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May 25, 2022

Via email to rule-comments@ocwr.gov

Teresa James
Acting Executive Director
Office of Congressional Workplace Rights
110 Second Street, SE
Room LA-200
Washington, DC 20540-1999

Re: Notice of Proposed Rulemaking Implementing FLSA Regulations

Dear Ms. James:

The Office of House Employment Counsel (OHEC) hereby submits its comments regarding the Office of Congressional Workplace Rights (OCWR) Board of Directors (Board) April 26, 2022 Notice of Proposed Rulemaking (2022 NPRM) implementing regulations relating to the Fair Labor Standards Act (FLSA) white-collar[1] overtime exemptions under the Congressional Accountability Act (CAA). The proposed regulations were published in the Congressional Record on April 26, 2022. 168 Cong. Rec. H4496-H4508 (daily ed. April 26, 2022).

Background and Relevant History

To properly evaluate the 2022 NPRM, the history of the Board's promulgation of prior proposed updates to these exemption regulations, comments received from OHEC and other entities to that earlier proposal, and the Board's response to those comments, must be considered.

In April 2004, the Department of Labor (DOL) issued final regulations that substantially updated the white-collar overtime exemptions applicable to most non-Legislative Branch employers. On September 29, 2004, the Board proposed regulations (2004 NPRM) that would have updated the white-collar exemption regulations under the CAA to align with the DOL's

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[1] The FLSA contains nineteen categories of exemptions. *See* 29 U.S.C. §§ 213(a)(1)-(19). The exemptions addressed by the regulations are the executive exemption, the administrative exemption, the professional exemption, the outside sales employee exemption, and the computer professional exemption, which are found at 29 U.S.C. §§ 213(a)(1) and (17). These are commonly referred to as the "white-collar exemptions."

update. OHEC provided comments to the Board's 2004 proposed regulations on October 29, 2004. *See* Attachment A (October 29, 2004 letter from OHEC to the Executive Director of the Office of Compliance). The Board agreed with some, but not all, of the submitted comments when it issued its final proposed regulations on March 9, 2005 (2005 Final Regulations). *See* Attachment B (Board's March 9, 2005 Notice of Adoption of final regulations). The Board's 2005 Final Regulations have not been approved by Congress.

When the DOL updated its white-collar regulations in 2004, it noted that the "minimum wage and overtime pay requirements of the Fair Labor Standards Act . . . have been severely eroded . . . because the Department of Labor has not updated the regulations defining and delimiting the exemptions for 'white collar' executive, administrative and professional employees. . . . The minimum salary level was last updated in 1975, almost 30 years ago, and is only $155 per week. The job duty requirements in the regulations have not been changed since 1949 – almost 55 years ago." 69 Fed. Reg. 22,122 (April 23, 2004) (to be codified at 29 C.F.R. 541).[2] That statement was made eighteen years ago, which means that the salary level applicable to Legislative Branch employees today was set *forty-seven years ago*, and the duties tests were drafted for workplaces that existed *seventy-three years ago*. Accordingly, adopting revised regulations for the Legislative Branch based on DOL's current white-collar exemptions will align the rules for Congressional employees to those in effect for most other employers. Moreover, it will assist Congressional employers in evaluating the exemption statuses of their employees by reference to current caselaw and DOL regulatory interpretation and modern circumstances. OHEC concurs in this modernization effort.

The proposed regulations, however, suffer from a consistent and apparent flaw: there are no substantive provisions directly tailored to unique work in the Legislative Branch. As explained below, in addition to the other comments listed, OHEC submits that the 2022 NPRM should be supplemented to reflect the issues identified in this letter, and to provide additional examples specific to Legislative Branch employment in the twenty-first century.[3]

Comments

1. *Unaddressed Modifications from the Board's 2005 Final Regulations*

The 2022 NPRM states that the proposed regulations "incorporate the 2004 amendments previously adopted by the Board after public notice and comment, and further update the

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[2] The 2022 NPRM states that these regulations were promulgated on August 23, 2004. That is incorrect, the final regulations were issued on April 23, 2004, and *became effective* on August 23, 2004. https://www.federalregister.gov/documents/2004/04/23/04-9016/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and

[3] To accomplish this, OHEC has offered a number of specific examples. In addition to, or in lieu of the examples OHEC offers, the Board might also hold fact-finding sessions with stakeholders to ensure that any new examples specifically tailored to the Legislative Branch accurately reflect the working environment and job duties that exist in Congressional offices in 2022.

overtime exemption regulations to mirror further Department of Labor changes in 2016, 2019 and 2020." 2022 NPRM at H4497. In addition, the 2022 NPRM makes some additional changes to the 2005 Final Regulations based on its reconsideration of comments submitted with respect to the 2004 NPRM. Some of the changes in the 2022 NPRM incorporate OHEC's comments from 2004 (*e.g.*, the deletion of references to outside sales employees and eliminating extraneous language regarding applicability of salary level test to U.S. territories (Sections 541.100(a)(1), 541.200(a)(1), 541.300(a)(1), and 541.400(b)). Other changes the Board made when it issued its 2005 Final Regulations, however, have not been included in the 2022 NPRM, and the 2022 NPRM provides no explanation for these changes. It is thus not clear whether the Board intended to make such changes from the 2005 Final Regulations or whether the changes in the 2022 NPRM were inadvertent errors.

Specifically, the final sentence of Section 541.0(c) of the 2022 NPRM states: "The equal pay provisions in Section 6(d) of the Fair Labor Standards Act are administered ***and enforced*** by the Office of Congressional Workplace Rights" (emphasis added). In our October 29, 2004 comments, OHEC explained that the then-named Office of Compliance had no enforcement authority with respect to this provision and that the reference to "enforcement" in the 2004 NPRM should be eliminated. *See* Attachment A at page 4. The Board agreed with this comment and in its 2005 Final Regulations it eliminated the reference to "enforcement." *See* Attachment B at page H1228 and Section 541.0 (c) of the 2005 Final Regulations (deleting words "and enforced"). The 2022 NPRM, however, reinserts the words "and enforced" in Section 541.0(c). For the reasons OHEC explained in 2004 and that the Board concurred with in 2005, OHEC submits that the words "and enforced" should be removed from Section 541.0(c) in the 2022 NPRM.

Additionally, the second sentence of Section 541.4 of the 2022 NPRM states: "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." 168 Cong. Rec. H4499. In our October 29, 2004 comments, OHEC noted that this reference should be eliminated because the CAA does not incorporate any such laws, regulations or ordinances. *See* Attachment A at page 4. The Board agreed in its 2005 Final Regulations and modified this sentence accordingly. *See* Attachment B at page H1228 and Section 541.4 of the 2005 Final Regulations. The 2022 NPRM, however, retains the reference to the applicability of State or municipal laws in Section 541.4. This issue continues to be particularly relevant for many employing offices because many states and localities have higher minimum wage requirements and/or different overtime exemption analyses than the FLSA. Therefore, any language in the Board's regulations that incorrectly suggests that such state and local laws govern district office employees is confusing and should be deleted.

Also, the following language in Section 541.0 that was added by the 2005 Final Regulations has not been included in the 2022 NPRM: *"as applied pursuant to sections 203 and 225(f)(1) of the Congressional Accountability Act, 2 U.S.C. 1313 and 1361(f)."* (emphasis in

original). *See* Attachment B at H1236. For the reasons we articulated in our October 2004 letter, this language should be reinstated. *See* Attachment A at 2.

It is unclear whether the inclusion of "and enforced" in Section 541.0(c), the reference to "State and municipal laws, regulations or ordinances" in Section 541.4, and the deletion of the statutory authority references in Section 541.0 were intended in the 2022 NPRM to be substantive changes from the Board's position in its 2005 Final Regulations, or whether they are inadvertent. If the former, the Board should identify the basis for reversing its prior position and provide an opportunity for such reversals to be evaluated and addressed. If inadvertent, the Board should modify the 2022 NPRM to adhere to such changes in the 2005 Final Regulations and review the 2022 NPRM line-by-line[4] to ensure that any other potential inadvertent reversals from the 2005 Final Regulations are corrected.

2. *OHEC concurs with the Board's decision to eliminate entirely inapplicable subparts of the 541 Regulations*

In our October 2004 comments, OHEC noted that examples in the 2004 NPRM addressing occupations and workplaces that are non-existent in the Congressional workplace should be eliminated. The Board disagreed and concluded that the new regulations "provide[d] a wealth of authoritative exemplary and descriptive material which can assist employers and employees to discern whether a particular position or job is exempt [and that t]he usefulness of this material does not depend on the direct applicability of each and every provision of the regulations to each and every position or job." Attachment B at H1229. In its 2022 NPRM, the Board notes that it has "reconsidered . . . and now agrees that subsections that refer to occupations that do not apply in any manner to the Congressional branch . . . should not be retained." 2022 NPRM at H4497. Accordingly, the Board has eliminated Sections 541.101 (business owner), Sections 541.500-541.504 (outside sales employees) and Section 541.709 (motion picture producing industry). OHEC fully concurs with this decision. OHEC submits that Section 541.605 (fee basis) should similarly be eliminated in its entirety since it is a separate section and has no applicability to employment in the House of Representatives as all House employees must be paid an annual salary of at least $45,000.[5]

OHEC understands that the Board has retained discussions of a number of other jobs that are clearly inapplicable to any Congressional working environment (*e.g.*, longshoremen, chefs,

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[4] For instance, in the 2005 Final Regulations, the Board replaced the terms "enterprise," "company," and "business" with "employing office" throughout the regulations. These changes did not carry over to the 2022 NPRM.

[5] Effective September 1, 2022, and pursuant to the provisions of 2 U.S.C. § 4532, all House employees must be paid at least at an annual rate of pay of at least $45,000. https://www.speaker.gov/newsroom/5622 (May 6, 2022 letter setting minimum and maximum pay for all House employees). Accordingly, all House employees will automatically meet the salary level test for exempt status set forth at Section 541.600(b).

dental hygienists, fire fighters) on the grounds that they are not separate sections, but are part of an overall descriptive discussion. Presumably, the Board's reasoning is expressed in the 2005 Final Regulations: "Any effort to carve this integrated body of regulations into segments which only refer to employment categories presently included within each category of employing office under the CAA would not only subvert the overall integration of Part 541, but prove to be enormously difficult in implementation." 2005 Final Regulations at H1230. To the extent, these otherwise nonapplicable job titles and similar non-applicable verbiage are purely descriptive examples, and are not stand-alone subsections such as outside sales or business owners, OHEC concurs that they need not be excised from the 2022 NPRM.[6]

3. *OHEC Recommends Adoption of specific examples reflecting work and duties performed in the Legislative Branch*

Because of their fact-specific nature, exempt status determinations often require complex analyses of competing factors that are often difficult to apply. Improper classifications can be problematic to both employing offices *and* employees. Among other things, they can result in litigation and potential back pay awards for the former, and potential underpayment for the latter. Employing offices and employees alike benefit from proper classifications of positions from the outset, and lack of clear guidance leads to unnecessary ambiguity. Accordingly, it is in the interest of both employing offices and employees to have clear guidance to assist in making exempt status determinations.

The DOL recognizes this by including targeted guidance for numerous industry-specific non-Legislative Branch employers – *e.g.*, screenplay writers, cartoonists, comparison shoppers in a retail store, journalists, chemists, traffic managers, chefs, athletic trainers, dental hygienists. The DOL regulations were not, however, drafted with the Congressional working environment in mind. Accordingly, just as DOL provides very specific occupation and industry-specific guidance in its regulations – which assists employers in those occupations and industries in properly classifying their employees – the OCWR should provide targeted guidance regarding the application of these regulations to the unique aspects of the Congressional working environment is necessary. To that end, OHEC strongly urges the Board to add some descriptive examples that discuss positions and factors unique to the Legislative Branch. Doing so would be consistent with the OCWR's statutory obligations under 2 U.S.C. § 1313(c)(2) (modification of regulations "would be more effective for the implementation of the rights and protections" under

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[6] OHEC notes that the Board proposes eliminating one of nine examples from Section 541.301(e)(9) – funeral directors or embalmers. Although OHEC certainly agrees that funeral directors and embalmers have no applicability to the Legislative Branch and that elimination of Section 541.301(e)(9) makes sense, it is unclear why the Board decided to eliminate this one example and not any of others in Section 541.301(e) that are clearly non-applicable (*e.g.*, dental hygienists (Section 541.301(e)(3)), chefs (Section 541.301(e)(6)), and athletic trainers (Section 541.301(e)(8))). Again, OHEC is not suggesting that these other discussions be removed since they are part of a broader discussion and provide descriptive examples; we are simply noting that the basis for removing only funeral directors is unclear.

the FLSA) and 2 U.S.C. §1381(h)(1) (OCWR shall carry out education program respecting the laws made applicable by the CAA). Furthermore, as the agency Congress set up to administer the CAA, the OCWR has years of specialized knowledge of and experience with the Congressional working environment that imbue it with a particular expertise to do so that DOL lacks. *This would not require the Board to delete any language from the DOL's regulations. On the contrary, we are suggesting only that the Board supplement the regulations with targeted examples and terminology that apply to the Congressional working environment.*

For example, in Sections 541.106(b) and 541.700(c), the regulations explain the analysis of concurrent and primary duties for an employee who performs both exempt and non-exempt work, using assistant managers in a retail establishment as examples. Adding a section in the Board's regulation to address a situation that occurs in the Legislative Branch would be particularly helpful. For instance, the Board might add the example of the Communications Director with primary exempt duties of developing the Member's press strategy and drafting substantive press statements and responses, even though the Communications Director may spend substantial time engaging in routine work such as updating contact lists of names and addresses for mass mailings using the frank.

Based on OHEC's experience with employing offices of the House, other areas where further descriptive examples would be helpful are as follows:

- Explaining, for purposes of Section 541.103, that a "customarily recognized department or subdivision" of a House Member's office (which, by statute, is limited to no more than twenty-two employees) could include the legislative staff who are often referred to colloquially as the "leg shop" and who typically report to the Legislative Director, the communications staff who are often referred to as the "press team" and who typically report to the Communications Director, and caseworkers who typically report to the Director of Casework/Constituent Services;

- Articulating that Legislative Counsels whose work advising Members regarding legal issues and the potential impact of legislation requires the use of skills and knowledge developed through law school studies can be exempt professionals under Section 541.301, even though they may not be engaged in the traditional practice of law under Section 541.304(a)(1);

- Explaining that legislative staffers who have primary responsibility for analyzing, developing and recommending legislative activity and initiatives, collecting support among other Member offices to co-sponsor legislation, drafting talking points for a Member to use on the House Floor or at committee hearings to encourage adoption of an amendment, and serving as subject matter experts for issues within their legislative portfolio – can be exempt under Section 541.200 if such are their primary duties and if they utilize sufficient discretion and independent judgment in performing such duties; and

- Clarifying that, with respect to the administrative exemption's requirement that the employee's work be "directly related to management or general business operations of the employer or the employer's customers" at Section 541.201(a), that the term "the employer's *customers*" includes "the employing office's *constituents*" and, accordingly, caseworkers who provide guidance to constituents regarding federal agency issues (*e.g.*, immigration appeals, social security benefits denials, veterans' benefits review, etc.) are performing work "directly related to management or general business operations" of those constituents.[7]

To be clear, OHEC is *not* suggesting that the Board affirmatively state in its regulations that an employee who performs the above duties will *always* establish exempt status. The FLSA requires that decisions regarding exempt status "of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations," Section 541.2, and those decisions generally require a case-by-case, fact-based analysis. However, because the job functions in the examples above are unique to the Legislative Branch and are not addressed in DOL's regulations, OHEC submits that there is good cause for the Board to include such or similar examples as indicia of exempt status.

4. Supervision of interns is relevant to the executive exemption

In our 2004 comments, OHEC suggested that under the executive exemption, the requirement that a manager supervise two or more employees be expanded to include supervision of interns. Attachment A at 5. The Board rejected that suggestion in the 2005 Final Regulations and noted that it had informally addressed the issue with the Department of Labor. Attachment B at H1231. OHEC respectfully requests that the Board reconsider that position in light of the following factors and post-2005 developments.

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[7] OHEC recognizes that Section 541.201(b) identifies "legal and regulatory compliance" as an example of work directly related to the management or general business operations of the employing office or its customers, and Section 541.201(c) provides that employees who function as advisers and consultants to an employer's customers can be exempt under the administrative exemption. OHEC interprets these provisions as providing that legislative staffer work falls within the administrative exemption (provided, of course, that other elements are met – *e.g.*, primary duty, discretion and independent judgment, etc.). However, this is a process of extrapolating and a bit like trying to fit a square peg into a round hole. Given that the Legislative Branch does not have "customers" and in light of the unique nature of Legislative Branch work, the Board could provide guidance to both employing offices and employees by giving examples of legislative work and casework that can meet this element of the administrative exemption. Again, for the Board to do so is no different than when DOL provided specific targeted guidance for unique professions such chefs, cartoonists, funeral directors and dental hygienists and would be fully consistent with OCWR's function and statutory mandates. (This specific guidance could be added to Section 541.201, or listed as an example under Section 541.203).

First, interns under the CAA and in the House of Representatives are unique and differ from generic interns in other employment contexts, and the CAA was amended in 2018 to clarify that interns are employees in some contexts. Under 2 U.S.C. § 1311(d) (as amended), interns are now specifically included as covered employees with respect to the application of the anti-discrimination laws incorporated by the CAA. This statutory change, post-dating the 2005 Final Regulations, endowed interns in Congressional offices with rights and statuses akin to employees.

Second, pursuant to section 120 of Public Law 115-244, the Energy and Water, Legislative Branch, and Military and Veterans Affairs Appropriations Act, 2019, the House enacted policies providing pay for interns, and the Committee on House Administration established formal regulations for paid interns which, among other things, authorize Members to "determine[] the terms and ***conditions of employment*** for an intern participating in this program, including provisions for leave (e.g., Annual, Administrative and Sick)" (emphasis added).[8]

Establishing by regulation (i) that interns under the House Paid Internship Program are to be paid a salary, (ii) that Members can provide them with annual, administrative and sick leave, and (iii) that Members can determine "the terms and conditions of employment for an intern" are all indicative that interns within the House now have the attributes of employees. *See also* discussion of House paid internship program on Committee on House Administration website at https://cha.house.gov/member-services/house-paid-internship-program.

Third, offices within the House typically designate one person to function as an "Intern Coordinator" and that person has substantial responsibility for running the intern program, selecting interns from a pool of possible candidates, approving requests for time off by interns, addressing performance and misconduct issues with interns in the first instance, assigning and delegating work to interns, and/or ensuring that interns attend and have access to educational and other learning opportunities such as attending legislative hearings.

Fourth, because all interns (whether paid or unpaid) are now expressly covered by the CAA's anti-harassment and anti-discrimination provisions, Intern Coordinators now typically have at least the initial responsibility for addressing allegations of harassment, and/or requests for reasonable accommodation due to an intern's disability.

These are all strong indicia of supervisory duties and responsibilities, which is why Intern Coordinators are typically advised to attend the supervisory (as opposed to non-supervisory) version of the House's mandatory yearly Workplace Rights and Responsibilities training.

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[8] *See* May 5, 2020 House Committee on House Administration Committee Resolution 116-19 at p. 2, located on the Committee's website at https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Resolution%20116-19%20Paid%20Internship%20Regulations%20Adopted.pdf

For all of these reasons, interns under the CAA and in the House of Representatives differ substantially from the generic understanding of interns in the private sector. Any informal opinion received from the DOL in 2005 should therefore not be controlling. Accordingly, individuals who have primary responsibility for supervising at least two full-time interns should be eligible for the executive exemption under Section 541.104.

5. Miscellaneous

Section 541.606(b) proposes deleting the provision that incorporates specific language from 29 C.F.R. §531.32 and, instead, incorporating entire Part 531. Part 531 is an extensive and exhaustive set of regulations regarding a variety of issues. To incorporate its entire regulatory scheme without more detailed analysis is, in our view, overbroad. We believe the Board should retain the specific quoted language from §531.32 and not incorporate Part 531 wholesale.

Thank you for the opportunity to submit these comments. If you have any questions or require clarification of any of the discussions above, please let me know.

Respectfully submitted,

Ann R. Rogers
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