,005.6	$2,041.7
Year 8	5.1	$0.0	$9.6	$697.8	$707.4	$31.3	$1,757.3	$1,788.6
Year 9	4.8	$0.0	$9.0	$682.3	$691.3	$26.4	$1,590.1	$1,616.6
Year 10	6.0	$68.9	$20.9	$816.3	$906.1	$22.6	$2,467.5	$2,490.1
Annualized (3% real discount rate)	--	$71.8	$44.6	$677.6	$794.0	$43.2	$1,522.0	$1,565.2
Annualized (7% real discount rate)	--	$79.3	$50.0	$673.6	$802.9	$44.8	$1,489.3	$1,534.1

[a] Regulatory familiarization costs occur in years when the salary and compensation levels are updated. Adjustment costs occur in all years when there are newly affected workers.

The Department calculated workers' earnings in future years by applying the historical wage growth rate in the workers' industry-occupation to current earnings. The wage growth rate was calculated as the geometric growth rate in median wages using CPS MORG data for occupation-industry categories from 2011-2023.[425] The geometric growth rate is the constant annual growth rate that when compounded (applied to the first year's wage, then to the resulting second year's wage, etc.) yields the last historical year's wage. This rate only depends on the wage values in the first and last year.[426]

The geometric wage growth rates per industry-occupation combination were also calculated from the BLS' Occupational Employment and Wage Statistics (OEWS) survey for 2012 to 2022. In occupation-industry categories where the CPS MORG data had an insufficient number of observations to reliably calculate median wages, the Department used the growth rate in median wages calculated from the OEWS data.[427] Any remaining occupation-industry

[425] To maximize the number of observations used in calculating the median wage for each occupation-industry category, 3 years of data were pooled for each of the endpoint years. Specifically, data from 2011, 2012, and 2013 (converted to 2012 dollars) were used to calculate the 2012 median wage and data from 2021, 2022, and 2023 (converted to 2022 dollars) were used to calculate the 2022 median wage.

[426] The geometric growth rate may be a flawed measure if either or both of the endpoint years were atypical; however, in this instance these values seem typical. An alternative method would be to use the time series of median wage data to estimate the linear trend in the values and continue this to project future median wages. This method may be preferred if either or both of the endpoint years are outliers, since the trend will be less influenced by them. However, the linear trend may be flawed if there are outliers in the interim years. The Department chose to use the geometric mean because individual year fluctuations are difficult to predict and applying the geometric growth rate to each year provides a better estimate of the long-term growth in wages.

[427] To lessen small sample bias in the estimation of the median growth rate, this rate was only calculated using CPS MORG data when these data contained at least 10 observations in each time period.

combinations without sufficient data in either data source were assigned the median of the growth rates in median wages from the CPS MORG data.

The Department compared workers' counter-factual earnings (*i.e.*, absent the rulemaking) to the predicted salary levels. If the counter-factual earnings are below the relevant salary level (*i.e.*, standard or HCE) then the worker is considered affected. In other words, in each year affected EAP workers were identified as those who would be exempt absent the rule change (*e.g.*, would earn at least $684 if exempt under standard salary level) but have projected earnings in the future year that are less than the relevant salary level. The projected number of affected workers also includes workers who were not EAP exempt in the base year but will become exempt in the absence of this rule in Years 2 through 10. For example, a worker who passes the standard duties test may earn less than $684 in Year 1 but between $684 and the new salary level in subsequent years; such a worker will be counted as an affected worker in those subsequent years. Additionally, the number of affected workers is not limited to newly affected workers. Workers who are affected in a given year may remain affected in subsequent years (*e.g.*, because they earn between $684 and $1,128 in years 1, 2, and 3), and continue to be counted as affected.

The projected number of affected workers also accounts for anticipated employment growth. Employment growth was estimated as the geometric annual growth rate based on the 10-year employment projection from BLS' National Employment Matrix (NEM) for 2022 to 2032 within an occupation-industry category.[428, 429] The Department applied these growth rates to the

[428] Bureau of Labor Statistics, Employment Projections Program. 2022-32 National Employment Matrix. https://www.bls.gov/emp/ind-occ-matrix/matrix.xlsx.

[429] An alternative method is to spread the total change in the level of employment over the ten years evenly (constant change in the number employed). The Department believes that on

sample weights of the workers to estimate increased employment levels over time. This is because the Department cannot introduce new observations to the CPS MORG data to represent the newly employed.

For workers newly affected in Year 2 through Year 10, employers' wage and hour adjustments due to the rulemaking are generally estimated as described in section VII.C.4. The only difference is the hours adjustment now uses a long-run elasticity of labor demand of -0.4.[430] Employer adjustments are made in the first year the worker is affected and then applied to all future years in which the worker continues to be affected (unless the worker switches to a Type 4 worker). Workers' earnings in predicted years are earnings post employer adjustments, with overtime pay, and with ongoing wage growth based on historical growth rates (as described above).

The Department quantified three types of direct employer costs in the 10-year projections: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Section VII.C.3 provides details on the methodology for estimating these costs. This section only discusses the aspects specific to projections. Projected costs and transfers were deflated to 2023 dollars using the Congressional Budget Office's projections for the CPI-U.[431]

Regulatory familiarization costs occur in years when the salary and compensation levels are updated. Thus, in addition to Year 1, some regulatory familiarization costs are expected to

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average employment is more likely to grow at a constant percentage rate rather than by a constant level (a decreasing percentage rate).

[430] Based on the Department's analysis of the following paper:
Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[431] Congressional Budget Office. 2023. The Budget and Economic Outlook: 2023 To 2033. *See* https://www.cbo.gov/system/files/2023-02/58848-Outlook.pdf.

occur in Year 4, Year 7, and Year 10. The Department assumed 10 minutes per establishment for time to access and read the published notice in the *Federal Register* with the updated standard salary level and HCE compensation level. This average time estimate is low because the majority of establishments will not have newly affected workers, and while some firms may spend more than 10 minutes to read the new rule, many firms will spend no time. The time estimate has been increased from 5 minutes in the 2016 rulemaking. In each of these 3 years regulatory familiarization costs are between $68.9 and $73.1 million. Although start-up firms must become familiar with the FLSA, the difference between the time necessary for familiarization with the current part 541 exemptions and those exemptions as modified by this rulemaking is essentially zero. Therefore, projected regulatory familiarization costs for new entrants over the next 9 years are zero (although these new entrants will incur regulatory familiarization costs in years when the salary and compensation levels are updated).

Adjustment costs are a function of the number of newly affected EAP workers and would occur in any year in which workers are newly affected. Adjustment costs would be largest in Year 1, of moderate size in update years, and smaller in other years. Management costs would recur each year for all affected EAP workers whose hours are adjusted. Therefore, managerial costs increase in update years and then modestly decrease between updates since earnings growth will cause some workers to no longer be affected in those years.

The Department projected transfers from employers to employees due to the minimum wage provision and the overtime pay provision. Transfers to workers from employers due to the minimum wage provision would decline from $87.5 million in Year 1 to $22.6 million in Year 10 as increased earnings over time move workers' regular rates of pay above the minimum wage.[432] Transfers due to overtime pay should grow slightly over time because the number of affected workers would increase, although transfers fall in years between updates. Transfers to workers from employers due to the overtime pay provision would increase from $1.4 billion in Year 1 to $2.5 billion in Year 10.

The Department compared projected impacts with and without updating (Table 27). Projections without updating are shown so impacts of the initial increase and subsequent increases can be disaggregated. With triennial updating, the number of affected EAP workers would increase from 4.3 million to 6.0 million over 10 years. Conversely, in the absence of updating, the number of affected EAP workers is projected to decline from 4.3 million in Year 1 to 2.6 million in Year 10. As shown in Figure 9, the number of affected workers decreases from year to year between updates as the real value of the salary and compensation levels decrease, and then increases in update years.

Regarding costs, regulatory familiarization costs are lower without updating because, in the absence of updating, employers would not need to familiarize themselves with updated salary and compensation levels every 3 years. Adjustment costs and managerial costs are a function of the number of affected EAP workers and so will be higher with updating. Average annualized direct costs will be $802.9 million with updating and $615.6 million without updating. Transfers are also a function of the number of affected workers and hence are lower without updating.

[432] State minimum wages above the Federal level as of January 1, 2023 were incorporated and used for projected years. Increases in minimum wages were not projected. If state or Federal minimum wages increase over the next 10 years, then estimated projected minimum wage transfers would be underestimated.

Disclaimer: This final rule has been approved by the Office of Management and Budget's Office of Information and Regulatory Affairs and has been submitted to the Office of the Federal Register (OFR) for publication. It is currently pending placement on public inspection at the OFR and publication in the *Federal Register*. This version of the final rule may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the *Federal Register* is the official version.

Average annualized transfers with a 7 percent real discount rate will be $1.5 billion with updating and $990 million without updating. Table 27 shows aggregated costs and transfers over the 10-year horizon.

Figure 9: 10-Year Projected Number of Affected Workers, with and without Updating

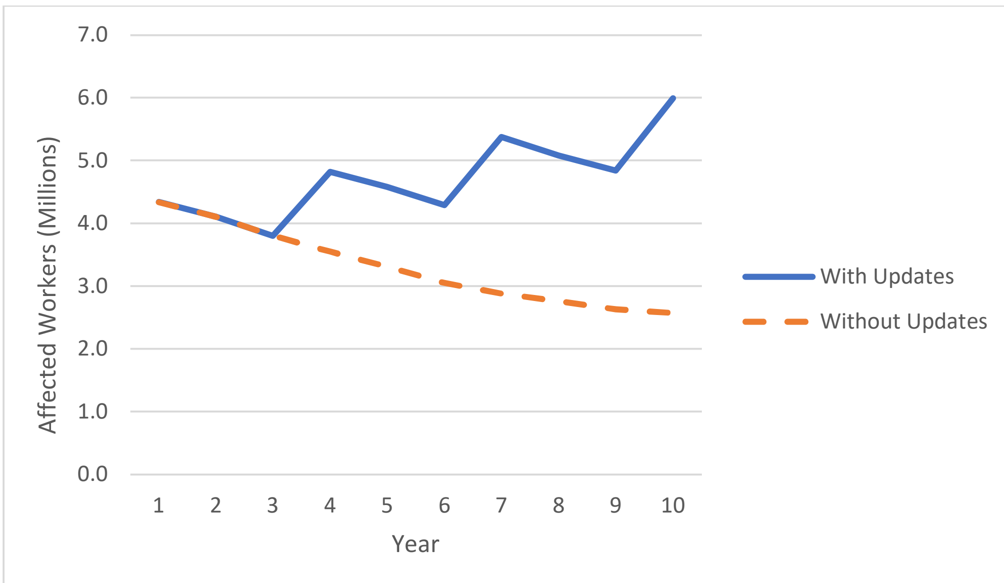

Table 27: Comparison of Projected Costs and Transfers with and without Updating

Year	Affected EAP Workers (Millions)		Costs (Millions $2023)		Transfers (Millions $2023)	
	With Updates	Without Updates	With Updates	Without Updates	With Updates	Without Updates
Year 1	4.3	4.3	$1,436.2	$1,436.2	$1,509.2	$1,509.2
Year 2	4.1	4.1	$641.5	$641.5	$1,094.3	$1,094.3
Year 3	3.8	3.8	$580.8	$580.8	$998.7	$998.7
Year 4	4.8	3.5	$789.5	$526.2	$1,651.6	$937.2
Year 5	4.6	3.3	$656.5	$483.6	$1,428.7	$885.9

Year 6	4.3	3.1	$634.2	$448.6	$1,285.9	$863.8
Year 7	5.4	2.9	$837.2	$420.8	$2,041.7	$847.6
Year 8	5.1	2.8	$707.4	$404.4	$1,788.6	$801.4
Year 9	4.8	2.6	$691.3	$388.8	$1,616.6	$809.9
Year 10	6.0	2.6	$906.1	$380.1	$2,490.1	$809.7
Annualized (3% real discount rate)	--	--	$794.0	$590.0	$1,565.2	$970.2
Annualized (7% real discount rate)	--	--	$802.9	$615.6	$1,534.1	$989.5

VIII. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The Department has determined that this rulemaking is economically significant. This section (1) provides an overview of the objectives of this rule; (2) estimates the number of affected small entities and employees; (3) discusses reporting, recordkeeping, and other compliance requirements; (4) presents the steps the Department took to minimize the significant economic impact on small entities; and (5) declares that it is unaware of any relevant Federal rules that may duplicate, overlap, or conflict with this rule.

A. Objectives of, and need for, the Final Rule

The FLSA requires covered employers to (1) pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment. The FLSA provides exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees, as those terms are "defined and delimited" by the Department.[433] The Department's regulations implementing this white-collar exemption are codified at 29 CFR part 541.

To qualify for the EAP exemption under the Department's regulations, the employee generally must meet three criteria: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test). In 2004, the Department revised its regulations to include a highly compensated employee test with a higher salary threshold and a minimal duties test.[434] The Department has periodically updated the regulations governing the white-collar exemptions since the FLSA's enactment in 1938. Most recently, the 2019 rule updated the standard salary level test to $684 per week and the HCE compensation level to $107,432 annually.

The goal of this rulemaking is to set effective earnings thresholds to help define and delimit the FLSA's EAP exemption. To this end, the Department is finalizing its proposed change

[433] 29 U.S.C. 213(a)(1).
[434] § 541.601.

to the salary level. Specifically, the Department is adjusting the salary level by setting it equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), based on the most recent year (2023) of Current Population Survey (CPS) data at the time of drafting. Using BLS 2023 data on percentiles of usual weekly earnings of nonhourly full-time workers, the standard salary level will be set at $1,128 per week. Additionally, to maintain the effectiveness of this test, the Department is finalizing an updating mechanism that will update the earnings thresholds to reflect current wage data on July 1, 2024 and every 3 years thereafter.

The Department's new salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity in a one-test system. As explained in greater detail in sections III and V.B, setting the standard salary level at or below the long test salary level, as the 2004 and 2019 rules did, results in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work, in effect significantly broadening the exemption compared to the two-test system. Setting the salary level at the low end of the historic range of short test salary levels, as the 2016 rule did, would have restored overtime protections to those employees who perform substantial amounts of nonexempt work and earned between the long test salary level and the low end of the short test salary range. However, it would also have resulted in denying employers the use of the exemption for lower-salaried employees who traditionally were not entitled to overtime compensation under the long test, which raised concerns that the Department was in effect narrowing the exemption. By setting a salary level above the equivalent of the long test salary level (using current data), the final rule will restore the right to overtime pay for salaried white-collar employees who prior to the 2019 rule were always considered nonexempt if they earned below the long test (or long test-equivalent) salary level. And it will ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting it well below the equivalent of the short test salary level (using current data), the rule will allow employers to continue to use the exemption for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. The new salary level will also more reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

As the Department has previously noted, the amount paid to an employee is "a valuable and easily applied index to the 'bona fide' character of the employment for which the exemption is claimed," as well as the "principal[]" "delimiting requirement" "prevent[ing] abuse" of the exemption .[435] Additionally, the salary level test facilitates application of the exemption by saving employees and employers from having to apply the more time-consuming duties analysis to a large group of employees who will not pass it. For these reasons, the salary level test has been a key part of how the Department defines and delimits the EAP exemption since the beginning of its rulemaking on the EAP exemption.[436] At the same time, the salary test's role in defining and delimiting the scope of the EAP exemption must allow for appropriate examination of employee

[435] Stein Report at 19, 24; *see also* 81 FR 32422.
[436] *See* 84 FR 51237.

duties.[437] Under the final rule, duties will continue to determine the exemption status for most salaried white-collar employees.

The Department is also adjusting the HCE total annual compensation requirement to the annualized weekly earnings for the 85th percentile of full-time salaried workers nationally ($151,164 using 2023 data). Though not as high a percentile as the HCE threshold initially adopted in 2004, which covered 93.7 percent of all full-time salaried workers,[438] the Department's new HCE threshold will ensure it continues to serve its intended function, because the HCE total annual compensation level will be high enough to exclude all but those employees at the very top of the economic ladder.

In its three most recent part 541 rulemakings, the Department has expressed its commitment to keeping the earnings thresholds up to date to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees. In contrast, routine updates to the part 541 earnings thresholds to reflect wage growth will bring certainty and stability to employers and employees alike. Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for regularly updating the salary levels, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status. Accordingly, the

[437] *See id.* at 51238.
[438] *See* 69 FR 22169 (Table 3).

Department is including in this rule a mechanism for updating the salary and compensation levels, to reflect current wage data, on July 1, 2024 and every 3 years thereafter. As explained in greater detail in section V.A, employees and employers alike will benefit from the certainty and stability of regularly scheduled updates.

B. Response to Comment Filed by the Chief Counsel for Advocacy of the Small Business Administration

SBA Advocacy expressed similar concerns as those expressed by other small business commenters, based upon its meetings, roundtables, and other discussions regarding the NPRM. SBA Advocacy stated that it was concerned that the IRFA underestimated the compliance costs of the rule, the proposed rule would add to the current difficult business environment, the proposed rule would have significant impacts on small nonprofits, the IRFA did not account for non-financial costs to small entities and employees, and the IRFA did not consider less burdensome alternatives. SBA Advocacy recommended that the Department issue a supplemental RFA to reanalyze small entity impacts, adopt a lower standard salary level, update the standard salary level every four years through notice and comment rulemaking, publish a small entity compliance guide, provide more time for compliance, and add provisions to help small nonprofits comply. SBA Advocacy's comments and the Department's response to those comments are discussed in detail below.

SBA Advocacy reported that participants at its roundtables estimated first year costs would be much higher than the estimates in the IRFA, from $20,000 to over $200,000 in compliance costs per small entity. SBA Advocacy asserted that small businesses may have to hire outside staff to interpret and implement the rule and face high administrative and operational costs to schedule and track employee hours to minimize overtime costs. SBA Advocacy also stated that participants at their roundtables reported much higher payroll costs than the estimates provided by the Department in the IRFA. Advocacy further stated that the IRFA failed to estimate compliance costs by small entity size and revenue by presenting average impacts by industry.

The assumptions small businesses used to estimate first-year compliance costs ranging from $20,000 to $200,000 per entity were not described. However, the Department clearly outlined its methodology and assumptions used to estimate regulatory familiarization, adjustment, and management costs that it expects businesses, including small businesses, might incur. The Department disagrees that it underestimated small entity costs in the IRFA. First, this rulemaking is narrow in scope as it only makes changes relating to earnings thresholds in the part 541 regulations. The Department published final rules changing the salary thresholds in 2016 and 2019. The Department therefore expects that most businesses will not require significant time to become familiar with these regulations, or that they will require significant time from outside consultants. Furthermore, the Department expects that small entities will rely upon compliance assistance materials provided by the Department, including the small entity compliance guide that will be published, or industry associations to become familiar with the final rule.

Second, the Department estimates businesses will require an average of 75 minutes per employee to choose how to make adjustments for affected employees. The Department expects that employers will most likely need to spend little to no time making adjustments for many affected workers, such as the almost 70 percent of the employees who do not work overtime (Type 1 employees) and those whose salaries are well below the new standard salary level or only occasionally work overtime. If, for example, decisions can be quickly made for half of a business' affected employees, then that leaves two hours or more per employee for employers to consider how to respond with regard to employees requiring more consideration.

Third, the Department believes that most, if not all, entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. The Department believes that applying those same policies and systems to the workers whose exemption status changes will, on average, not require more than 10 minutes per week per worker who works overtime in managerial time cost, as employers will rely on policies such as a policy against working overtime without express approval or a standard weekly schedule of assigned hours. The Department notes that nearly 70 percent of affected employees do not work overtime, and another 17 percent who do work overtime average about an hour of overtime per week; less than 15 percent of currently exempt employees average 10 or more hours of overtime per week. The Department therefore disagrees with SBA Advocacy that small entities will "face vast administrative and operational costs to schedule and track employee hours to minimize overtime costs." Consistent with the approach taken in calculating managerial costs in the 2019 rule,[439] the Department believes that an average of 10 additional minutes per week managing the hours of each newly exempt worker who works overtime is appropriate.

SBA Advocacy bases its claim that the Department underestimated payroll costs on reports from "[r]oundtable participants" of "much higher payroll costs," pointing to four businesses—"an Arkansas restaurant with four locations" and three "small amusement businesses"—which claimed they would need to increase manager salaries from $57,000 to $250,000 to comply with the rule. SBA Advocacy also provided hypothetical scenarios of

[439] *See* 84 FR 51267.

potential salary increases that restaurant employers with currently exempt employees would need to incur to comply with the proposed rule based on various assumptions. As discussed in section VII.C.4.iii.c, these anecdotal reports and hypothetical examples do not have any information on the actual amount of overtime work being performed by employees who could become newly nonexempt under the new salary level. The Department expects that businesses that would be faced with large increases in payroll costs if they were to increase salaries to the new threshold would instead find other responses more economically feasible, such as limiting the number of overtime hours worked by nonexempt workers.

Moreover, as explained above, the majority of affected workers who work no overtime or minimal overtime will likely receive little additional pay as a result of the rule. While some employers might have to pay the overtime premium, when combined with the 85 percent of affected employees who will receive little or no overtime pay premium because they work little or no overtime, the average pay raise over all affected employees and their employers will be much smaller than the examples presented in SBA Advocacy's comment.

SBA Advocacy stated that small firms have expressed the sentiment that they would have to fire and not promote employees and limit hours worked as a result of the rule, after recent inflation, supply chain disruptions, shutdowns and tight labor markets that followed the COVID-19 pandemic. The Department acknowledges that the economic climate has been difficult to navigate since the start of 2020. However, most indications are that the economy has been returning to long run growth patterns with subsiding inflation. For example, a report by Van

Nostrand and Sinclair (2023)[440] from the U.S. Department of the Treasury indicates that the United States has seen a strong GDP recovery and was on track during 2023 to recover to levels predicted before the pandemic. Similarly, reflecting improvements in inflation and personal incomes, the Survey of Consumers from the University of Michigan reported that consumer sentiment in January 2024 grew by 13 percent and reached its highest level since July 2021.[441] To the extent that labor markets remain tight, that might be a reflection of significant, potentially long-run changes in factors such as long run labor force participation rates.[442] Regardless, workers affected by this rule compose a relatively small part of the overall labor market and the increase in wages should be relatively small (*see e.g.*, estimated transfers per worker, Table 23). While small businesses may be more affected by labor market turmoil, the overall size of the impact of this rule on the economy would indicate that it is unlikely that the rule will have a significant impact on this market turmoil.

SBA Advocacy also stated that it believes that the Department underestimated the impact of the proposed rule on small nonprofit organizations, citing examples of small nonprofits that estimate costs above the one to three percent of revenue threshold, a measure for determining the economic impact on small entities from SBA Advocacy's RFA compliance guide. The Department disagrees that it underestimated the impact of this rule on small nonprofits. First,

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[440] *Van Nostrand and Sinclair* (2023). The U.S. Economy in Global Context. U.S. Department of the Treasury. https://home.treasury.gov/news/featured-stories/the-us-economy-in-global-context
[441] University of Michigan (2024). Surveys of Consumers. http://www.sca.isr.umich.edu/
[442] Bognar et al. (2023) What Does Everything Besides the Unemployment Rate Tell Us About Labor Market Tightness?. Federal Reserve Bank of Chicago. https://www.chicagofed.org/publications/chicago-fed-letter/2023/491.
Hornstein and Kudlyak (2022). The Pandemic's Impact on Unemployment and Labor Force Participation Trends. Federal Reserve of Richmond Economic https://www.richmondfed.org/publications/research/economic_brief/2022/eb_22-12.

many nonprofits are non-covered enterprises because when determining enterprise coverage, only revenue derived from business operations, not charitable activities, is included. However, as discussed in section VII.B.3, the Department nonetheless included workers employed by enterprises that do not meet the enterprise coverage requirements in its estimate of workers subject to the FLSA, since there is no data set that would adequately inform an estimate of the size of this worker population in order to exclude them from these estimates. [443] Second, for the reasons stated above, the Department believes that expected costs and payroll impacts of the rule cited by SBA Advocacy and other commenters are overestimates, and that the Department's estimates are more accurate reflections of costs and impacts. The Department finds that even if all employees at a small entity, whether for-profit or nonprofit, are exempt—an unlikely scenario—then cost and increased payroll combined comprise about one percent of payroll per affected small entity, and therefore an even smaller percentage of revenues. *See* Table 32. SBA Advocacy cited concerns about the rule's effect on seasonal businesses raised by a representative from America Outdoors Association, which asserted that many affected employees in seasonal recreational businesses work nontraditional work schedules that would make it difficult to reclassify them as hourly workers, as well as a concern raised by a representative of the Independent Community Bankers Association of America that the rule could cause its members to reduce services in "rural or less profitable areas." The Department reiterates that employers do not need to reclassify nonexempt workers as hourly employees; they merely need to pay an

[443] Although not excluding such entities and associated workers only affects a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for nonprofits, because revenue from charitable activities is not included when determining enterprise coverage. *See* section VII.B.3.

overtime premium for hours worked over 40 in a workweek. While there will be affected workers in the finance sector, the Department believes that costs and transfers for small entities in the finance sector will be manageable as a share of payroll and of total revenue.[444]

SBA Advocacy further stated that the IRFA "does not consider the non-financial consequences to reclassify workers, such as the effect on worker flexibility, worker morale, and loss of benefits and career advancement." The Department addresses these and other possible impacts that cannot be quantified in sections V.B.4.v and VII.C.3.v. In addition, the Department believes that while individual experiences vary, the rule will benefit employees in a variety of ways (*e.g.*, through increased earnings and an increase in personal time for some affected workers).

Exempt workers may enjoy more scheduling flexibility because their hours are less likely to be monitored than nonexempt workers. If so, the final rule could impose costs on newly nonexempt, overtime-eligible workers by, for example, limiting their ability to adjust their schedules to meet personal and family obligations. However, employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes. For these reasons, and because there is little data or literature on these costs, the Department did not quantify potential costs regarding scheduling flexibility. Further, a study by Lonnie Golden[445] using data from the General Social Survey (GSS) found that "[i]n general, salaried workers at the lower (less than $50,000) income levels don't have noticeably greater

[444] *See* Table 32.
[445] Golden, L. (2014). Flexibility and Overtime Among Hourly and Salaried Workers. Economic Policy Institute. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597174.

levels of work flexibility that they would 'lose' if they became more like their hourly counterparts."

Some of the workers who become nonexempt as a result of the final rule and whose pay is changed by their employer from salaried to hourly status may have preferred to remain salaried. As noted above in section VII.C.3.v, research has shown that salaried workers are more likely than hourly workers to receive benefits such as paid vacation time and health insurance,[446] and are more satisfied with their benefits.[447] Additionally, when employer demand for labor decreases, hourly workers tend to see their hours cut before salaried workers, making earnings for hourly workers less predictable.[448] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

If workers are reclassified as hourly, and hourly workers have fewer benefits than salaried workers, reclassification could reduce workers' benefits. But the Department notes that these newly nonexempt workers may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent premium on that base wage for any overtime hours each week. Similarly,

[446] Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities. Washington, D.C.: Urban Institute Press.
[447] Balkin, D. B., & Griffeth, R. W. (1993). The Determinants of Employee Benefits Satisfaction. Journal of Business and Psychology, 7(3), 323-339.
[448] Lambert, S. J., & Henly, J. R. (2009). Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy. The Mobility Agenda. Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities. Washington, D.C.: Urban Institute Press.

employers may continue to provide these workers with the same level of benefits as previously, whether paid on an hourly or salary basis. While reducing benefits may be one way for employers to offset payroll increases associated with this rule, as shown below, the Department estimates that costs and payroll increases for small, affected firms are less than 0.9 percent of payroll and less than 0.2 percent of estimated revenues. Therefore, the Department does anticipate that it will be necessarily for a significant number of employers to reduce employee benefits.

Finally, it is unclear why career advancement will be inhibited. As noted above, *see* section VII.C.3.v., nothing in this rule requires employers to limit advancement opportunities for newly nonexempt workers. The Department notes that if an employer believes that career advancement opportunities such as training are sufficiently important, it can ensure employees attend the trainings during their 40-hour workweek or pay the overtime premium where training attendance causes the employee to work over 40 hours in a workweek.

SBA Advocacy stated that the IRFA was incomplete "because it d[id] not analyze any regulatory alternatives that would minimize the impact of the rule for small businesses, such as lower salary levels." However, the Department considered several regulatory alternatives in the NPRM, describing both the alternatives it considered, which included lower (and higher) thresholds for the standard salary level and HCE total compensation requirement, and why it chose the earnings thresholds it proposed.[449] And it has considered and analyzed multiple

[449] *See* 88 FR 62217.

regulatory alternatives, including lower (and higher) thresholds for the standard salary and HCE total compensation requirement, in this final rule as well.[450]

SBA Advocacy recommended that the Department issue a Supplemental Regulatory Flexibility Analysis to be published in the *Federal Register* for public comment addressing compliance costs in and after the first year, compliance costs by different sized small entities, the current business environment, impacts to small nonprofits, the non-financial consequences of the rule, and the impacts of adopting alternative salary thresholds on different sizes of small businesses. The Department disagrees with SBA Advocacy that this rulemaking should be delayed for this reason. The Department provided a fully robust and transparent analysis of estimated impacts on small entities in its IRFA, relying on largely the same methods and assumptions the Department employed in drafting the IFRA in its 2019 rulemaking.

As the Department stated in the IRFA, it is difficult to directly evaluate compliance cost impacts by entity size due to lack of data concerning the distribution of affected workers by entity size. There are fewer affected workers than there are small entities. Therefore, many small entities will employ zero affected workers; small entities that do employ affected workers may employ one affected worker, or have nearly all workers affected, and anywhere in between. The number of small entities that employ affected workers will be inversely related to the number of affected employees per entity; if small entities only employ one affected worker, more entities will be affected, and vice versa.

Therefore, the Department evaluated a range of potential impacts from lowest to highest depending on whether one or all employees are affected. Furthermore, the Department evaluated

[450] *See* section VII.C.8.

the impact of regulatory compliance costs plus increased wages as a percent of payroll. Payroll is largely proportionate to the number of employees at the firm; if one entity has 10 times as many employees as another, its payroll is likely to be 10 times larger. Similarly, if an entity has 10 times more affected employees than another firm, then it will likely incur 10 times more compliance cost and wage impacts. Finally, firms hire more workers to increase production and sales, so entity revenues will be a multiple of payroll, although that multiple might vary by industry. If compliance costs and increased wages comprise 2 percent of payroll, those costs will comprise less than 2 percent of revenues. Thus, regardless of the size of the small entity, regulatory impacts should fall within the range calculated by the Department.

The Department shows in Table 34 that with the exception of the accommodation and the food services and drinking places industries, if all employees at an entity are affected by the rule, compliance cost and increased wages comprise less than 1.5 percent of payroll and substantially less than 1 percent of revenues per affected small entity. Although compliance costs and increased wages might comprise 3.55 percent of payroll in the food services and drinking places industry, that is about 1.10 percent of revenues. Performing this analysis for different sized firms should not appreciably change these results.

SBA Advocacy also recommended adopting a lower standard salary level that considers the significant small business impacts of the rule. The comment proposed two alternatives: retain the current standard salary threshold, or "adjust[] the standard salary threshold by a particular industry sector that will experience the greatest economic costs," noting that the 2019 standard salary level was based on earnings in both the lowest-wage Census region and the retail industry.

The comment also stated that small entities at SBA Advocacy's roundtable recommended a gradual or phased increase in the standard salary threshold.

Although SBA Advocacy disagreed with the standard salary level selected by the Department, the salary level accounts for regions and industries likely to be most affected by the rule. As discussed above,[451] the Department is setting the final rule standard salary level using the lowest-wage Census Region, instead of a national level, ensuring the salary level is not driven by earnings in high- or even middle-wage regions of the country. The Department believes that using earnings data from the lowest-wage Census Region produces a salary level that accounts for differences across industries and regional labor markets. The Department thus believes that the standard salary level is appropriate for small businesses.

Consistent with the history of the part 541 regulations, the Department also declines to create a lower salary level requirement for employees employed at small entities, or to exclude such employees from the salary level test. As the Department has previously noted, while "the FLSA itself does provide special treatment for small entities under some of its exemptions . . . the FLSA's statutory exemption for white-collar employees in section 13(a)(1) contains no special provision based on size of business."[452] In the 86-year history of the part 541 regulations defining the EAP exemption, the salary level requirements have never varied according to the size or revenue of the employer.[453]

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[451] *See* sections V.B.4.iv, VII.C.2.
[452] *See* 81 FR 32526; 69 FR 22238.
[453] *See* Stein Report at 5–6 (rejecting proposals to set varying regional salary levels); *see also* 69 FR 22238 (stating that implementing differing salary levels based on business size industry-by-industry "would present the same insurmountable challenges" as adopting regional or population-based salary levels).

SBA Advocacy recommended that updates to the standard salary threshold be made once every 4 years through a proposed rule with a notice and comment process for each update, as opposed to updating the standard salary level every three years through the proposed updating mechanism. The comment conveyed skepticism regarding the lawfulness of the Department's proposed updating mechanism asserting that the FLSA requires the Department to periodically issue regulations to set the standard salary level. The comment also expressed concern that the updating provision would drive wage inflation for salaried workers because employers may raise the salaries of their newly nonexempt workers to keep them exempt or move them to hourly work to comply with the rule, thereby causing "a self-perpetuating threshold, as the salary level of the 35th percentile would grow each iteration or three years." The comment reported small businesses at Advocacy's roundtable opposed the proposed updating mechanism "because it creates steep and unpredictable changes to the EAP exemption and uncertainty for employers[,]" and asserted that small entities have highlighted the administrative burdens of reclassifying workers and tracking employee hours. The comment also mentioned the concern from small construction and professional services businesses about difficulties setting price structures on long term federal and private contracts.

The Department disagrees with SBA Advocacy's skepticism regarding the lawfulness of the updating mechanism. As explained in section V.A.3.i, the Department is adopting an updating mechanism in this rulemaking after publishing a notice of the proposed rule and providing opportunity for stakeholders to comment in accordance with the appropriate notice and comment requirements. The Department has received and considered numerous comments on the proposed updating mechanism. Future updates under the triennial updating mechanism would simply reset the thresholds by applying current data to a standard already established by regulation. Therefore, the Department disagrees with the assertion that a notice and comment rulemaking must precede each future update made through the updating mechanism even where the methodology for setting the compensation levels and the mechanism for updating those levels would remain unchanged.

The Department also disagrees with the concern that the updating mechanism would result in rapid increases to the salary level solely because of employers' actions in response to the rule. This assertion is akin to the ones made by a number of other commenters that the updating mechanism tied to a fixed percentile would lead to the salary level being ratcheted upward over time due to the resulting actions of employers. As explained in detail in sections V.A.3.iii and VII.C.9, there is nothing to substantiate this assertion. On the contrary, the Department's analyses shows that employers' actions in response to the rule will not have the asserted impact on future updates. Rather, the updating mechanism will only ensure that the salary level continues to reflect prevailing economic conditions.

The Department also finds unpersuasive the assertion that the updating mechanism will lead to unpredictable changes and uncertainty for employers. Unlike irregular updates to the earnings thresholds, which may result in drastic changes to the thresholds, regular updates on a pre-determined interval and using an established methodology will produce more predictable and incremental changes. Through the updating mechanism, the Department will reset the standard salary level and total annual compensation threshold using the most recent, publicly available, BLS data on earnings for salaried workers. Therefore, employers will be able to track where the thresholds would fall on a quarterly basis by looking at the BLS data and can estimate the changes in the thresholds even before the Department publishes the notice with the adjusted thresholds in the Federal Register. The Department believes that, compared to the irregular updates of the past, employers will be better positioned to anticipate and prepare for future updates under the updating mechanism.

SBA Advocacy also referenced that the Department must publish a small entity compliance guide for this rule. Pursuant to its obligations under section 212 of SBREFA, the Department will publish a small entity compliance guide for this rule.

SBA Advocacy recommended the Department add provisions to help small nonprofits comply with the rule, due to difficulties renegotiating government grants and contracts. As explained in section II.D, issues directly related to the public financing available for certain employers that might be affected by this final rule are beyond the Department's authority to address. However, the Department intends to issue technical assistance to help employers comply with the FLSA.

Finally, SBA Advocacy recommended an extended effective date for the rule of at least 1 year or 18 months, as small entities indicated needing "more time to understand and evaluate the rule, and possibly reclassify their workforce and budget for expenditures." As discussed in section IV, having considered commenter feedback in response to the NPRM, the Department has determined that a delayed applicability date is appropriate for the new standard salary level and the HCE total annual compensation threshold. Specifically, the new $1,128 per week standard salary level and $151,164 per year HCE total annual compensation threshold will not be applicable until approximately 8 months after publication of this final rule in the Federal Register. The Department will initially update those thresholds on July 1, 2024, by reapplying the methodologies used to set those thresholds in the 2019 rule, resulting in an initial salary level of $844 per week and an initial HCE total annual compensation threshold of $132,964 per year. Those initial thresholds will remain in effect until the higher thresholds become applicable.

C. Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis

Many of the issues raised by small businesses in the public comments received on the proposed rule are described in the preamble and RIA above, which are incorporated herein. Nevertheless, significant issues raised by representatives of small businesses are also addressed here.

Most of the comments received concerning small businesses centered on the burden that the proposed salary level would impose on small entities. Many such commenters emphasized that rule-related costs would detrimentally impact small businesses. *See, e.g.*, Amusement and Music Operators Association; Independent Women's Forum; NSBA. Some commenters specifically asserted that the Department underestimated compliance costs for small entities under the proposed rule. *See, e.g.*, ABC; The 4A's. For example, NFIB contended that the rule could cost small businesses more than large businesses because, among other reasons, small businesses often have fewer resources (such as administrative staff members, experienced human resources personnel, or regular access to legal counsel). Sixteen Members of the U.S. House of Representatives cited rule-related costs, combined with burdens facing small businesses, in urging the Department to withdraw its proposal. A number of small businesses specifically raised concerns about the impact of the proposed salary level on small entities in low-wage regions and industries. *See, e.g.*, Nebraska Bankers Association; National Restaurant Association. Other commenters, including the Job Creators Network Foundation, expressed concern that the rule would adversely impact small businesses by increasing inflation. Some small businesses, raising these and similar concerns, urged the Department to set a special salary level or create an exemption for small businesses. *See, e.g.*, Bowling Proprietors Association of America; WFCA. Opposition was not uniform, however, as some small businesses supported the proposed rule. *See, e.g.* A Few Cool Hardware Stores; BA Auto Care; Well-Paid Maids.

For the reasons previously discussed in detail, the Department believes its cost estimates are appropriate and do not provide a basis for changing the methodology used to set the salary level or for abandoning this rulemaking altogether. The Department does not agree with those commenters who asserted that the proposal would be ruinous for small businesses. As shown later in this section, Department's upper bound estimate of the impact of this rule per small establishment (which assumed all employees in a small firm are affected by the new rule) shows that costs and payroll increases for small affected firms were less than 0.9 percent of payroll and less than 0.2 percent of estimated revenues. While the affect in some industries will be somewhat larger, these figures reinforce that this rule will not be unduly burdensome for small businesses. In addition, the Department believes that most, if not all, small businesses, like larger businesses, employ a mix of exempt and overtime-protected workers. As such, to the extent cost concerns are tied in part to small businesses reclassifying some employees who become nonexempt as hourly as a result of this rule, many employers will already have policies and systems in place for scheduling workers and monitoring overtime hours worked and the corresponding overtime premium pay. Such established procedures, and experience gained through fairly recent rulemakings to increase the earnings thresholds, may help mitigate concerns related to small businesses requiring substantial assistance from outside professionals to comply with this final rule. Additionally, the Department intends to publish compliance assistance materials, including a small entity compliance guide. Industry associations also typically become familiar with rulemakings such as this one and often provide compliance assistance to association members. As to inflationary concerns, as previously discussed, the Department does not expect its rule to lead to increased inflation on a national level.

The Department recognizes that many small employers operate in low-paying regions or industries, and the Department has historically accounted for small employers when setting the salary level.[454] This final rule is no exception, as the Department is setting the salary level using the lowest-wage Census Region. The Department declines to adopt special exceptions or lower salary levels for small businesses. As stated above and as the Department has emphasized in past rules, "'the FLSA's statutory exemption for white-collar employees in section 13(a)(1) contains no special provision based on size of business.'"[455] In the 86-year history of the part 541 regulations defining the EAP exemption, the Department has never adopted special salary levels for small businesses. The Department continues to believe that implementing differing salary levels based on business size industry-by-industry would be inadvisable because, among other reasons, it "would present the same insurmountable challenges" as adopting regional or population-based salary levels.[456]

The Department received many comments in response to its proposed mechanism to update the standard salary and HCE total annual compensation requirements. As discussed in

[454] *See, e.g.*, Weiss Report at 14–15 (setting the long test salary level for executive employees "slightly lower than might be indicated by the data" in part to avoid excluding "large numbers of the executives of small establishments from the exemption").
[455] *See* 81 FR 32526 (quoting 69 FR 22238).
[456] 69 FR 22238.

section V.A.3.i, some commenters asserted that the proposed updating mechanism would violate the RFA. Commenters, including Independent Electrical Contracts, RILA, and Seyfarth Shaw, commented that the RFA required the Department "to undertake a detailed economic and cost analysis" and that Department's proposed updating mechanism would bypass these requirements. The RFA requires a regulatory flexibility analysis to accompany any agency final rule promulgated under 5 U.S.C. 553.[457] In accordance with this requirement, this section estimates the costs of future triennial updates using the fixed percentile method. The RFA only requires that such analyses accompany rulemaking, and commenters did not cite any RFA provision that would require the Department to conduct a new regulatory flexibility analysis before each scheduled update to the salary and annual compensation thresholds.

Several commenters addressed the potential effects that the proposed updating mechanism could have on small entities. Small Business Majority expressed support for the proposed updating mechanism, asserting that "[s]maller, predictable increases that are known well in advance will allow small business owners to be better prepared for any staffing or compensation changes they need to make." Business for a Fair Minimum Wage—whose members include many small business owners—commented that the proposed updating mechanism would keep the thresholds up to date and predictable for employers. In contrast, NFIB asserted that "triennial updates would result in instability in labor and administrative costs for small businesses in perpetuity" as small businesses would have to reconsider the classifications given to their employees every 3 years. The 4As similarly asserted that the updating mechanism imposes substantial ongoing expense on small agencies noting that "[l]ike

[457] *See* 5 U.S.C. 603–604.

many small businesses, small agencies often outsource legal, payroll, and some HR functions to outside professionals." ASTA expressed concern that "small business owners with limited resources to engage outside help, would have difficulty keeping abreast of salary level increases and could inadvertently find themselves out of compliance."

As previously explained, the Department believes the updating mechanism adopted by this final rule will ensure greater certainty and predictability for the regulated community. For all future triennial updates, the Department will publish a notice with the revised salary and annual compensation thresholds not fewer than 150 days before the new thresholds are set to take effect. Moreover, businesses will be able to estimate the changes in the thresholds by looking at BLS data even before the Department publishes the notice with the adjusted thresholds. The Department believes that, compared to the irregular updates of the past, employers will be better positioned to anticipate and prepare for future updates under the updating mechanism. As noted in section V.A.3.ii, the alternative to Department's updating mechanism is not a permanent fixed earnings threshold, but instead larger changes to the threshold that would occur during irregular future updates. Since the updating mechanism will change the thresholds regularly and incrementally, and based on actual earnings of salaried workers, the Department predicts that employers will be in a better position to be able to adjust to the changes resulting from triennial updates.

The Department believes that the updating mechanism will ensure that the earnings thresholds for the EAP exemption will remain effective and up to date over time. The updating mechanism should benefit employers of all sizes going forward by avoiding the uncertainty and disruptiveness of larger increases that would likely occur as a result of irregular updates.

D. Estimate of the Number of Affected Small Entities

1. Definition of Small Entity

The RFA defines a "small entity" as (1) a small not-for-profit organization, (2) a small governmental jurisdiction, or (3) a small business. The Department used the entity size standards defined by SBA and in effect as of 2019, to classify entities as small or large.[458] The most recent size standards were released in 2022 and use the 2022 NAICS. However, because the data used by the Department to estimate the number of small entities uses the 2017 NAICS, the Department used the 2019 entity size standards instead of the 2022 standards.[459]

SBA establishes standards for 6-digit NAICS industry codes, and standard size cutoffs are typically based on either the average number of employees or average annual receipts. However, some exceptions exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets and small governmental jurisdictions are defined as areas with populations of less than 50,000.[460]

2. Number of Small Entities and Employees

The primary data source used to estimate the number of small entities and employment in these entities is the Statistics of U.S. Businesses (SUSB). Alternative sources were used for

[458] *See* https://data.sba.gov/dataset/small-business-size-standards/resource/d89a5f17-ab8e-4698-9031-dfeb34d0a773.
[459] The SBA size standard changes in 2022 primarily adjusted the standards to the 2022 NAICS, these changes were not substantive. https://www.govinfo.gov/content/pkg/FR-2022-09-29/pdf/2022-20513.pdf.
[460] *See* https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/rfa-data-resources-for-federal-agencies/ for details.

industries with asset thresholds (credit unions,[461] commercial banks and savings institutions,[462] agriculture[463]), and public administration.[464] The Department used 2017 data, when possible, to align with the use of 2017 SUSB data. Private households are excluded from the analysis due to lack of data.

For each industry, the SUSB 2017 tabulates employment, establishment, and firm counts by both enterprise employment size (*e.g.*, 0-4 employees, 5-9 employees) and receipt size (*e.g.*, less than \$100,000, \$100,000-\$499,999).[465] Although more recent SUSB data are available, these data do not disaggregate entities by revenue sizes. The Department combined these data with the SBA size standards to estimate the proportion of firms and establishments in each industry that are considered small, and the proportion of workers employed by a small entity. The Department classified all firms and establishments and their employees in categories below the SBA cutoff as small.[466] If a cutoff fell in the middle of a category, the Department assumed a uniform

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[461] National Credit Union Association. (2018). 2018 Year End Statistics for Federally Insured Credit Unions. Available at: https://www.cuna.org/advocacy/credit-union---economic-data/data---statistics/credit-union-profile-reports.html.
[462] Federal Depository Insurance Corporation. (2018). Quarterly Financial Reports-Statistics On Depository Institutions (SDI). Available at: https://www.fdic.gov/foia/ris/id-sdi/index.html. Data are from 12/31/17.
[463] United States Department of Agriculture. (2019). 2017 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.
[464] Census of Governments. 2017. Available at: https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.
[465] The SUSB defines employment as of March 12th.
[466] The Department's estimates of the numbers of affected small entities and affected workers who are employees of small entities includes entities not covered by the FLSA and thus are likely overestimates. The Department had no credible way to estimate which enterprises with annual revenues below \$500,000 also did not engage in interstate commerce and hence are not subject to the FLSA.

distribution of employees across that bracket to determine what proportion of establishments should be classified as small.[467] The estimated share of establishments that were small in 2017 was applied to the more recent 2021 SUSB data on the number of small establishments to determine the number of small entities.[468]

The Department also estimated the number of small establishments and their employees by employer type (nonprofit, for-profit, government). This calculation is similar to the calculation of the number of establishments by industry but with different data. Instead of using data by industry, the Department used SUSB data by Legal Form of Organization for nonprofit and for-profit establishments. The estimated share of establishments that were calculated as small with the 2017 data was then applied to the 2021 SUSB counts. For governments, the Department used the number of governments reported in the 2017 Census of Governments.[469]

Table 28 presents the estimated number of establishments/governments and small establishments/governments in the U.S. (hereafter, referred to as "entities").[470] The numbers in the following tables are for Year 1; projected impacts are considered later. The Department found

[467] The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions.
[468] Statistics of U.S. Businesses 2021, https://www.census.gov/programs-surveys/susb.html.
[469] Census of Governments 2017. Available at https://www.census.gov/programs-surveys/cog.html.
[470] SUSB reports data by "enterprise" size designations (a business organization consisting of one or more domestic establishments that were specified under common ownership or control). However, the number of enterprises is not reported for the size designations. Instead, SUSB reports the number of "establishments" (individual plants, regardless of ownership) and "firms" (a collection of establishments with a single owner within a given state and industry) associated with enterprises size categories. Therefore, numbers in this analysis are for the number of establishments associated with small enterprises, which may exceed the number of small enterprises. The Department based the analysis on the number of establishments rather than firms for a more conservative estimate (potential overestimate) of the number of small businesses.

Disclaimer: This final rule has been approved by the Office of Management and Budget's Office of Information and Regulatory Affairs and has been submitted to the Office of the Federal Register (OFR) for publication. It is currently pending placement on public inspection at the OFR and publication in the *Federal Register*. This version of the final rule may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the *Federal Register* is the official version.

that of the 8.2 million entities, 80 percent (6.6 million) are small by SBA standards. These small entities employ 55.3 million workers, about 37 percent of workers (excluding self-employed, unpaid workers, and members of the armed forces). They also account for roughly 35 percent of total payroll ($3.7 trillion of $10.7 trillion).[471]

Although the Department used 6-digit NAICS to determine the number of small entities and the associated number of employees, the following tables aggregate findings to 27 industry categories. This was the most detailed level available while maintaining adequate sample sizes.[472] The Department started with the 51-industry breakdown and aggregated where necessary to obtain adequate sample sizes.

Table 28: Number of Entities and Employees by SBA Size Standards, by Industry and Employer Type

Industry / Employer Type	Entities (1,000s)		Workers (1,000s) [a]		Annual Payroll (Billions)	
	Total	Small	Total	Small Business Employed	Total	Small
Total	8,238.7	6,588.6	147,798.7	55,279.6	$10,660.7	$3,743.6
Industry [b]						
Agriculture, forestry, fishing, and hunting	23.3	19.3	1,349.6	702.6	$66.0	$34.7
Mining	23.0	18.5	587.9	276.3	$62.3	$28.6
Construction	780.3	752.7	9,345.8	5,617.2	$646.7	$390.4
Manufacturing - durable goods	174.6	159.8	10,032.5	4,634.0	$824.9	$368.6
Manufacturing - non-durable goods	108.4	96.6	5,580.1	2,674.4	$435.0	$195.1

[471] Since information is not available on employer size in the CPS MORG, respondents were randomly assigned as working in a small business based on the SUSB probability of employment in a small business by detailed Census industry. Annual payroll was estimated based on the CPS weekly earnings of workers by industry size.

[472] The Department required at least 15 affected workers (*i.e.*, observations) in small entities in Year 1.

Wholesale trade	390.8	301.3	3,169.5	1,308.9	$250.8	$100.9
Retail trade	1,036.9	661.3	15,698.4	4,878.2	$815.6	$264.4
Transportation and warehousing	279.1	220.1	7,539.4	1,795.4	$476.5	$112.3
Utilities	19.9	8.0	1,463.3	309.9	$142.3	$27.2
Information	162.0	93.9	2,720.8	702.5	$283.3	$69.2
Finance	297.4	137.5	4,859.8	875.2	$533.1	$99.5
Insurance	181.5	139.9	2,801.6	641.1	$254.1	$58.0
Real estate and rental and leasing	456.2	353.3	2,359.8	1,212.3	$181.8	$93.5
Professional and technical services	962.5	858.7	12,003.4	5,320.8	$1,389.8	$598.3
Management, administrative and waste management services	499.5	411.0	5,622.8	2,406.6	$310.7	$121.8
Educational services	111.5	98.9	14,383.5	3,701.4	$998.1	$239.4
Hospitals	7.5	1.5	7,832.2	277.4	$649.1	$22.6
Health care services, except hospitals	751.4	579.3	10,476.2	4,565.8	$672.5	$288.7
Social assistance	188.7	152.8	3,121.3	1,739.0	$153.9	$82.7
Arts, entertainment, and recreation	156.1	142.3	2,656.0	1,296.1	$138.7	$66.7
Accommodation	70.8	59.4	1,190.0	466.8	$57.9	$22.6
Food services and drinking places	675.1	524.8	8,750.2	4,952.0	$294.8	$167.6
Repair and maintenance	220.0	202.3	1,736.5	1,253.6	$95.9	$68.8
Personal and laundry services	254.4	226.7	1,644.1	1,286.4	$71.7	$55.5
Membership associations and organizations	307.0	294.8	2,038.9	1,395.3	$143.6	$96.1

Public administration [c]	90.1	65.7	8,211.2	990.3	$692.2	$70.6
Employer Type						
Nonprofit, private	597.3	504.5	10,692.3	4,029.0	$796.6	$264.3
For profit, private	7,551.3	5,874.3	114,570.7	47,910.7	$8,169.1	$3,257.6
Government (state and local)	90.1	65.7	18,284.5	3,339.9	$1,296.3	$221.7

Note: Establishment data are from SUSB 2021; worker and payroll data from pooled CPS MORG data for 2021-2023 adjusted to reflect 2023.

[a] Excludes the self-employed, unpaid workers, and workers in private households.

[b] Summation across industries may not add to the totals reported due to suppressed values and some entities not reporting an industry.

[c] Entity number represents the total number of governments, including state and local. Data from Census of Governments, 2017.

Estimates are not limited to entities subject to the FLSA because the Department cannot estimate which enterprises do not meet the enterprise coverage requirements because of data limitations. Although not excluding such entities and associated workers only affects a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for non-profits, because revenue from charitable activities is not included when determining enterprise coverage.

3. Number of Affected Small Entities and Employees

The calculation of the number of affected EAP workers was explained in detail in section VII.B. Here, the Department focuses on how these workers were allocated to either small or large entities. To estimate the probability that an exempt EAP worker in the CPS data is employed by a small entity, the Department assumed this probability is equal to the proportion of all workers employed by small entities in the corresponding industry. That is, if 50 percent of workers in an industry are employed in small entities, then on average small entities are expected to employ one out of every two exempt EAP workers in this industry.[473] The Department applied these probabilities to the population of exempt EAP workers to find the number of workers (total exempt EAP workers and total affected by the rule) that small entities employ. No data are available to determine whether small businesses (or small businesses in specific industries) are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. Therefore, the best assumption available is to assign the same rates to all small and non-small businesses.[474, 475]

The Department estimated that small entities employ 1.6 million of the 4.3 million affected workers (36.3 percent) (Table 29). This composes 2.8 percent of the 55.3 million workers that small entities employ. The sectors with the highest total number of affected workers employed by small entities are professional and technical services (281,000); health care services, except hospitals (140,000); and retail trade (125,000). The sectors with the largest percent of workers employed by small entities who are affected include: insurance (7.0 percent);

[473] The Department used CPS microdata to estimate the number of affected workers. This was done individually for each observation in the relevant sample by randomly assigning them a small business status based on the best available estimate of the probability of a worker to be employed in a small business in their respective industry.
[474] A strand of literature indicates that small businesses tend to pay lower wages than larger businesses. This may imply that workers in small businesses are more likely to be affected than workers in large businesses; however, the literature does not make clear what the appropriate alternative rate for small businesses should be.
[475] Workers are designated as employed in a small business based on their industry of employment. The share of workers considered small in nonprofit, for profit, and government entities is therefore the weighted average of the shares for the industries that compose these categories.

membership associations and organizations (5.7 percent); and professional and technical services (5.3 percent).

Table 29: Number of Affected Workers Employed by Small Entities, by Industry and Employer Type

Industry	Workers (1,000s)		Affected Workers (1,000s) [a]	
	Total	Small Business Employed	Total	Small Business Employed
Total	147,798.7	55,279.6	4,337.5	1,574.1
Industry				
Agriculture, forestry, fishing, and hunting	1,349.6	702.6	13.3	6.4
Mining	587.9	276.3	18.5	8.8
Construction	9,345.8	5,617.2	184.6	112.1
Manufacturing - durable goods	10,032.5	4,634.0	232.9	121.8
Manufacturing - non-durable goods	5,580.1	2,674.4	117.7	58.9
Wholesale trade	3,169.5	1,308.9	112.3	50.9
Retail trade	15,698.4	4,878.2	377.4	124.5
Transportation and warehousing	7,539.4	1,795.4	113.1	30.0
Utilities	1,463.3	309.9	39.8	7.5
Information	2,720.8	702.5	132.4	34.8
Finance	4,859.8	875.2	276.4	43.6
Insurance	2,801.6	641.1	198.6	45.1
Real estate and rental and leasing	2,359.8	1,212.3	89.4	51.3
Professional and technical services	12,003.4	5,320.8	676.3	280.7
Management, administrative and waste management services	5,622.8	2,406.6	151.1	47.5
Educational services	14,383.5	3,701.4	244.1	53.4
Hospitals	7,832.2	277.4	238.9	11.4
Health care services, except hospitals	10,476.2	4,565.8	347.0	140.1
Social assistance	3,121.3	1,739.0	154.2	91.4
Arts, entertainment, and recreation	2,656.0	1,296.1	118.3	64.6

Accommodation	1,190.0	466.8	26.6	12.3
Food services and drinking places	8,750.2	4,952.0	83.6	42.0
Repair and maintenance	1,736.5	1,253.6	21.5	16.1
Personal and laundry services	1,644.1	1,286.4	23.4	14.3
Membership associations and organizations	2,038.9	1,395.3	117.8	79.4
Public administration	8,211.2	990.3	227.2	25.2
Employer Type				
Nonprofit, private	10,692.3	4,029.0	461.3	201.3
For profit, private	114,570.7	47,910.7	3,392.5	1,310.8
Government (state and local)	18,284.5	3,339.9	483.6	62.1

Note: Worker data are from pooled CPS MORG data for 2021-2023 adjusted to reflect 2023.
[a] Estimation of affected workers employed by small entities was done at the most detailed industry level available. Therefore, at the more aggregated industry level shown in this table, the ratio of small business employed to total employed does not equal the ratio of affected small business employed to total affected for each industry, nor does it equal the ratio for the national total because relative industry size, employment, and small business employment differs from industry to industry.

Because no information is available on how affected workers would be distributed among small entities, the Department estimated a range of effects. At one end of this range, the Department assumed that each small entity employs no more than one affected worker, meaning that at most 1.6 million of the 6.6 million small entities will employ an affected worker. Thus, these assumptions provide an upper-end estimate of the number of affected small entities. (However, it provides a lower-end estimate of the effect per small entity because costs are spread over a larger number of entities; the impacts experienced by an entity would increase as the share of its workers that are affected increases.) For the purpose of estimating a lower-range number of affected small entities, the Department used the average size of a small entity as the typical size of an affected small entity, and assumed all workers are affected. This can be considered an approximation of all employees at an entity affected.[476] The average number of employees in a small entity is the number of workers that small entities employ divided by the total number of small establishments in that industry. The number of affected employees at small businesses is then divided by this average number of employees to calculate 208,300 affected small entities.

Table 30 summarizes the estimated number of affected workers that small entities employ and the expected range for the number of affected small entities by industry. The Department estimated that the rule will affect 1.6 million workers who are employed by somewhere between 208,300 and 1.6 million small entities; this comprises from 3.2 percent to 23.9 percent of all small entities. It also means that from 5.0 million to 6.4 million small entities would incur no more than minimal regulatory familiarization costs (*i.e.*, 6.6 million minus 1.6 million equals 5.0 million; 6.6 million minus 208,300 equals 6.4 million, using rounded values). The table also presents the average number of affected employees per establishment using the method in which all employees at the establishment would be affected. For the other method, by definition, there would always be one affected employee per establishment. Also displayed is the average payroll per small establishment by industry (based on both affected and non-affected small entities), calculated by dividing total payroll of small businesses by the number of small businesses (Table 28) (applicable to both methods).

[476] This is not the true lower bound estimate of the number of affected entities. Strictly speaking, a true lower bound estimate of the number of affected small entities would be calculated by assuming all employees in the largest small entity are affected. For example, if the SBA standard is that entities with 500 employees are "small," and 1,350 affected workers are employed by small entities in that industry, then the smallest number of entities that could be affected in that industry (the true lower bound) would be three. However, because such an outcome appears implausible, the Department determined a more reasonable lower estimate would be based on average establishment size.

Disclaimer: This final rule has been approved by the Office of Management and Budget's Office of Information and Regulatory Affairs and has been submitted to the Office of the Federal Register (OFR) for publication. It is currently pending placement on public inspection at the OFR and publication in the *Federal Register*. This version of the final rule may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the *Federal Register* is the official version.

Table 30: Number of Small Affected Entities and Employees by Industry and Employer Type

Industry	Affected Workers in Small Entities (1,000s)	Number of Small Affected Entities (1,000s) [a]		Per Entity	
		One Affected Employee per Entity [b]	All Employees at Entity Affected [c]	Affected Employees [a]	Average Annual Payroll ($1,000s)
Total	1,574.1	1,574.1	208.3	7.6	$568.2
Industry					
Agriculture, forestry, fishing, and hunting	6.4	6.4	0.2	36.4	$1,796.9
Mining	8.8	8.8	0.6	15.0	$1,546.6
Construction	112.1	112.1	15.0	7.463	$518.6
Manufacturing - durable goods	121.8	121.8	4.2	29.0	$2,306.3
Manufacturing - non-durable goods	58.9	58.9	2.1	27.7	$2,020.1
Wholesale trade	50.9	50.9	11.7	4.3	$334.9
Retail trade	124.5	124.5	16.9	7.4	$399.7
Transportation and warehousing	30.0	30.0	3.7	8.2	$510.4
Utilities	7.5	7.5	0.2	38.9	$3,415.5
Information	34.8	34.8	4.7	7.5	$736.8
Finance	43.6	43.6	6.9	6.4	$723.6
Insurance	45.1	45.1	9.8	4.6	$415.0
Real estate and rental and leasing	51.3	51.3	15.0	3.4	$264.7
Professional and technical services	280.7	280.7	45.3	6.2	$696.8
Management, administrative and waste management services	47.5	47.5	8.1	5.9	$296.4
Educational services	53.4	53.4	1.4	37.4	$2,420.0
Hospitals	11.4	9.9 [d]	0.1	189.1	$15,377.1
Health care services, except hospitals	140.1	140.1	17.8	7.9	$498.4
Social assistance	91.4	91.4	8.0	11.4	$541.3

Arts, entertainment, and recreation	64.6	64.6	7.1	9.1	$468.5
Accommodation	12.3	12.3	1.6	7.9	$379.4
Food services and drinking places	42.0	42.0	4.5	9.4	$319.3
I Repair and maintenance	16.1	16.1	2.6	6.2	$340.1
Personal and laundry services	14.3	14.3	2.5	5.7	$244.8
Membership associations and organizations	79.4	79.4	16.8	4.7	$325.8
Public administration [e]	25.2	25.2	1.7	15.1	$1,075.1
Employer Type					
Nonprofit, private	201.3	201.3	25.2	8.0	$523.9
For profit, private	1,310.8	1,310.8	160.7	8.2	$554.5
Government (state and local)	62.1	62.1	1.2	50.8	$3,373.6

Note: Establishment data are from SUSB 2021; worker and payroll data from pooled CPS MORG data for 2021-2023 adjusted to reflect 2023.

[a] Estimation of both affected small entity employees and affected small entities was done at the most detailed industry level available. Therefore, the ratio of affected small entities employees to total small entity employees for each industry may not match the ratio of small affected entities to total small entities at the more aggregated industry level presented in the table, nor will it equal the ratio at the national level because relative industry size, employment, and small business employment differs from industry to industry.
[b] This method may overestimate the number of affected entities and therefore the ratio of affected workers to affected entities may be greater than 1-to-1. However, the Department addresses this issue by also calculating effects based on the assumption that 100 percent of workers at an entity are affected.

[c] For example, on average, a small entity in the construction industry employs 7.5 workers (5.6 million employees divided by 752,700 small entities). This method assumes if an entity is affected then all 7.5 workers are affected. Therefore, in the construction industry this method estimates there are 15,000 small affected entities (112,100 affected small entity workers divided by 7.5).
[d] Number of entities is smaller than number of affected employees; thus, total number of entities is ,reported.
[e] Entity number represents the total number of state and local governments.

4. Impacts to Affected Small Entities

For small entities, the Department estimated various types of effects, including regulatory familiarization costs, adjustment costs, managerial costs, and payroll increases borne by employers. The Department estimated a range for the number of affected small entities and the impacts they incur. While the upper and lower bounds are likely over- and under-estimates, respectively, of effects per small entity, the Department believes that this range of costs and payroll increases provides the most accurate characterization of the effects of the rule on small employers.[477] Furthermore, the smaller estimate of the number of affected entities (*i.e.*, where all employees at each affected employer are assumed to be affected) will result in the largest costs and payroll increases per entity as a percent of establishment payroll and revenue, and the Department expects that many, if not most, entities will incur smaller costs, payroll increases, and effects relative to entity size.

Parameters that are used in the small business cost analysis for Year 1 are provided in Table 31, along with summary data of the impacts.[478]

Table 31: Overview of Parameters used for Costs to Small Businesses and the Impacts on Small Businesses

Small Business Costs	Cost
Direct and Payroll Costs	
Average total cost per affected entity [a]	$4,544
Range of total costs per affected entity [a]	$1,767-$57,218
Average percent of revenue per affected entity	0.16%
Average percent of payroll per affected entity	0.80%
Direct Costs	

[477] As noted previously, these are not the true lower and upper bounds. The values presented are the highest and lowest estimates the Department believes are plausible.
[478] *See* section VII.C.3 for a more fulsome discussion on these costs.

Regulatory familiarization	
Time (first year)	1 hour per entity
Time (update years)	10 minutes per entity
Hourly wage	$54.82
Adjustment	
Time (first year affected)	75 minutes per newly affected worker
Hourly wage	$54.82
Managerial	
Time (weekly)	10 minutes per affected worker whose hours change
Hourly wage	$86.82
Payroll Increases	
Average payroll increase per affected entity [a]	$2,773
Range of payroll increases per affected entity [a]	$674-$15,532

[a] Using the methodology where all employees at an affected small firm are affected. This assumption generates upper-end estimates. Lower-end cost estimates are significantly smaller.

The Department expects total direct employer costs will range from $368.7 million to $443.6 million for affected small entities (*i.e.*, those with affected employees) in the first year (an average cost of between $282 to $1,771 per entity) (Table 32). Small entities that do not employ affected workers will incur $274.9 million to $349.7 million in regulatory familiarization costs (an average cost of $54.82 per entity). The three industries with the highest costs (professional and technical services; health care services, except hospitals; and retail trade) account for about 35 percent of the costs. Hospitals are expected to incur the largest cost per establishment ($42,900 using the method where all employees are affected), although the costs are not expected to exceed 0.3 percent of payroll. The food services and drinking places industry is expected to experience the largest effect as a share of payroll (estimated direct costs compose 0.69 percent of average entity payroll).

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Table 32: Year 1 Small Establishment Direct Costs, Total and per Establishment, by Industry and Employer Type

Industry	Direct Cost to Small Entities in Year 1 [a]					
	One Affected Employee			All Employees Affected		
	Total (Millions) [a]	Cost per Affected Entity	Percent of Annual Payroll	Total (Millions) [b]	Cost per Affected Entity	Percent of Annual Payroll
Total	$443.6	$282	0.05%	$368.7	$1,771	0.31%
Industry						
Agriculture, forestry, fishing, and hunting	$1.8	$281	0.02%	$1.5	$8,292	0.46%
Mining	$2.5	$281	0.02%	$2.0	$3,443	0.22%
Construction	$31.6	$282	0.05%	$26.3	$1,751	0.34%
Manufacturing - durable goods	$34.3	$282	0.01%	$27.9	$6,631	0.29%
Manufacturing - non-durable goods	$16.7	$283	0.01%	$13.5	$6,367	0.32%
Wholesale trade	$14.3	$281	0.08%	$12.2	$1,039	0.31%
Retail trade	$35.1	$282	0.07%	$29.2	$1,731	0.43%
Transportation and warehousing	$8.5	$282	0.06%	$7.0	$1,912	0.37%
Utilities	$2.1	$281	0.01%	$1.7	$8,876	0.26%
Information	$9.8	$281	0.04%	$8.1	$1,750	0.24%
Finance	$12.3	$281	0.04%	$10.3	$1,496	0.21%
Insurance	$12.7	$281	0.07%	$10.8	$1,093	0.26%
Real estate and rental and leasing	$14.5	$283	0.11%	$12.5	$839	0.32%
Professional and technical services	$79.1	$282	0.04%	$66.2	$1,460	0.21%
Management, administrative and waste management services	$13.5	$284	0.10%	$11.3	$1,394	0.47%

Educational services	$15.0	$281	0.01%	$12.2	$8,531	0.35%
Hospitals	$3.2	$281	0.00%	$2.6	$42,885	0.28%
Health care services, except hospitals	$39.5	$282	0.06%	$32.8	$1,842	0.37%
Social assistance	$25.7	$281	0.05%	$21.1	$2,633	0.49%
Arts, entertainment, and recreation	$18.2	$282	0.06%	$15.0	$2,120	0.45%
Accommodation	$3.5	$281	0.07%	$2.9	$1,834	0.48%
Food services and drinking places	$11.9	$282	0.09%	$9.8	$2,203	0.69%
Repair and maintenance	$4.5	$281	0.08%	$3.8	$1,459	0.43%
Personal and laundry services	$4.0	$282	0.12%	$3.4	$1,343	0.55%
Membership associations and organizations	$22.4	$282	0.09%	$18.9	$1,129	0.35%
Public administration	$7.1	$281	0.03%	$5.8	$3,471	0.32%
Employer Type						
Nonprofit, private	$54.4	$270	0.05%	$44.8	$1,777	0.34%
For profit, private	$394.4	$301	0.05%	$331.4	$2,062	0.37%
Government (state and local)	$17.5	$283	0.01%	$14.2	$11,633	0.34%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.
[a] Direct costs include regulatory familiarization, adjustment, and managerial costs.
[b] The range of costs per entity depends on the number of affected entities. The minimum assumes that each affected entity has one affected worker (therefore, the number of affected entities is equal to the number of affected workers). The maximum assumes the share of workers in small entities who are affected is also the share of small entity entities that are affected.

It is possible that the costs of the rule may be disproportionately large for small entities, especially because small entities often have limited human resources personnel on staff. However, the Department expects that small entities would rely on compliance assistance materials provided by the Department or industry associations to become familiar with the final rule. Additionally, the Department notes that the rule is narrow in scope because the changes all relate to the salary component of the part 541 regulations. Finally, the Department believes that most entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. The Department believes that applying those same policies and systems to the workers whose exemption status changes will not be an unreasonable burden on small businesses.

Average weekly earnings for affected EAP workers in small entities are expected to increase by about $7.06 per week per affected worker, using the incomplete fixed-job model[479] described in section VII.C.4.iii.[480] This would lead to $577.5 million in additional annual wage payments to employees in small entities (less than 0.5 percent of aggregate affected establishment payroll; Table 33). The largest payroll increases per establishment are expected in utilities (up to $15,500 per entity); hospitals (up to $14,300 per entity); and manufacturing - durable goods (up to $13,000 per entity). However, average payroll increases per entity would exceed one percent of average annual payroll in only two sectors: food services and drinking places (2.9 percent) and accommodation (1.1 percent).

Table 33: Year 1 Small Establishment Payroll Increases, Total and per Establishment, by Industry and Employer Type

[479] The incomplete fixed-job model reflects the Department's determination that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers should be determined using the average of Barkume's and Trejo's two estimates of the incomplete fixed-job model adjustments: a wage change that is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.
[480] This is an average increase for all affected workers (both standard test and HCE), and reconciles to the weighted average of individual salary changes discussed in the Transfers section.

Industry	Increased Payroll for Small Entities in Year 1 [a]				
	Total (Millions)	One Affected Employee		All Employees Affected	
		Per Entity	Percent of Annual Payroll	Per Entity	Percent of Annual Payroll
Total	$577.5	$367	0.06%	$2,773	0.49%
Industry					
Agriculture, forestry, fishing, and hunting	$1.2	$195	0.01%	$7,088	0.39%
Mining	$2.2	$256	0.02%	$3,828	0.25%
Construction	$43.6	$389	0.08%	$2,904	0.56%
Manufacturing - durable goods	$54.7	$449	0.02%	$13,027	0.56%
Manufacturing - non-durable goods	$21.9	$372	0.02%	$10,291	0.51%
Wholesale trade	$24.9	$489	0.15%	$2,123	0.63%
Retail trade	$66.2	$532	0.13%	$3,922	0.98%
Transportation and warehousing	$14.0	$468	0.09%	$3,815	0.75%
Utilities	$3.0	$399	0.01%	$15,532	0.45%
Information	$4.1	$116	0.02%	$871	0.12%
Finance	$12.0	$274	0.04%	$1,746	0.24%
Insurance	$6.6	$147	0.04%	$674	0.16%
Real estate and rental and leasing	$25.7	$500	0.19%	$1,716	0.65%
Professional and technical services	$116.8	$416	0.06%	$2,577	0.37%
Management, administrative and waste management services	$14.1	$296	0.10%	$1,733	0.58%
Educational services	$12.0	$225	0.01%	$8,434	0.35%
Hospitals	$0.9	$76	0.00%	$14,333	0.09%
Health care services, except hospitals	$30.6	$218	0.04%	$1,721	0.35%
Social assistance	$12.3	$135	0.02%	$1,534	0.28%
Arts, entertainment, and recreation	$28.8	$446	0.10%	$4,059	0.87%
Accommodation	$6.6	$533	0.14%	$4,189	1.10%

Food services and drinking places	$40.7	$968	0.30%	$9,136	2.86%
Repair and maintenance	$8.7	$539	0.16%	$3,341	0.98%
Personal and laundry services	$2.1	$148	0.06%	$841	0.34%
Membership associations and organizations	$19.4	$244	0.07%	$1,155	0.35%
Public administration	$4.6	$181	0.02%	$2,730	0.25%
Employer Type					
Nonprofit, private	$47.3	$235	0.04%	$1,879	0.36%
For profit, private	$511.4	$390	0.07%	$3,182	0.57%
Government (state and local)	$18.8	$302	0.01%	$15,371	0.46%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

[a] Aggregate change in total annual payroll experienced by small entities under the updated salary levels after labor market adjustments. This amount represents the total amount of (wage) transfers from employers to employees.

Table 34 presents estimated first year direct costs and payroll increases combined per entity and the costs and payroll increases as a percent of average entity payroll. The Department presents only the results for the upper bound scenario where all workers employed by the entity are affected. Combined costs and payroll increases per establishment range from $1,800 in insurance to $57,200 in hospitals. Combined costs and payroll increases compose more than two percent of average annual payroll in one sector, food services and drinking places (3.6 percent).

However, comparing costs and payroll increases to payrolls overstates the effects on entities because payroll represents only a fraction of the financial resources available to an establishment. The Department approximated revenue per affected small establishment by calculating the ratio of small business revenues to payroll by industry from the 2017 SUSB data then multiplying that ratio by average small entity payroll.[481] Using this approximation of annual revenues as a benchmark, only one sector will have costs and payroll increases amounting to greater than one percent of revenues, food services and drinking places (1.1 percent).

Table 34: Year 1 Small Establishment Direct Costs and Payroll Increases, Total and per Entity, by Industry and Employer Type, Using All Employees in Entity Affected Method

Industry	Costs and Payroll Increases for Small Affected Entities, All Employees Affected			
	Total (Millions)	Per Entity [a]	Percent of Annual Payroll	Percent of Estimated Revenues [b]
Total	$946.3	$4,544	0.80%	0.16%
Industry				
Agriculture, forestry, fishing, and hunting	$2.7	$15,381	0.86%	0.17%
Mining	$4.3	$7,271	0.47%	0.07%
Construction	$69.9	$4,655	0.90%	0.21%
Manufacturing - durable goods	$82.6	$19,659	0.85%	0.18%
Manufacturing - non-durable goods	$35.4	$16,658	0.82%	0.11%
Wholesale trade	$37.1	$3,162	0.94%	0.07%
Retail trade	$95.4	$5,652	1.41%	0.14%
Transportation and warehousing	$21.1	$5,726	1.12%	0.26%
Utilities	$4.7	$24,409	0.71%	0.05%
Information	$12.2	$2,621	0.36%	0.11%
Finance	$22.2	$3,242	0.45%	0.13%
Insurance	$17.4	$1,767	0.43%	0.09%
Real estate and rental and leasing	$38.2	$2,554	0.97%	0.21%
Professional and technical services	$182.9	$4,038	0.58%	0.23%
Management, administrative and waste management services	$25.4	$3,127	1.06%	0.43%
Educational services	$24.2	$16,965	0.70%	0.29%
Hospitals	$3.5	$57,218	0.37%	0.16%

[481] The Department used this estimate of revenue, instead of small business revenue reported directly from the 2017 SUSB so revenue aligned with payrolls in 2023.

Health care services, except hospitals	$63.4	$3,564	0.72%	0.30%
Social assistance	$33.4	$4,167	0.77%	0.36%
Arts, entertainment, and recreation	$43.8	$6,179	1.32%	0.43%
Accommodation	$9.4	$6,023	1.59%	0.38%
Food services and drinking places	$50.5	$11,339	3.55%	1.11%
Repair and maintenance	$12.5	$4,800	1.41%	0.40%
Personal and laundry services	$5.5	$2,184	0.89%	0.31%
Membership associations and organizations	$38.3	$2,284	0.70%	0.17%
Public administration	$10.4	$6,201	0.58%	0.14%
Employer Type				
Nonprofit, private	$94.40	$3,570	1.00%	0.30%
For profit, private	$585.30	$3,532	1.00%	0.20%
Government (state and local)	$12.20	$9,264	0.60%	0.20%

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.
[a] Total direct costs and transfers for small entities in which all employees are affected. Impacts to small entities in which one employee is affected will be a fraction of the impacts presented in this table.
[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2017 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2017 Census of Governments.

5. Projected Effects to Affected Small Entities in Year 2 through Year 10

To determine how small businesses would be affected in future years, the Department projected costs to small businesses for 9 years after Year 1 of the rule. Projected employment and earnings were calculated using the same methodology described in section VII.B.3. Affected employees in small firms follow a similar pattern to affected workers in all entities: the number decreases gradually between automatic update years, and then increases. There are 1.6 million affected workers in small entities in Year 1 and 2.2 million in Year 10. Table 35 reports affected workers in these 2 years only.

Table 35: Projected Number of Affected Workers in Small Entities, by Industry

Industry	Affected Workers in Small entities (1,000s)	
	Year 1	Year 10
Total	1,574.1	2,171.7
Agriculture, forestry, fishing, and hunting	6.4	8.8
Mining	8.8	10.6
Construction	112.1	159.7
Manufacturing - durable goods	121.8	169.8
Manufacturing - non-durable goods	58.9	79.7
Wholesale trade	50.9	70.5
Retail trade	124.5	148.4
Transportation and warehousing	30.0	47.1
Utilities	7.5	13.3
Information	34.8	40.7
Finance	43.6	58.7
Insurance	45.1	58.6
Real estate and rental and leasing	51.3	81.0
Professional and technical services	280.7	394.5
Management, administrative and waste management services	47.5	56.8
Educational services	53.4	80.9
Hospitals	11.4	16.3
Health care services, except hospitals	140.1	205.0
Social assistance	91.4	136.0
Arts, entertainment, and recreation	64.6	99.6
Accommodation	12.3	12.4
Food services and drinking places	42.0	52.4
Repair and maintenance	16.1	20.5
Personal and laundry services	14.3	17.5
Membership associations and organizations	79.4	98.7
Public administration	25.2	34.2

Note: Worker data are from Pooled CPS data for 2021-2023 adjusted to reflect 2023.

Direct costs and payroll increases for small entities vary by year but generally decrease between updates as the real value of the salary and compensation levels decrease and the number of affected workers consequently decreases. In updating years, costs will increase due to newly affected workers and some regulatory familiarization costs. Direct costs and payroll increases for small businesses will increase in Year 10 (an automatic update year) compared to Year 1, $946 million in Year 1 and $1.3 billion in Year 10 (Table 36 and Figure 10).

Table 36: Projected Direct Costs and Payroll Increases for Affected Small Entities, by Industry, Using All Employees in Entity Affected Method

Industry	Costs and Payroll Increases for Small Affected Entities, All Employees Affected (Millions $2023)	
	Year 1	Year 10
Total	$946.3	$1,263.5
Agriculture, forestry, fishing, and hunting	$2.7	$5.8
Mining	$4.3	$4.2
Construction	$69.9	$102.7
Manufacturing - durable goods	$82.6	$113.3
Manufacturing - non-durable goods	$35.4	$44.5
Wholesale trade	$37.1	$67.7
Retail trade	$95.4	$97.3
Transportation and warehousing	$21.1	$35.1
Utilities	$4.7	$5.5
Information	$12.2	$14.3
Finance	$22.2	$26.6
Insurance	$17.4	$16.7
Real estate and rental and leasing	$38.2	$54.7
Professional and technical services	$182.9	$236.7
Management, administrative and waste management services	$25.4	$41.1
Educational services	$24.2	$33.1
Hospitals	$3.5	$4.4
Health care services, except hospitals	$63.4	$94.0
Social assistance	$33.4	$41.3
Arts, entertainment, and recreation	$43.8	$65.3
Accommodation	$9.4	$7.9
Food services and drinking places	$50.5	$59.4
Repair and maintenance	$12.5	$16.9

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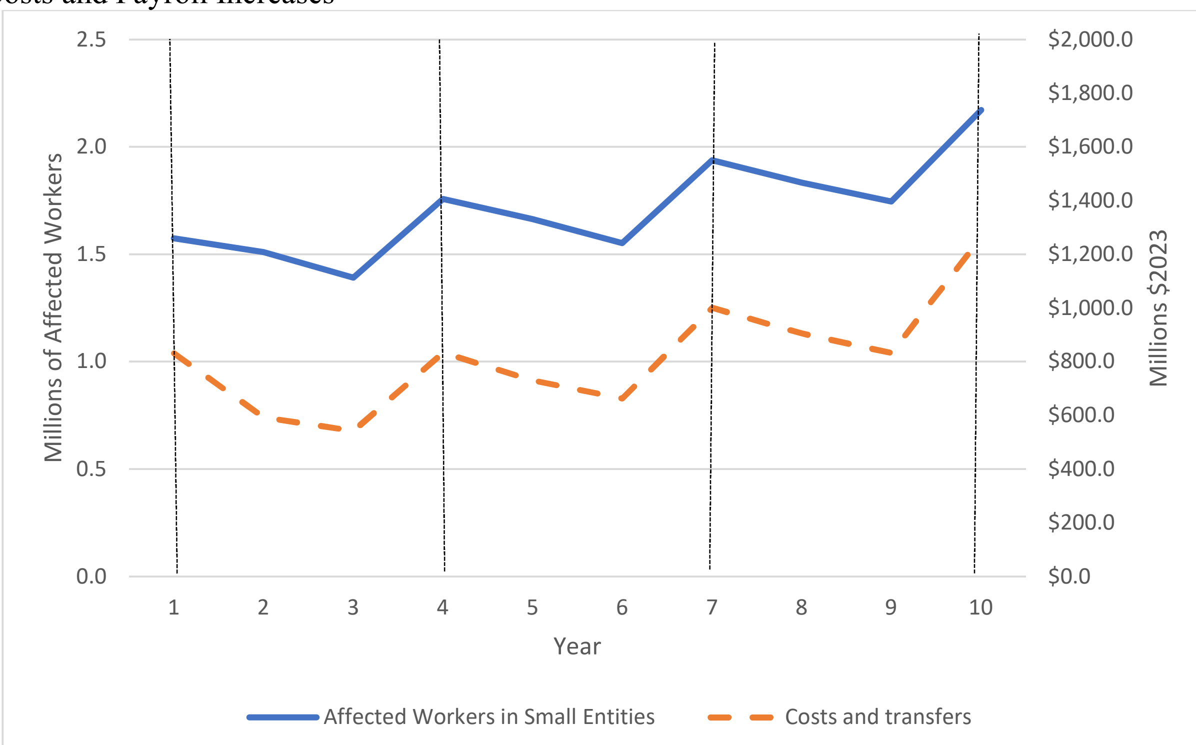
Personal and laundry services	$5.5	$10.1
Membership associations and organizations	$38.3	$53.3
Public administration	$10.4	$11.7

Note: Pooled CPS data for 2021-2023 adjusted to reflect 2023.

Figure 10: 10-Year Projected Number of Affected Workers in Small Entities, and Associated Costs and Payroll Increases



E. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Pursuant to section 11(c) of the FLSA, the Department's regulations at part 516 require covered employers to maintain certain records about their employees. Bona fide EAP workers are subject to some of these recordkeeping requirements but are exempt from others related to pay and hours worked.[482] Thus, although this rulemaking does not introduce any new recordkeeping requirements, employers will need to keep some additional records for affected employees who become newly nonexempt if they do not presently record such information. As indicated in this analysis, this rule expands minimum wage and overtime pay coverage to 4.3 million affected EAP workers, of which 1.6 million are employed by a small entity. This will result in an increase in employer burden and was estimated in the PRA portion (section VI) of this rule.

F. Steps the Agency Has Taken to Minimize the Significant Economic Impact on Small Entities

This section describes the steps the agency has taken to minimize the economic impact on small entities, consistent with the stated objectives of the FLSA. It includes a statement of the factual, policy, and legal reasons for the selected standard and HCE levels adopted in the rule and why alternatives were rejected.

In this rule, the Department sets the standard salary level equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Based on 2023 data, this results in a salary level of $1,128 per week. This approach will fully restore the salary level's screening function and, by setting the salary level above the long test salary level, ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting it below the short test salary level, the new salary level allows employers to continue to use the exemption

[482] *See* 29 CFR 516.3 (providing that employers need not maintain the records required by 29 CFR 516.2(a)(6) through (10) for their EAP workers).

for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. Thus, the Department believes that the new salary level will also more reasonably distribute between employees and their employers the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels. As in prior rulemakings, the Department is not establishing multiple salary levels based on region, industry, employer size, or any other factor, which stakeholders have generally agreed would significantly complicate the regulations.[483] Instead, the Department is setting the standard salary level using earnings data from the lowest-wage Census Region, in part to accommodate small employers and employers in low-wage industries.[484]

The Department is setting the HCE total annual compensation level equal to the 85th percentile of earnings of full-time salaried workers nationally ($151,164 annually based on 2023 data). The Department believes that this level avoids costs associated with evaluating, under the standard duties test, the exemption statuses of large numbers of highly-paid white-collar employees, many of whom would have remained exempt even under that test, while providing a meaningful and appropriate complement to the more lenient HCE duties test. While the threshold is higher than the HCE level adopted in the 2019 rule (which was set equal to the 80th percentile of earnings for salaried workers nationwide), the HCE threshold in this rule is lower than the HCE percentile adopted in the 2004 and 2016 rules, which covered 93.7 and 90 percent of salaried workers nationwide respectively. The Department further believes that nearly all of the highly-paid white-collar workers earning above this threshold "would satisfy any duties test."[485]

[483] *See* 84 FR 51239; 81 FR 32411; 69 FR 22171.
[484] *See* 84 FR 51238; 81 FR 32527; 69 FR 22237.
[485] *See* 84 FR 51250 (internal citation omitted).

1. Differing Compliance and Reporting Requirements for Small Entities

This rule provides no differing compliance requirements and reporting requirements for small entities. The Department strives to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers normally maintain the records under usual or customary business practices.

2. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and results in the least burden. Among the options considered by the Department, the least restrictive option was using the 2004 methodology (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census region, currently the South, and in retail nationally) to set the standard salary level, which was also the methodology used in the 2019 rule. As noted above, however, the salary level produced by the 2004 methodology is below the long test salary level, which the Department considers to be a key parameter for determining an appropriate salary level in a one-test system using the current standard duties test. Using the 2004 methodology thus does not address the Department's concerns discussed above under Objectives of, and Need for, the Rule.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing Compliance or Reporting Requirements That Take into Account the Resources Available to Small Entities.

The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not implementing differing compliance or reporting requirements for small businesses.

ii. The Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements for Small Entities.

This rule imposes no new reporting requirements. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iii. The Use of Performance Rather than Design Standards.

Under this rule, employers may achieve compliance through a variety of means. Employers may elect to continue to claim the EAP exemption for affected employees by adjusting salary levels, hiring additional workers, spreading overtime hours to other employees, or compensating employees for overtime hours worked. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iv. An Exemption from Coverage of the Rule, or any Part Thereof, for Such Small Entities.

Creating an exemption from coverage of this rulemaking for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees, regardless of employer size.[486]

IX. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA),[487] requires agencies to prepare a written statement for rulemaking that includes any Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of

[486] *See* 29 U.S.C. 203(s).
[487] 2 U.S.C. 1501 *et seq.*

$200 million ($100 million in 1995 dollars adjusted for inflation to 2023) or more in at least one year. This statement must (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, present its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This rule contains unfunded mandates as described below.

A. Authorizing Legislation

This final rule is issued pursuant to section 13(a)(1) of the FLSA, 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act]. . .)."[488] The requirements of the exemption are contained in part 541 of the Department's regulations. Section 3(e) of the FLSA[489] defines "employee" to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA[490] also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

[488] 29 U.S.C. 213(a)(1).
[489] 29 U.S.C. 203(e).
[490] 29 U.S.C. 203(x).

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B. Costs and Benefits

For purposes of the UMRA, this rule includes a Federal mandate that is expected to result in increased expenditures by the private sector of more than $200 million in at least one year and result in increased expenditures by state, local and tribal governments, in the aggregate, of $200 million or more in at least one year. Based on the economic impact analysis of this final rule, the Department determined that Year 1 costs for state and local governments would total $197.7 million, of which $98.9 million are direct employer costs and $98.8 million are payroll increases (Table 37). In subsequent years, state and local governments may experience payroll increases of as much as $183.7 million (in year 10 of the rule).

The Department estimates that the final rule will result in Year 1 costs to the private sector of approximately $2.7 billion, of which $1.3 billion are direct employer costs and $1.4 billion are payroll increases.

Table 37: Summary of Year 1 Impacts by Type of Employer

Impact	Total	Private	Government [a]
Affected EAP Workers (1,000s)			
Number	4,337	3,854	475
Direct Employer Costs (Millions)			
Regulatory familiarization	$451.6	$446.7	$4.9
Adjustment	$299.1	$265.9	$32.6
Managerial	$685.5	$622.8	$61.4
Total direct costs	$1,436.2	$1,335.3	$98.9
Payroll Increases (Millions)			
From employers to workers	$1,509.2	$1,402.7	$98.8
Direct Employer Costs & Payroll Increases (Millions)			
From employers	$2,945.4	$2,738.0	$197.7

[a] Includes only state, local, and tribal governments.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[491] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $68.4 billion to $136.8 billion (using 2023 GDP). A regulation with a smaller aggregate effect is not likely to have a measurable effect in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total first-year costs (direct employer costs and payroll increases from employers to workers) of the final rule would be approximately $2.7 billion for private employers and $197.7 million for state and local governments. Given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable effect on the economy. Therefore, these costs are compared to payroll costs and revenue to demonstrate the feasibility of adapting to these new rules.

Total first-year state and local government costs compose 0.02 percent of state and local government payrolls.[492] First-year state and local government costs compose 0.004 percent of state and local government revenues (projected 2023 revenues were estimated to be $5.0 trillion).[493] Effects of this magnitude will not result in significant disruptions to typical state and

[491] 2 U.S.C. 1532(a)(4).
[492] 2020 state and local government payrolls were $1.1 trillion, inflated to 2023 payroll costs of $1.2 trillion using the GDP deflator. State and Local Government Finances 2020. Available at https://www.census.gov/data/datasets/2020/econ/local/public-use-datasets.html.
[493] 2020 state and local revenues were $4.3 trillion, inflated to 2023 dollars using the GDP deflator. State and Local Government Finances 2020. Available at https://www.census.gov/data/datasets/2020/econ/local/public-use-datasets.html.

local governments. The $197.7 million in state and local government costs constitutes an average of approximately $2,200 for each of the approximately 90,126 state and local entities. The Department considers these costs to be quite small both in absolute terms and in relation to payroll and revenue.

Total first-year private sector costs compose 0.034 percent of private sector payrolls nationwide.[494] Total private sector first-year costs compose 0.006 percent of national private sector revenues (revenues in 2023 are projected to be $45.3 trillion).[495] The Department concludes that effects of this magnitude are affordable and will not result in significant disruptions to typical firms in any of the major industry categories.

C. Summary of State, Local, and Tribal Government Input

Prior to issuing the NPRM, the Department held a series of stakeholder listening sessions between March 8, 2022, and June 3, 2022 to gather input on its part 541 regulations. Stakeholders invited to participate in these listening sessions included representatives from labor unions; worker advocate groups; industry associations; small business associations; state and local governments; tribal governments; non-profits; and representatives from specific industries such as K-12 education, higher education, healthcare, retail, restaurant, manufacturing, and wholesale. Stakeholders were invited to share their input on issues including the appropriate EAP salary level, the costs and benefits of increasing the salary level to employers and employees, the methodology for updating the salary level and frequency of updates, and whether changes to the

[494] Private sector payroll costs are projected to be $8.1 trillion in 2023 based on private sector payroll costs of $6.6 trillion in 2017, inflated to 2023 dollars using the GDP deflator. 2017 Economic Census of the United States.
[495] Private sector revenues in 2017 were $37.0 trillion using the 2017 Economic Census of the United States. This was inflated to 2023 dollars using the GDP deflator.

duties test are warranted. A listening session was held specifically for state and local governments on April 1, 2022, and a session for tribal governments was held on May 12, 2022. The input received at these listening sessions aided the Department in drafting its rule.

The Department received mixed feedback on the proposed rule from state, local, and tribal government commenters. Some state and local government stakeholders voiced strong support for the proposed rule. For example, the Coalition of State AGs supported the proposal, stating that the current salary level is too low and that the proposed updating mechanism "is important for employers in our respective states to have predictability in their labor costs." The Washington State Department of Labor & Industries noted that it implemented a state EAP salary level through administrative rulemaking which is currently $1,302.40 per week ($67,724.80 annually), stating that "the State of Washington considered many of the same factors" as the Department to set its salary level. Commenting on behalf of 1.4 million members who are state and local government employees, AFSCME described the proposed salary level as "a modest increase that will nevertheless benefit millions of workers."

Other state and local government stakeholders voiced opposition to the proposed rule. The National Association of Counties asserted that the proposed threshold increases would have a disproportionate impact on small and rural county governments, emphasizing that practical and legal constraints limit the ability of county governments to raise revenues to account for added labor costs. Similarly, Ohio Township Association commented that "[if] townships [do] not wish to raise taxes or residents reject a property tax levy for such purpose, the township will be forced to cut or eliminate services." *See also* Pennsylvania State Association of Township Supervisors (providing similar feedback). The Mississippi State Personnel Board asserted that the proposed rule could jeopardize Mississippi's use of telework to recruit and retain certain employees for the state government.

The Department received one comment from a tribal government stakeholder—Ho-Chuck Inc., a subsidiary of the Winnebago Tribe of Nebraska. Explaining that it operates various establishments in the gaming and retail industries, Ho-Chuck Inc. expressed concern about the magnitude of the Department's proposed increase to the standard salary level and of the NPRM's proposed 60-day effective date. Ho-Chuck Inc. requested the Department to consider a smaller increase, such as a 25 percent increase to the current $684 per week salary level (i.e., $855 per week), with "staggered increases over a period of 3 to 5 years to the higher amount."

As discussed in this final rule,[496] the Department agrees with commenters such as the Coalition of State AGs that the updating mechanism's triennial updates to the earnings thresholds for exemption will provide greater certainty and predictability for the regulated community. The Department appreciates that some employers, such as state, local, and tribal governments, may have less flexibility than others to account for new labor costs, as well as that employers in low-wage industries, regions, and in non-metropolitan areas may be more affected because they typically pay lower wages and salaries. However, the Department believes that costs and transfers associated with this rule will be manageable for and will not result in significant disruptions to state, local, and tribal governments. The Department is setting the standard salary level using earnings data from the lowest-wage Census Region, in part to accommodate small employers and employers in low-wage sectors and regions. As discussed earlier in this section, the Department estimates that total first-year costs for state and local governments comprise 0.02

[496] *See* sections V.A.3, VII.C.

percent of state and local government payrolls and 0.004 percent of state and local government revenues. Moreover, as discussed in this final rule,[497] the Department has determined, upon consideration of commenter feedback, that a delayed applicability date is appropriate for the new standard salary level and the HCE total annual compensation threshold. Specifically, the new $1,128 per week standard salary level and $151,164 per year HCE total annual compensation threshold will not be applicable until January 1, 2025.

D. Least Burdensome Option or Explanation Required

This final rule has described the Department's consideration of various options throughout the preamble (*see* section V.B.4.iv) and economic impact analysis (*see* section VII.C.8). The Department believes that it has chosen the least burdensome but still cost-effective methodology to update the salary level consistent with the Department's statutory obligation to define and delimit the scope of the EAP exemption. Although some alternative options considered would set the standard salary level at a rate lower than the finalized level, that outcome would not necessarily be the most cost-effective or least-burdensome. A salary level equal to or below the long test level would result in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work. This approach would also effectively place the burden of the move from a two-test system to a one-test system on employees who historically were nonexempt because they earned between the long and short test salary levels but did not meet the long duties test.

[497] *See* section IV.

Selecting a standard salary level in a one-test system inevitably affects the impact of providing overtime protection to employees paid between the long and short test salary levels. Too low of a salary level shifts the impact of the move to a one-test system to employees by exempting lower-salaried employees who perform large amounts of nonexempt work. However, too high a salary level shifts the impact of the move to a one-test system to employers by denying them the use of the exemption for lower-salaried employees who traditionally were exempt under the long duties test, thereby increasing their labor costs. The Department has determined that setting the standard salary level equivalent to the earnings of the 35th percentile of full-time salaried workers in the lowest-wage Census Region will more effectively identify in a one-test system who is employed in a bona fide EAP capacity in a manner that reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move from a two-test to a one-test system. The Department believes that the final rule reduces burden on employers of nonexempt workers who earn between the current and finalized standard salary level. Currently, employers must rely on the duties test to determine the exemption status of these workers. Under this final rule, the exemption status of these workers will be determined based on the simpler salary level test.

The Department is also adopting a mechanism to regularly update the standard salary level and HCE total compensation requirement for wage growth, which will ensure that the thresholds continue to work efficiently to help identify EAP employees. As noted above, the history of the part 541 regulations shows multiple, significant gaps during which the earnings thresholds were not updated and their effectiveness in helping to define the EAP exemption decreased as wages increased. Routine updates of the earnings thresholds to reflect wage growth will bring certainty and stability to employers and employees alike.

X. Executive Order 13132, Federalism

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This rule will not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

For the reasons set out in the preamble, the Wage and Hour Division, Department of Labor amends Title 29 CFR chapter V, as follows:

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PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

1. The authority citation for part 541 continues to read as follows:

Authority: 29 U.S.C. 213; Pub. L. 101-583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945-53 Comp., p. 1004); Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

2. Add § 541.5 to read as follows:

§ 541.5 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision must be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding be one of utter invalidity or unenforceability, in which event the provision will be severable from part 541 and will not affect the remainder thereof.

3. Amend § 541.100, by revising paragraph (a)(1) to read as follows:

§ 541.100 General rule for executive employees.

(a) * * *

(1) Compensated on a salary basis at not less than the level set forth in § 541.600;

* * * * *

4. Amend § 541.200, by revising paragraph (a)(1) to read as follows:

§ 541.200 General rule for administrative employees.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600;

* * * * *

5. Amend § 541.204, by revising paragraph (a)(1) to read as follows:

§ 541.204 Educational establishments.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

* * * * *

6. Amend § 541.300, by revising paragraph (a)(1) to read as follows:

§ 541.300 General rule for professional employees.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600; and

* * * * *

7. Amend § 541.400, by revising the first sentence of paragraph (b) to read as follows:

§ 541.400 General rule for computer employees.

* * * * *

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at not less than the level set forth in § 541.600. * * *

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* * * * *

8. Revise § 541.600 to read as follows:

§ 541.600 Amount of salary required.

(a) *Standard salary level*. To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate per week of not less than the amount set forth in paragraphs (a)(1) through (3) of this section, exclusive of board, lodging or other facilities, unless paragraph (b) or (c) of this section applies. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(1) Beginning on July 1, 2024, $844 per week (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region and/or retail industry nationally).

(2) Beginning on January 1, 2025, $1,128 per week (the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region).

(3) As of July 1, 2027, the level calculated pursuant to § 541.607(b)(1).

(b) *Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, U.S. Virgin Islands.* To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act, an employee in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands employed by employers other than the Federal Government must be compensated on a salary basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(c) *American Samoa*. To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act, an employee in American Samoa employed by employers other than the Federal Government must be compensated on a salary basis at a rate of not less than $380 per week, exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(d) *Frequency of payment*. The salary level requirement may be translated into equivalent amounts for periods longer than one week. For example, the $1,128 per week requirement described in paragraph (a)(2) of this section would be met if the employee is compensated biweekly on a salary basis of not less than $2,256, semimonthly on a salary basis of not less than $2,444, or monthly on a salary basis of not less than $4,888. However, the shortest period of payment that will meet this compensation requirement is one week.

(e) *Alternative salary level for academic administrative employees*. In the case of academic administrative employees, the salary level requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.204(a)(1).

(f) *Hourly rate for computer employees*. In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

(g) *Exceptions to the standard salary criteria*. In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see*

§ 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

9. Amend § 541.601 by revising paragraph (a), the first sentence of paragraph (b)(1), and paragraph (b)(2) to read as follows:

§ 541.601 Highly compensated employees.

(a) An employee shall be exempt under section 13(a)(1) of the Act if the employee receives total annual compensation of not less than the amount set forth in paragraph (a)(1) through (4) of this section, and the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in subpart B, C, or D of this part:

(1) Beginning on July 1, 2024, $132,964 per year (the annualized earnings amount of the 80th percentile of full-time nonhourly workers nationally).

(2) Beginning on January 1, 2025, $151,164 per year (the annualized earnings amount of the 85th percentile of full-time nonhourly workers nationally).

(3) As of July 1, 2027, the total annual compensation level calculated pursuant to § 541.607(b)(2).

(4) Where the annual period covers periods during which multiple total annual compensation levels apply, the amount of total annual compensation due will be determined on a proportional basis.

(b)(1) Total annual compensation must include at least a weekly amount equal to that required by § 541.600(a)(1) through (3) paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) shall not apply to highly compensated employees. * * *

(2) If an employee's total annual compensation does not total at least the amount set forth in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, for a 52-week period beginning January 1, 2025, an employee may earn $135,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee only earns $14,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $2,164 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subpart B, C, or D of this part.

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10. Amend § 541.602 by revising the first sentence of paragraph (a)(3) and the first sentence of paragraph (a)(3)(i) to read as follows:

§ 541.602 Salary basis.

* * * * *

(a)(3) Up to ten percent of the salary amount required by § 541.600(a) through (c) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid annually or more frequently. * * *

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by § 541.600(a) through (c), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. * * *

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11. Amend § 541.604 by

a. Revising the second, third, and fourth sentences of paragraph (a) and;

b. Revising the third sentence in paragraph (b).

The revisions and additions read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) * * * Thus, for example under the salary requirement described in § 541.600(a)(2), an exempt employee guaranteed at least $1,128 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $1,128 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $1,128 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. * * *

(b) * * * Thus, for example under the salary requirement described in § 541.600(a)(2), an exempt employee guaranteed compensation of at least $1,210 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $350 per shift without violating the $1,128 per week salary basis requirement. * * *

12. Amend § 541.605 by revising paragraph (b) to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) through (c) and 541.602(a), if the employee worked 40 hours. Thus, for example under the salary requirement described in § 541.600(a)(2), an artist paid $600 for a picture that took 20 hours to complete meets the $1,128 minimum salary requirement for exemption since earnings at this rate would yield the artist $1,200 if 40 hours were worked.

13. Add § 541.607 to read as follows:

§ 541.607 Regular updates to amounts of salary and compensation required.

(a) *Initial update*—(1) *Standard salary level*. Beginning on July 1, 2024, the amount required to be paid per week to an exempt employee on a salary or fee basis, as applicable, pursuant to § 541.600(a)(1) will be not less than $844.

(2) *Highly compensated employees*. Beginning on July 1, 2024, the amount required to be paid in total annual compensation to an exempt highly compensated employee pursuant to § 541.601(a)(1) will be not less than $132,964.

(b) *Future updates*—(1) *Standard salary level.* (i) As of July 1, 2027, and every 3 years thereafter, the amount required to be paid to an exempt employee on a salary or fee basis, as applicable, pursuant to § 541.600(a) will be updated to reflect current earnings data.

(ii) The Secretary will determine the future update amounts by applying the methodology in effect under § 541.600(a) at the time the Secretary issues the notice required by paragraph (b)(3) of this section to current earnings data.

(2) *Highly compensated employees.* (i) As of July 1, 2027, and every 3 years thereafter, the amount required to be paid in total annual compensation to an exempt highly compensated employee pursuant to § 541.601(a) will be updated to reflect current earnings data.

(ii) The Secretary will determine the future update amounts by applying the methodology used to determine the total annual compensation amount in effect under § 541.601(a) at the time the Secretary issues the notice required by paragraph (b)(3) of this section to current earnings data.

(3) *Notice.* (i) Not fewer than 150 days before each future update of the earnings requirements under paragraphs (b)(1) and (2) of this section, the Secretary will publish a notice in the *Federal Register* stating the updated amounts based on the most recent available 4 quarters of CPS MORG data, or its successor publication, as published by the Bureau of Labor Statistics.

(ii) No later than the effective date of the updated earnings requirements, the Wage and Hour Division will publish on its website the updated amounts for employees paid pursuant to this part.

(4) *Delay of updates.* A future update to the earnings thresholds under this section is delayed from taking effect for a period of 120 days if the Secretary has separately published a notice of proposed rulemaking in the *Federal Register*, not fewer than 150 days before the date the update is set to take effect, proposing changes to the earnings threshold(s) and/or updating mechanism due to unforeseen economic or other conditions. The Secretary must state in the notice issued pursuant to paragraph (b)(3)(i) of this section that the scheduled update is delayed in accordance with this paragraph (b)(4). If the Secretary does not issue a final rule affecting the scheduled update to the earnings thresholds by the end of the 120-day extension period, the updated amounts published in accordance with paragraph (b)(3) of this section will take effect upon the expiration of the 120-day period. The 120-day delay of a scheduled update under this paragraph will not change the effective dates for future updates of the earnings requirements under this section.

Signed this 11th day of April, 2024.

Jessica Looman
Administrator, Wage and Hour Division