



June 14, 2016

Senator Johnny Isakson  
131 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Isakson:

I am writing on behalf of the Recreational Scuba Diving Industry to ask you and the entire Senate to disapprove the implementation of the recently-issued U.S. Department of Labor's (DOL) rules announced on May 18, 2016, which amend the Fair Labor Standards Act (FLSA) regulations implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees (known as the "white collar" or "EAP" exemptions). As you know such disapproval by the Senate is possible under the 60-legislative day provision in the [Congressional Review Act](#), permitting 60 legislative days for the Congress to vote to overturn the rule with a simple majority.

DEMA is a non-profit trade association (501 (c) 6) based in the United States, representing the business interests of the entire Recreational Diving Industry and including more than 1,400 business members and 10,000 employees and business owners. DEMA represents manufacturers, diver training organizations, non-retail service providers including the media, retail dive centers, and travel destinations both within and outside of the United States.

While DEMA supports the principle in President Obama's March 13, 2014 Presidential Memorandum that the FLSA regulations should be "modernized and streamlined," DEMA has heard from numerous members of the recreational diving industry, each expressing serious concerns about the impact of the changes found in the rules released on May 18, 2016 by the Department of Labor.

The DOL rules indicate a minimum weekly salary level for EAP exemptions at the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region, currently in the south, based on Bureau of Labor Statistic (BLS) data. In addition, the rules include an automatic adjustment to the minimum salary level every three years by reviewing the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region at the time. Effective December 1, 2016, the minimum salary required for the EAP exemption increases from \$455 a week or \$23,660 annually to **\$913 a week or \$47,476 annually**. DEMA and our constituents are concerned about the likely negative outcome of these new overtime rules.

The FLSA was first passed in 1938. Since that time the workplace and employees have changed drastically. FLSA was enacted to protect employees in a Depression-era workplace characterized by:

- There was a fixed beginning and end to both the workday and workweek in most American workplaces;
- Most jobs were performed within the confines of the employer's physical workplace – remote technology to perform similar work did not yet exist;
- A layered hierarchy of duties and positions existed, differing from today's workplaces where exempt employees may perform a variety of duties, including those previously associated with non-exempt employees;
- Business and occupations were primarily carried out locally and within the US, compared to today's globalized markets covering many different time zones and cultures;
- Manual labor was the predominate form of work;
- There was relatively little use of private litigation as a means to enforce federal laws and policies; and
- Fewer jobs required college or technical education, and most of those in existence at the time necessitated a four year college degree or more.

Even with the periodic changes in structure made to the FLSA since 1938, the law is archaic. For example, the definition of "Computer Professionals" found in the current FLSA was frozen by Congress in 1996<sup>1</sup>, when less than 40% of Americans owned a cell phone<sup>2</sup> and fewer than 3% of U.S. homes had broadband access<sup>3</sup>. Today the entire concept of work is changing; companies are moving to highly automated manufacturing using fewer employees, and an expanded service economy exists - one that is heavily dependent on technology and much more mobile. It is an understatement to say that how and where work gets done today has changed dramatically since the FLSA was implemented. In our opinion changing the rules by merely altering the definition of the exempt employee salary threshold seems to be inadequate to meet the President's goal of "modernizing and streamlining" the law.

While DEMA contends that the FLSA is outdated and no longer appropriate as written, and that these new rules should be completely overhauled, we make comment below on the likely impact the newly proposed rules will have on employment in the recreational diving industry. It is for the following reasons that we ask you to disapprove of these rules as written under the Congressional Review Act.

### **What are the Likely Outcomes of these New Rules?**

Most empirical economic studies on the effect of overtime laws find that businesses are initially reluctant to pass along the increased labor cost associated with the significant change in the threshold for the exempt employee to their customers. Instead, these businesses cut expenses and find ways around the added employee-related expenditures.

As a small industry contributing about \$11 billion to the US GDP, the recreational diving industry has dedicated and passionate employees many of whom work numerous hours to advance themselves and their own employment goals. For example, retail dive stores currently employ exempt and non-exempt workers who are involved in a variety of store-related activities including sales and sales management, and who are also involved in scuba diving-related activities such as consumer education, on-site training, offshore travel, equipment maintenance and more. In the manufacturing, travel and training sectors, currently-exempt employees may be

involved in product development, testing and management, marketing, engineering, education, inside or outside sales, extensive customer service, and additional duties.

Numbers of workers in every sector of the diving industry are likely to be re-classified under these new rules, making these individuals (as but one example) ineligible to attend educational and technical conferences which are critical to maintaining their expertise. Further, the proposed rules do nothing to help employers and employees account for the way people work today; the rules actually discourage the concept of working remotely (sometimes a necessity in the diving industry); they favor elimination of mid-level management and entry-level administrative positions; and they make it more difficult for lower-level employees to climb the professional employment ladder. The new rules attempt to force a one-size-fits-all framework on a modern work environment that otherwise rewards flexibility. These new rules are likely to encourage business in the recreational diving industry to adopt one or more of the following strategies:

Make an adjustment in accounting:

Currently-salaried employees who are furthest from the new threshold will probably be re-classified from exempt to non-exempt, and their wages converted to hourly. As most businesses already limit labor hours to the minimum required, hours are unlikely to change. However, in order to control overall labor costs, employers are likely to adjust the hourly rate of pay downward for these employees so that the calculated hourly rate for the hours they work will include overtime. In many cases benefits will be reduced so that the total compensation for a given employee remains the same or less for the same work and same hours.

Importantly, when this employee does not work overtime in a given week, his or her pay will be less.

In some cases employees whose exempt status has been changed may find that they have lost both tangible and intangible benefits that are available only to exempt employees. For example, the opportunity to attend conferences, education programs or maintain certifications required for employment may be withdrawn by the employer since these could necessitate overtime pay. Employees in this situation could find that they are unable to advance professionally, and could see the loss of important training needed to keep their jobs.

Make an adjustment to the employees' compensation "mix":

Currently-exempt employees who are close to the new, higher threshold could see their salary increased so that they would still be considered "exempt" and thus ineligible for overtime. While their salary may actually increase, to control costs, employees could see the remainder of their "total compensation package" reduced by a comparable amount, so that their overall compensation remains the same as prior to the threshold increase.

Reduce employee hours (and pay) and a turn to automation:

Current non-exempt workers may see a reduction in their hours from 40 per week to something less, so the employer can manage hours to avoid pay for overtime (e.g. the employee is reduced to a 38-hour workweek). A reduction in hours will also reduce total compensation for this non-exempt employee.

With reduced non-exempt employee hours, one of two scenarios may occur:

- The business turns to automation of functions where possible; this could eliminate the need for some non-exempt positions. Back-office employees are particularly vulnerable to this cost-savings approach.

- The business may create a part-time position (30 or fewer hours per week) to make up for the lost hours created when non-exempt employees' hours are cut. This may be the one and only situation where additional positions could be created by the business, but only with part-time positions.

#### Other outcomes – reductions in flexibility, price increases and lost jobs

Formerly salaried employees, re-classified to hourly workers are most likely to stagnate as their opportunities for demonstrating a willingness to work harder or more are withdrawn. It should be no surprise that when employers are compelled to re-classify employees from exempt to non-exempt status, there is often bitter, employee resentment. The realization that there may be little or no extra pay, along with the fact that work flexibility, mobility, education and advancement are adversely affected, may cause employees to feel deeply disappointed, and as a result, lose motivation – something that could lower the employer company's overall level of customer service and effectiveness, which is critical in the diving industry.

Labor is among the highest costs in the recreational diving industry. At the point where recreational scuba diving meets the end-user, such as in recreational dive stores or at US-based dive destinations, these diving activities are service-intensive, and profit margins can be slim. Diving consumers require personal attention, including assistance from a diving instructor, sales person or dive guide. While the diving industry has no intention of cutting corners by reducing the service levels needed to maintain safety protocols and promote enjoyment of recreational scuba diving, the increased labor cost created in these proposed rules will result in increased prices for the consumer. Increased prices will, in turn, reduce demand as price-sensitive consumers move to other recreational activities that are less labor-intensive and consequently less expensive.

In some cases, as price sensitive customers decline to participate in diving, retail dive stores, travel businesses, manufacturing and training will all be forced to lay off employees and in some cases, close their operations.

#### DEMA's Suggestions for the DOL's New Rules

DEMA strongly suggests revising the DOL's rules to adjust the overtime threshold by adjusting based on the federal government's own data on a region-by-region or state-by-state basis or by using changes in the Consumer Price Index as the basis for change.

#### Regional/State Salary Thresholds

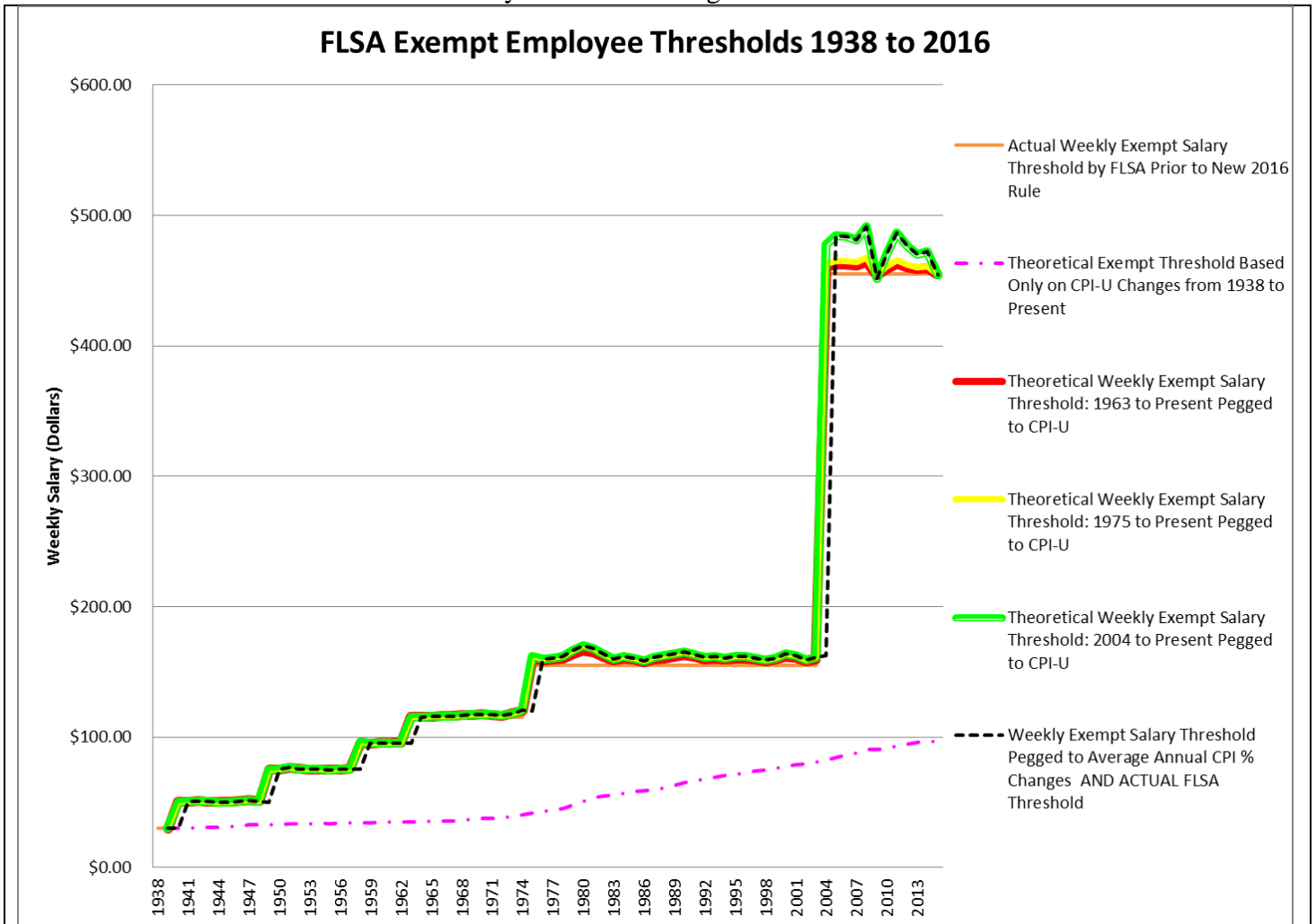
It is well known that the average salary in areas outside of major metropolitan cities is lower than the national average. Living in one state or region could carry a higher or lower cost of living than living in another. The Federal Government itself recognizes, and has access to information about these regional differences, and uses them in calculating pay grades for its General Schedule (GS) Pay Tables. For example, according to the relocation calculator of the FAS Relocation Network (as of June 10, 2016), an employee in Washington, D.C. earning an annual salary of \$47,476 would only need to earn \$30,186 to have a comparable standard of living in Corpus Christi, Texas, where the cost of living is calculated as about 36% of the cost of living in the nation's capital.

**Solution:** Rather than an exemption threshold with a one-size-fits all minimum, allow the exemption threshold to be keyed to the states or key it to regional differences in accordance with the actual cost of living.

### Tie The Threshold to the Consumer Price Index

Alternative to keying to a state or region, the DOL's rules could key an exempt employee threshold to the Consumer Price Index.

DEMA has calculated the annual earnings thresholds based on the FLSA since 1938 and adjusted them based on the Consumer Price Index (CPI). The data reveals that using the 1963, 1975 or 2004 thresholds as a starting point, the CPI adjusted threshold remains less than \$25,000. Clearly the jump from the current \$23,600 per year (\$455 per week) to \$47,476 is substantially more than is warranted based on any calculation using CPI.



Source: US Bureau of Labor Statistics, CPI Tables, Through December 2015

**Solution:** Calculate a reasonable increase in the threshold that encourages remote and mobile employees and job retention.

### **Summary: Adverse Impact on the Diving Industry and DEMA's Members**

The original Notice of Proposed Rulemaking on the FLSA acknowledge that the new regulatory changes to overtime will entail a significant cost for employers, as the new salary level standards “transfer income from employers to employees in the form of higher earnings.” Diving businesses typically operate on minimal margins, and payroll can be one of the largest cost components. The Department of Labor's automatic every-three-year increases to the minimum salary level will also be difficult for the diving industry to implement, as it will for many specialty recreation businesses. As a consequence of the new rules' required conversion of

currently exempt employees into non-exempt employees, many recreational diving businesses will be forced to choose among three unpleasant options:

- Lay off employees to fund the increase in wages for retained employees. This could necessitate curtailing aspects of business operations and/or increasing the workloads of the remaining exempt workforce.
- Lower the hourly wages of non-exempt employees in order to maintain current payroll budgets, so that the total annual compensation costs, including overtime payments, remain at the prior year's level. This will have a negative impact on employee morale in an industry dependent on high levels of customer service.
- Recreational diving businesses will need to adopt firm restrictions on the overtime hours worked by non-exempt employees, relying on temporary or part-time staff for additional personnel resources at straight-time rates, or forcing exempt employees to absorb some of their non-exempt colleagues' duties. The industry will lose some remote employees as these individuals are re-classified from exempt to non-exempt.

In an industry where workers are passionate and excited everyday about what they do, these new rules will have an adverse impact on employee morale, curtail professional growth as employees are restricted or prevented from attending education programs and events, and in some cases, cause them to lose their jobs.

Senator Isakson, we ask that you disapprove of the new Department of Labor rules under the Congressional Review Act.

Sincerely,



Tom Ingram  
President/CEO

Resources:

- <sup>1</sup> Pub. Law No. 101-188; 104-583.
- <sup>2</sup> "Wireless History Timeline," CTIA-The Wireless Association, accessed June 11, 2014, <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-history-timeline>.
- <sup>3</sup> Pew Research Internet Project, *Home Broadband 2013*, <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>.