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U.S. House of Representatives
Washington, DC 20515

H2-377
Ford HOB

May 24, 2022

COMMENTS BY THE OFFICE OF EMPLOYEE ADVOCACY, U.S. HOUSE OF REPRESENTATIVES IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

RE: OCWR Rules Implementing Certain Substantive Rights and Protections of the Fair Labor Standards Act
(as published in the Congressional Record – House; April 26, 2022; pages H4496-H4508)

Editorial Notes:

Text highlighted in yellow in the Office of Congressional Workplace Rights (OCWR), Board of Directors' Proposed Rule constitutes language that the Office of Employee Advocacy proposes to add to the Proposed Rule.

Text that has been struck through (example: ~~strike through~~) in the OCWR Board's Proposed Rule constitutes language that Employee Advocacy proposes to delete from the Proposed Rule.

Employee Advocacy then sets forth the revised Proposed Rule as it would have been presented in the Congressional Record Notice to mark changes from the Secretary of Labor's regulations, including the OCWR Board's conventions for deletions (**[ ]**) and new text (<< >>).

At Section 541.0(a) *[page H4498, column 3 – H4499 , column 1]***, the Proposed Rule reads:**

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for 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 nursery school programs). **[** ~~elementary or secondary schools)~~**]**, or in the capacity of an outside sales employee, 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.**]**

This Proposed Rule should be changed to read:

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for 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 **<<nursery school programs).>> [**elementary or secondary schools), or in the capacity of an outside sales employee, 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.**]**

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Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Although Congressional child care centers have teachers, it is not clear that either the House or Senate has its own elementary or secondary schools. Yet, the definition of "educational establishment" in section 541.204(b) includes "nursery school programs," which does apply to child care centers in Congress. The term "nursery school program" is more applicable in Section 541.0(a); so, "nursery school program" can be substituted for "elementary or secondary school."

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541.0(c) *[page H4499, column 1]***, the Proposed Rule reads, in relevant part:**

> … (including any employee employed in the capacity of academic administrative personnel or teacher in nursery school programs~~elementary or secondary schools~~) **[**, or in the capacity of an outside sales employee under section 13(a)(1) of the Act.**]**….

This Proposed Rule should be changed to read:

> … (including any employee employed in the capacity of academic administrative personnel or teacher in **<<nursery school programs>> [**elementary or secondary schools), or in the capacity of an outside sales employee under section 13(a)(1) of the Act.**]**….

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Although Congressional child care centers have teachers, it is not clear that either the House or Senate has its own elementary or secondary schools. Yet, the definition of "educational establishment" in section 541.204(b) includes "nursery school programs," which does apply to child care centers in Congress. The term "nursery school program" is more applicable in Section 541.0(c); so, "nursery school program" can be substituted for "elementary or secondary school."

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541.3(b)(1) *[page H4499, column 2]***, the Proposed Rule reads:**

> (b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, ~~deputy sheriffs, state troopers, highway patrol officers,~~ investigators, inspectors, ~~correctional officers, parole or probation officers, park rangers, fire fighters,~~ paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted

criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

This Proposed Rule should be changed to read:

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, **[**deputy sheriffs, state troopers, highway patrol officers,**]** investigators, inspectors, **[**correctional officers, parole or probation officers, park rangers, fire fighters,**]** paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Although Congress has U.S. Capitol Police Officers, who conduct many investigative, safety, rescue, and criminal apprehension functions, Congress does not employ individuals under many of the titles included in the Department of Labor's regulations at § 541.3(b)(1). Among the position titles that we recommend deleting are "fire fighters." To the extent that Congress does not employ fire fighters or individuals engaged in firefighting duties, the regulations should omit references to the position. However, it is not clear whether Congress employs individuals engaged in fire protection. OCWR's previous FLSA regulations at H553.213 indicated that some agencies have law enforcement officers that serve a second role in fire protection. It is unclear, however, that Congress has officers that engage in such dual service. To the extent Congress does not employ officers engaged in such dual service, Section 541.3(b)(1) should be revised to omit "fire fighter" as a position title.

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541.3(b)(2) *[page H4499, column 2]***, the Proposed Rule reads, in relevant part:**

… Thus, for example, a police officer ~~or fire fighter~~ whose primary duty is to investigate crimes ~~or fight fires~~ is not exempt under section 13(a)(1) of the Act merely because the police officer ~~or fire fighter~~ also directs the work of other employees in the conduct of an investigation ~~or fighting a fire~~.

This Proposed Rule should be changed to read:

… Thus, for example, a police officer **[**or fire fighter**]** whose primary duty is to investigate crimes **[**or fight fires**]** is not exempt under section 13(a)(1) of the Act merely because the police officer **[**or fire fighter**]** also directs the work of other employees in the conduct of an investigation **[**or fighting a fire**]**.

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Section 541.3(b)(2) uses an example an employee's "primary duty" to demonstrate a proper exemption. Although Congress employs Capitol police officers, it is not clear whether Congress employs fire fighters or individuals whose "primary duty" is to fight fires. To the extent that Congress does not employ fire fighters or individuals engaged in firefighting duties, the regulations should omit references to the position. OCWR's previous FLSA regulations at H553.213 indicated that some agencies have law enforcement officers that serve a second role in fire protection. It is unclear, however, that Congress has officers that engage in such dual service. To the extent Congress does not employ officers that engage in such dual service, Section 541.3(b)(2) should be revised.

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541.3(b)(4) *[page H4499, column 2]***, the Proposed Rule reads, in relevant part:**

> … Although some police officers, ~~fire fighters~~, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

This Proposed Rule should be changed as follows:

> This sentence in Section 541.3(b)(4) should be revised to eliminate job positions that do not appear in Congress.

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Congress employs Capitol police officers, but it is not clear that Congress employs fire fighters; and it is unclear whether all of the other positions listed in Section 541.3(b)(4) are positions within Congress.

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541.4 *[page H4499, column 2, last paragraph, second sentence]***, the Proposed Rule reads, in relevant part:**

> … Employers must comply, for example, with any Federal~~, State or municipal~~ laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act….

This Proposed Rule should be changed as follows:

> … Employers must comply, for example, with any Federal**[**, State or municipal**]** laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act….

Reason for proposed change: In response to questions about the applicability of state and local minimum wage laws to federal employees under the Fair Labor Standards Act, the U.S. Office of Personnel Management has offered clear guidance. OPM has stated the following:

> State and local government minimum wage laws are not binding on the Federal Government and its component agencies since, under the preemption doctrine which originates from the Supremacy Clause of the Constitution, Federal law supersedes conflicting State law. (*See* U.S. Const. Art. VI. cl. 2.) This is the case when Federal employee pay rates are specifically fixed under Federal law (e.g., GS employees) and when Federal agencies are given discretion in setting rates of pay under Federal law.

U.S. OFFICE OF PERSONNEL MANAGEMENT, CPM 2019-23, *Memorandum for Human Resources Directors: Inapplicability of a State or Local Minimum Wage to Federal Employees,* (Nov. 27, 2019). OPM issued its 2019 guidance in the context of the Department of Labor's FLSA regulations and their applicability to Executive Branch federal agencies. OCWR's FLSA regulations substantially adopt the Secretary of Labor's regulations, and thus OPM's guidance can inform how the DOL regulations should apply to Legislative Branch employers. Accordingly, State or municipal minimum wage laws would not apply to Congressional employees. Only the federal minimum wage would apply.

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At Section 541.100(a)(3) *[page H4499, column 3]***, the Proposed Rule reads:**

> (3) Who customarily and regularly directs the work of two or more other full-time employees or their equivalent; and

This should be changed to read:

> (3) Who customarily and regularly directs the work of two or more other **<<full-time>>** employees **<<or their equivalent>>**; and

Reason for proposed change: Section 541.100(a)(3) should be revised to clarify that the definition of an "employee employed in a bona fide executive capacity" applies to those who direct the work of full-time employees. Such a definition would be in harmony generally with the FLSA regulations published by the Department of Labor, including Section 541.104(a).

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At Section 541.203(a) *[page H4501, column 1, full paragraph 5]***, the Proposed Rule reads:**

> ~~(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims;~~

~~determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.~~

This should be changed to read:

[(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.**]**

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." This example of an administrative exemption in Section 541.203(a) is not relevant to Congress and, as such, should be omitted.

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At Section 541.203(b) *[page H4501, column 2]***, the Proposed Rule reads:**

~~(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.~~

This should be changed to read:

[(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.**]**

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." This example of an administrative exemption in Section 541.203(b) is not relevant to Congress and, as such, should be omitted.

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541.204(c)(1) *[page H4502, column 1]***, the Proposed Rule reads, in relevant part:**

(1) Employees engaged in academic administrative functions include: the superintendent or other head of ~~an elementary or secondary school system~~ a nursery school program….; …the principal and any vice-principals responsible for the operation of ~~an elementary or secondary school~~a nursery school program; ~~department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.;~~ academic counselors who perform work such as administering school testing programs~~,~~ and assisting students with academic problems ~~and advising students concerning degree requirements~~; and other employees with similar responsibilities.

This Proposed Rule should be changed as follows:

(1) Employees engaged in academic administrative functions include: the superintendent or other head of **[**an elementary or secondary school system**] <<a nursery school program>>**….

…; the principal and any vice-principals responsible for the operation of **[**an elementary or secondary school**] <<a nursery school program>>**; **[**department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.;**]** academic counselors who perform work such as administering school testing programs**[**,**]** **<<and>>** assisting students with academic problems **[**and advising students concerning degree requirements**]**; and other employees with similar responsibilities.

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." Although Congress has child care centers, it is not clear that either the House or Senate has its own elementary or secondary schools. The definition of "educational establishment" in section 541.204(b) includes "nursery school programs," which does apply to child care centers in Congress. Thus, "nursery school program" can be substituted for "elementary or secondary school." Further, Congress does not have employing offices that are institutions of higher education, so language that refers to such occupations should not be retained.

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At Section 541.301(e)(3) *[page H4502, column 3]***, the Proposed Rule reads:**

~~(3) Dental hygienists. Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.~~

This should be changed to read:

> **[**(3) Dental hygienists. Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.**]**

Reason for proposed change: The Board has stated in the "Background" section of the Proposed Rules that it "now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch … should not be retained." This example of a professional exemption in Section 541.301(e)(3) is not relevant to the House of Representatives and, as such, should be omitted.

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At Section 541.303(b) *[page H4503, column 2]***, the Proposed Rule reads, in relevant part:**

> (b) Exempt teachers include, but are not limited to: Regular academic teachers; ~~teachers of kindergarten or nursery school pupils;~~ teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations;….

This should be changed to read:

> (b) Exempt teachers include, but are not limited to: Regular academic teachers; **[**teachers of kindergarten or nursery school pupils;**]** teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations….

Reason for proposed change: The OCWR regulations should omit teachers of kindergarten or nursery school pupils from the Section 541.303(a) term "employee employed in a bona fide professional capacity." In this respect, the Board's regulations should not be the same as the Department of Labor's substantive regulations because there is good cause to depart from DOL's regulations. Congressional teachers of kindergarten or nursery school pupils should not be within the scope of the exemption for teaching professionals because such teachers do not regularly include individuals with any advanced knowledge in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction as required by other sections of the professional exemption. Omitting teachers of kindergarten or nursery school pupils in Congress would be consistent with requirements of the professional exemption.

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At Section 541.303(d) *[H4503, column 2, full paragraph 4]***, the Proposed Rule reads, in relevant part:**

> ~~(d) The requirement of §541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.~~

This should be changed to read:

> **[**(d) The requirement of §541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.**]**

Reason for proposed change: The OCWR regulations should not exempt teaching professionals in Congress from the salary requirements in Section 541.300 and Subpart G. In this respect, the Board's regulations should not be the same as the Department of Labor's substantive regulations because there is good cause to depart from DOL's regulations. In Congress, there is no rational basis for excluding teaching professionals from the salary threshold test for determination of FLSA exclusion. Empirical data demonstrates that teaching professionals often receive lower salaries than others potentially exempt as professionals. *See* https://www.brookings.edu/blog/education-plus-development/2020/04/13/are-our-preschool-teachers-worth-more-than-they-were-two-months-ago/ (report from the Brookings Institute); https://www.nea.org/advocating-for-change/new-from-nea/average-teacher-salary-down-45-over-past-decade (report from the National Education Association); https://www.epi.org/press/teachers-are-paid-almost-20-less-than-similar-workers-when-including-benefits-teachers-still-face-a-10-2-total-compensation-penalty/ (report from the Economic Policy Institute). Congressional teachers tirelessly serve in childcare centers and administer nursery school programs. In Congress, the teaching professionals are hard-working, but do not typically hold advanced degrees or earn high salaries, as can be the case in the Executive Branch agencies to which DOL's regulations apply. Thus, Congress' teaching professionals do not typically meet the requirements of the professional exemption. Therefore, there is good cause for the Board's regulations to differ from the DOL regulations; and Section 541.300 and Subpart G salary requirements should apply so that Congress' teachers can be entitled to benefits like overtime compensation.

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At Section 541.601(a)(1) *[page H4505, column 1]***, the Proposed Rule reads, in relevant part:**

> (a)(1) Beginning on ~~January 1, 2020~~the effective date of these regulations, an employee with total annual compensation of at least $107,432 is….

This should be changed to read:

> (a)(1) Beginning on **[**January 1, 2020**]<<the effective date of these regulations>>**, an employee with total annual compensation of at least $107,432 is….

Reason for proposed change: The January 2020 date should be deleted because it would result in retroactive application of these regulations. The standards prescribed by these new regulations should apply prospectively, not retroactively.

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At Section 541.601(a)(2) *[page H4505, column 1]***, the Proposed Rule reads:**

(2) Where the annual period covers periods both prior to and after ~~January 1, 2020~~ the effective date of these regulations, the amount of total annual compensation due will be determined on a proportional basis.

This should be changed to read:

(2) Where the annual period covers periods both prior to and after **[**January 1, 2020**]<<the effective date of these regulations>>**, the amount of total annual compensation due will be determined on a proportional basis.

Reason for proposed change: The January 2020 date should be deleted because it would result in retroactive application of these regulations. The standards prescribed by these new regulations should apply prospectively, not retroactively.

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At Section 541.601(b)(2) *[page H4505, column 2, full paragraph 1, second full sentence]***, the Proposed Rule reads, in relevant part:**

. . . For example, for a 52-week period beginning ~~January 1, 2020~~ on the effective date of these regulations, an employee may earn $90,000….

This should be changed to read:

. . . For example, for a 52-week period beginning **[**January 1, 2020**]<<on the effective date of these regulations>>**, an employee may earn $90,000….

Reason for proposed change: The January 2020 date should be deleted because it would result in retroactive application of these regulations. The standards prescribed by these new regulations should apply prospectively, not retroactively.

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541.606(b) *[page H4507, column 1]***, the Proposed Rule reads, in relevant part:**

Regulations defining what constitutes "board, lodging, or other facilities" are contained in 29 CFR part 531**<<, which are incorporated herein>>**….

This Proposed Rule should be changed as follows:

Regulations defining what constitutes "board, lodging, or other facilities" are contained in 29 CFR part 531**<<, which are incorporated herein>>**….

Reason for proposed change: A comma should be inserted before the added "which" to address a grammatical typographical error and ensure clarity.

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Text and Numbering Regarding Section 541.101 *[page* H4499, *column 3*]; **Subpart F Sections 541.500 – 541.504** *[page H4504, columns 1 through 3]*; **Section 541.607** *[page H4507, column 1]*; **Section 541.709** *[page H4508, column 2]*; and the **Sections recommended for deletion in these Comments**.

The numbering of these Proposed Rules should be changed as follows:

In Sections 541.101, 541.500 - .504, 541.607, 541.709, etc., text should be inserted that states "Intentionally left blank."

Reason for change: The content and numbering of the DOL Sections 541.101, 541.500 - .504, 541.607, and 541.709 have been deleted in their entirety in the Proposed Rules. Consequently, there are gaps in the numerical order of the remaining numbered subparts and sections. To avoid confusion, an "Intentionally left blank" or similar notation should be inserted for removed text and numbering. The same notation should be applied for any section recommended for deletion in these Comments where OCWR agrees with the recommendation.

[END OF COMMENTS]