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**ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**HEARING ON
"IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY STRUCTURE"**

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Introduction

Chairman Walberg, Ranking Member Courtney and distinguished members of the Subcommittee, my name is Nancy McKeague, and I am Senior Vice President, Employer and Community Strategies and Chief Human Resources Officer for the Michigan Health & Hospital Association, based near Lansing, Michigan. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. On behalf of our approximately 275,000 members in over 160 countries, I thank you for this opportunity to appear before the Committee to discuss improving the federal wage and hour law and regulatory structure in the 21st century workplace.

SHRM is the world's largest association devoted to human resource (HR) management. Representing more than 275,000 members in over 160 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

The Michigan Health & Hospital Association (MHA), founded in 1919 as a nonprofit association, advocates for hospitals and the patients they serve. This includes all community hospitals in the state, which are available to assist each of Michigan's nearly 10 million residents, 24 hours a day, seven days a week. Michigan hospitals consist of various types of health care facilities, including public hospitals—owned by city, county, state or federal government, and nonpublic hospitals—individually incorporated or owned and operated by a larger health system. In total, the MHA has 151 employees, including 73 exempt employees and 78 nonexempt employees. The MHA has employees in a variety of occupations including lawyers, physicians, allied health professionals, and computer and information technology (IT) professionals.

The MHA is a top employer in Michigan, earning the Alfred P. Sloan Award for Excellence in Workplace Effectiveness and Flexibility in both 2009 and 2010. The Sloan Awards, given annually by SHRM and the Families and Work Institute, honor organizations that are using workplace flexibility as a strategy to make work "work" better—for the employer and the employees. In addition, the MHA received Modern Healthcare magazine's "Best Places to Work in Healthcare" 2010 award based on a judging system that is weighted 25 percent on an organization's nomination and 75 percent on its employees' survey results—making the award significantly representative of staff sentiment.

In my testimony, I will explain the key issues posed by the Fair Labor Standards Act (FLSA) to our nation's employers and employees; demonstrate some of the practical challenges faced by employers when complying with the FLSA, with a focus on nonprofit organizations; explain how the FLSA hinders an employer's ability to provide workplace flexibility; share SHRM's efforts to promote these benefits to employees; explain SHRM's principles for a 21st Century Workplace Flexibility Policy; and lastly, provide a quick overview of President Obama's recent actions to update overtime regulations.

The Fair Labor Standards Act

The FLSA has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) administers and enforces the FLSA with respect to private employers and state and local government employers.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education."[1]

Employees of firms that are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, record-keeping or child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce.

Additionally, many states have their own laws pertaining to overtime pay. If a state's law is more inclusive or more generous to the employee than federal law, the state law will apply. If, however, the state law is less inclusive, then employers are required to follow federal law. The myriad of federal and state laws add additional complexity when employers are working diligently to remain compliant.

Employee Classification Determinations under the FLSA

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Taking into consideration the regulations under 29 CFR Part 541, employers and HR professionals should use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime and the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or nonexempt is made on whether the employee is paid on a salary basis, at a defined salary level, and an individual's specific duties and responsibilities. It is assumed under the FLSA that all employees are covered under the FLSA as nonexempt employees, and each element of the three-part FLSA test must be met in order to consider an employee exempt under the statute.

These classification determinations must also be made looking at each individual job position. Classification decisions for all positions are particularly challenging as they are based on both objective (salary basis level, salary basis test) and subjective criteria (duties test). As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt who, in reality, should be nonexempt, or vice versa.

Given the challenges HR professionals encounter, a significant portion of SHRM's programs and educational resources focus on compliance with the FLSA. SHRM's HR Knowledge Center responds to thousands of FLSA inquires each year from our members as employers diligently work to stay in compliance with the law. In fact, the volume of questions SHRM receives regarding the FLSA is second only to one other federal statute—the Family and Medical Leave Act (FMLA).

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[1] 29 U.S.C. 203(s)(1)(A)

FLSA–Practical Challenges for Employers

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself has remained relatively unchanged in the more than 70 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done.

Therefore, today's examination of how to improve the FLSA regulatory structure is an important discussion. HR professionals and employers can benefit from the findings of the December 2013 Government Accountability Office (GAO) report on how the DOL should adopt a more systematic approach to developing guidance for employers. In fact, should the DOL implement this approach, SHRM and HR professionals would welcome increased dialogue with employers, including nonprofit organizations and small employers.

Additional guidance would certainly be helpful given the practical challenges most employers face when complying with the FLSA. Complying with the statute can create high legal costs for employers, which is difficult for an organization like the MHA with a tight budget. Simply stated, increased litigation related to alleged FLSA violations leads to less funding for a nonprofit's core mission, whether that is providing patient treatment, caring for children or conducting research. That is why improved guidance from the Department in order to prevent baseless lawsuits is critical. The following areas represent practical challenges for many employers:

Employee Classification Determinations: The organizational structure of and duties performed by employees in the nonprofit sector can lead to difficult employee classification determinations. The MHA, like many nonprofits, has a fairly flat organizational structure that is not as rigid as those commonly found in for-profit enterprises. For example, exempt employees in nonprofit organizations that are similar to the MHA often engage in work activities along with nonexempt employees in order to meet members' expectations. Thus, employee classifications do not always fit nicely into the FLSA's two separate bucket approach of "exempt" or "nonexempt" employees.

For a small organization, the "primary duties" test presents unique challenges because it is difficult to distribute work evenly across a limited capacity organization. As a result, managers may frequently assist with the work of their nonexempt colleagues and perform exempt and nonexempt work concurrently. I will elaborate later in my testimony on the flexibility restraints associated with the FLSA.

For example, we sometimes find an employee will fit all of the executive employee exemptions under the FLSA with the exception of the supervision of two or more employees. Take the instance of the MHA Foundation, which was established to support hospitals and their community partners to improve the health of individuals and communities throughout Michigan. Because the executive director for this Foundation supervises only one employee, determining her classification was challenging. In the end, we decided to make her exempt because of her autonomy, experience and our confidence in her judgment.

Defending Against Litigation: Despite the ambiguity of many employment situations, the stakes in "improperly" classifying employees are high. The DOL frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorneys' fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position's proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

Nonprofit employers like the MHA work hard to ensure employee classification decisions are in compliance with the FLSA. With a limited budget and tight margins, we must do everything in our power to limit expensive lawsuits. When the 2004 changes to the FLSA overtime regulations were enacted, the MHA had to allocate additional funding to retain counsel in order to assure our practices were compliant. We have two HR staff members, and I estimate that about 35 percent of their time is dedicated to compliance matters. This restricts the time and resources we have available for organizational development and building support services for our member hospitals in Michigan.

With employers and employees now finally understanding the full impact of the 2004 overtime changes, any sweeping changes to the FLSA regulations should be carefully constructed to prevent a new wave of litigation and additional confusion. Planning for an increase in litigation can be particularly difficult for the nonprofit sector and small employers. In the end, a nonprofit hospital's decision to direct limited funds to defending against lawsuits means less money for patient care and treatment.

Technology Challenges: Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Smartphones, tablets, the use of social media and other technology allow many employees to perform job duties when and where they choose.

As an employer in the health care sector, our member hospitals are working 24 hours a day, seven days a week, providing critical treatment and care to patients. With the outdated nature of the FLSA, many of our members feel limited with how nonexempt staff can use their time when working from home. Currently, our database manager and our help desk manager are nonexempt employees, but they both would greatly benefit, and so would our organization at large, from the flexibility that comes with a work-provided smartphone. These employees want to be responsive to our members' needs. However, because of the difficulties associated with tracking these after work hours, we've had to restrict when and how these employees assist users with technology-related questions. Added flexibility to provide this technology would be quite beneficial because these employees are supporting and assisting other smartphone users within our organization.

Diminished Workplace Flexibility: The 21st century workforce and workplace are increasingly demanding workplace flexibility, defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

In the health care sector we have many jobs that didn't even exist ten years ago—some technology-related and some due to medical and scientific advances. Because of the nature of our work, we must have the ability to respond as quickly as possible and utilize flexible hours, especially for clinicians. For instance, when several states, including Michigan, experienced medical emergencies due to contaminated compounded injections, we had nurse managers working alongside the teams they manage to provide patient care for an extended period during the crisis.

The FLSA makes it difficult, if not impossible in many instances, for employers to provide workplace flexibility to millions of nonexempt employees. While nonexempt employees can receive time-and-a-half pay, they cannot be afforded the same workplace flexibility benefits as exempt employees. At the MHA, we restrict telecommuting options because of FLSA compliance concerns. While we do offer flexible schedules, we require that all work be performed between 7:00 a.m. and

6:00 p.m. on weekdays. Another consequence of this outdated statute is seen in the MHA's decision to limit internships and fellowship opportunities because of flexibility restrictions.

Furthermore, the statute also prohibits private-sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public-sector employees are offered this type of flexibility, commonly referred to as "compensatory or comp time." This comp time option would be made available to all employers and employees if H.R. 1406, the Working Families Flexibility Act, was enacted. SHRM strongly supports H.R. 1406 because it meets our core workplace flexibility principle—that in order for flexibility to be effective, it must work for both employers and employees. Specifically, the bill would modernize the application of the FLSA to the private sector by permitting employers to offer employees the voluntary choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work. Currently, federal, state and local government employees are offered a similar benefit.

While the ability to offer nonexempt, private-sector employees comp time is one way public policy can encourage greater access to workplace flexibility, SHRM believes more can be done to incentivize employers to implement effective and flexible workplaces. It is our strong belief that public policy must not hinder an employer's ability to provide flexible work options. Rather, public policy should incentivize and enhance the voluntary employer adoption of workplace flexibility programs.

Because SHRM and its members believe the United States must have a 21st century workplace flexibility policy that reflects the nature of today's workforce, and that meets the needs of both employees and employers, the Society has developed a set of five principles to help guide the creation of a new workplace flexibility public policy. I have included a copy of these principles at the end of my written statement (Appendix A).

Workplace Flexibility Educational Efforts

As SHRM continues to advocate for public policy proposals that encourage or incentivize employers to create effective and flexible workplaces, the Society has also formed a multiyear partnership with the Families and Work Institute (FWI) to educate HR professionals about the business benefits of workplace flexibility. The primary goal of the SHRM/FWI partnership is to transform the way employers view and adopt workplace flexibility by combining the influence and reach of the world's largest association devoted to human resource management with the research and expertise of a widely respected organization specializing in workplace effectiveness.

Although the FWI is an independent nonadvocacy organization that does not take positions on these matters, and the position of SHRM should not be considered reflective of any position or opinion of the FWI, I'd like to mention one of the key elements of the SHRM/FWI partnership: "When Work Works," a national initiative to bring research on workplace effectiveness and flexibility into community and business practice. "When Work Works" partners with communities and states around the country to:

- Share rigorous research and employer best practices on workplace effectiveness and flexibility.
- Recognize exemplary employers through the Sloan Award for Excellence in Workplace Effectiveness and Flexibility.

- Inspire positive change so that increasing numbers of employers understand how effective and flexible workplaces benefit both employers and employees, and use this information to make work "work" better.

Change is constant in business. We know that in order for organizations to remain competitive, they must employ strategies to respond to changes in the economy, the workforce and work itself. By highlighting strategies that enable people to do their best work, "When Work Works" promotes practical, research-based knowledge that helps employers create effective and flexible workplaces that fit the 21st century workforce and ensures a new competitive advantage for organizations.

President's Call to Update Overtime Regulations

In closing, I would note that today's hearing on the FLSA is particularly timely given President Obama's recent memorandum to DOL Secretary Perez requesting that the Department modernize the FLSA regulations related to overtime. In short, while we appreciate the president's interest in clarifying and simplifying the regulations, we remain concerned that these revisions could lead to more complications for employers and employees, especially for smaller employers and nonprofit organizations that might not have a full HR office or legal team.

Since the DOL's latest Semiannual Regulatory Agenda suggested a Notice of Proposed Rulemaking (NPRM) on the overtime regulations later this fall, it is unclear what changes will be proposed. However, any changes to the FLSA overtime regulations will likely touch almost every employer and employee in the country. The proposal could include an increase to the salary basis level amount from $455 a week by a significant amount. This means that a substantial number of employees currently classified as exempt from the overtime requirements would be eligible for overtime pay. In addition, the proposal might adjust the primary duty test.

In preparation for a regulatory proposal, over the past few months the DOL has been holding listening sessions to directly hear from various stakeholders about how the rules governing overtime and overtime exemptions are currently operating in the workplace. I was pleased to have joined in one of the three listening sessions the DOL conducted with SHRM members recently.

In these sessions, SHRM members highlighted the impact potential changes to the overtime rules could have on employee morale and workplace flexibility. For example, changing overtime regulations could take an entire level of management and convert them to hourly employees, curtailing their access to workplace flexibility offerings valued by employees and limiting their ability to decide where, when and how work is done. Also, many employees prefer the exempt classification because it is associated with "professional status" in an organization.

SHRM members also discussed the need for employer education if the rules are changed, and advocated for a "safe harbor" allowing employers to adjust their employee classifications, if necessary, without fear of repercussions or litigation. HR professionals working in California, who have their own, more stringent rules for overtime exemptions, have expressed concerns with moving to a duties test that could curtail the ability of exempt employees to concurrently perform exempt and nonexempt duties.

In anticipation of these changes, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), a group of various industry employer associations concerned about potential changes to the FLSA regulations. As the employer community voice on the FLSA regulations, the PPWO looks

forward to analyzing a NPRM on this issue and commenting on behalf of employers across industries and across the country.

Conclusion

The FLSA is a valuable and fundamental cornerstone among America's workplace statutes. SHRM educates its membership and their organizations about all wage and hour issues under the FLSA. But the FLSA was crafted in a bygone era, and it should be re-evaluated to ensure it still encourages employers to hire, grow and better meet the needs of their employees. As such, SHRM encourages the Department to improve its approach to developing guidance for employers, as suggested by the GAO report.

Working to comply with the FLSA can create high legal costs for employers, which is particularly difficult for the nonprofit sector with tighter budgets. Simply stated, more confusion from Washington and increased litigation related to alleged FLSA violations leads to less funding for a nonprofit's core mission, whether that is providing patient treatment, caring for children or conducting research.

SHRM and its members, who are located in every congressional district in the nation, are committed to working with this Subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce requirements that could limit workplace flexibility.

As we anticipate the DOL's proposed changes to the FLSA regulations later this fall, SHRM appreciates the Administration's interest in modernization. However, we caution that enacting sweeping changes could make compliance even more complicated for employers, in particular small employers and nonprofit organizations.

Thank you. I welcome your questions.

Appendix A.

SHRM's Recommendations for a 21st Century Workplace Flexibility Policy

Shared Needs: SHRM envisions a "safe-harbor" standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer's policies or collective bargaining agreements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing—and often conflicting—existing patchwork of regulations.
- Create administrative and compliance incentives for employers that offer paid leave by offering them a safe-harbor standard that would facilitate compliance and save on administrative costs.
- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe-harbor leave standards to satisfy federal, state and local leave requirements.

Employee Leave: Employers should be encouraged to voluntarily provide paid leave to help employees meet work and personal life obligations through the safe-harbor leave standard. A federal policy should:

- Encourage employers to offer employees some level of paid leave that meets minimum eligibility requirements as allowed under the employer's safe-harbor plan.
- Allow the employee to use the leave for illness, vacation, personal and family needs.
- Require employers to create a plan document, made available to all eligible employees, that fulfills the requirements of the safe harbor.
- Require employers to attest to the U.S. Department of Labor that their plan meets the safe-harbor requirements.

Flexibility: A federal workplace leave policy should encourage maximum flexibility for both employees and employers. A federal policy should:

- Permit the leave requirement to be satisfied by following the policies and parameters of an employer plan or collective bargaining agreement, where applicable, consistent with the safe-harbor provisions.
- Provide employers with predictability and stability in workforce operations.
- Provide employees with the predictability and stability necessary to meet personal needs.

Scalability: A federal workplace leave policy must avoid a mandated one-size-fits-all approach and instead recognize that paid leave offerings should accommodate the increasing diversity in workforce needs and environments. A federal policy should:

- Allow leave benefits to be scaled to the number of employees at an organization; the organization's type of operations; talent and staffing availability, market and competitive forces, and collective bargaining arrangements.
- Provide prorated leave benefits to full- and part-time employees as applicable under the employer plan, which is tailored to the specific workforce needs and consistent with the safe harbor.

Flexible Work Options: Employees and employers can benefit from a public policy that meets the diverse needs of the workplace in supporting and encouraging flexible work options such as telecommuting, flexible work arrangements, job sharing, and compressed or reduced schedules. Federal statutes that impede these offerings should be updated to provide employers and employees with maximum flexibility to navigate work and personal needs. A federal policy should:

- Amend federal law to allow employees to manage work and family needs through flexible work options such as telecommuting, comp time, flextime, a part-time schedule, job sharing, and compressed or reduced schedules.
- Permit employees to choose either earning compensatory time off for work hours beyond the established workweek, or overtime wages.
- Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.