Testimony of
Christine L. Owens
National Employment Law Project

Hearing Before the
United States Congress

Workforce Protections Subcommittee
House of Representatives Education and Workforce Committee

December 9, 2015

Christine L. Owens, Executive Director
National Employment Law Project
2040 S Street, NW, Lower Level
Washington, D.C. 20009
(202) 683-4810
cowens@nelp.org

Chairman Walberg, Ranking Member Wilson, and members of the subcommittee on Workforce Protections: My name is Christine Owens. I am the Executive Director of the National Employment Law Project (NELP) and testify today on NELP's behalf. We appreciate the opportunity to address the Subcommittee.

NELP is a national non-profit organization that for over 45 years has combined research and advocacy, public education, technical assistance and direct services to advance the rights and interests of low-income and unemployed workers, a disproportionate share of whom are women, people of color and immigrants. Our goal is to ensure that work is an anchor of economic security and a ladder of economic opportunity for all of America's working families. Working together with national, state, and local partners, we promote policies and programs to create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing.

Over the past seven years, the Obama administration has issued several crucial regulations (and in the case of the Equal Employment Opportunity Commission, sub-regulatory guidance) on issues within this Subcommittee's jurisdiction, and we expect a few more will be finalized before the end of the President's second term. Though opponents of these actions castigate them as "job-killers," the reality is quite different: The regulations and sub-regulatory guidance, along with the President's labor-related executive orders, do not deter economic growth or cost us jobs. Instead, they are essential to our nation's workforce – to workers' ability to earn pay commensurate with the work they do and the time they spending doing it, to balance their personal and professional obligations, to labor free of insidious discrimination, and to work in environments that do not put their health, well-being and very lives in danger. Mischaracterizing these actions as bad for employers, bad for workers and bad for the economy ignores the crucial role that thoughtful, tailored regulatory action plays in building a robust economy on the foundation of safe and healthy workplaces, where workers earn living wages and have fair opportunities to advance. It also unfairly demeans regulators for striking a balance between sometimes competing interests that our labor and employment statutory framework requires.

The Ongoing Wage Crisis amid a Recovering Economy

By now, we all know that when President Obama took office, the U.S. economy was descending into the worst economic crisis since the Great Depression. Over a formal recession of 18 months followed by a jobless recovery that persisted into early 2010, the economy shed more than eight million jobs, the unemployment rate peaked at 10 percent, and long-term unemployment reached unprecedented levels. A series of aggressive measures, including multiple extensions of federal unemployment benefits for the long-term unemployed and critical investments in job-creation and job-stabilizing programs, helped to mitigate the severity and duration of the downtown, and put the economy on course to turn the corner. We are now in the midst of the longest period of sustained monthly job growth on record, with the economy adding more than 13 million new jobs since its low point and unemployment having shrunk to a much-improved (though still too high) five percent.

Notwithstanding these improvements, there is no real dispute that for most of America's workers, wages have declined for most of the past 35 years, and that our economy is marked by wage stagnation and near-unprecedented income inequality. These are destructive trends for the economy and our nation. Even Speaker Ryan, when first addressing the House of Representatives after taking the gavel, noted that:

> [The American people are] working hard. They're paying a lot. They are trying to do right by their families. And they are going nowhere fast. They never get a raise. They never get a break. But the bills keep piling up—and the taxes and the debt. They are working harder than ever to get ahead. Yet they are falling further behind.[1]

Data amply support the Speaker's assessment. A recent review by the Bureau of Labor Statistics considered wage and compensation trends from the years 2007-2014 and found that when looking at either wages alone or total compensation (wages plus benefits), the overwhelming majority of workers have experienced stagnant or declining pay.[2] Taking only

---

[1] Speaker Ryan's Remarks to the House of Representatives, http://www.speaker.gov/press-release/speaker-ryans-remarks-house-representatives.

[2] "Compensation inequality: evidence from the National Compensation Survey," http://www.bls.gov/opub/mlr/2015/article/compensation-inequality-evidence-from-the-national-compensation-survey.htm.

wages into account, four out of five workers (the bottom 80 percent) have experienced stagnant or declining pay; and when looking at total compensation, the share of workers experiencing stagnation or decline increases to 88 percent. Not surprisingly, the higher-paid workers saw increasing compensation, particularly their benefits, during the same time period, with the disparity being "more pronounced in 2014 than it was in 2007."[3]

NELP's review of occupational wage changes by quintile between 2009 and 2014 confirms the BLS observations of declining wages. Our analysis divided 785 occupations into quintiles by median pay, with each quintile representing roughly one-fifth of total employment in 2014. We found that averaged across all occupations, real median hourly wages fell by four percent over the five-year period, with quintiles at the bottom of the wage distribution experiencing the greatest declines. Specifically, in the bottom two quintiles, real average hourly wages declined by 5.7 percent and 4.7 percent, respectively. Real average wages declined in the top two quintiles as well, but the declines were smaller.[4]

Wages have remained stagnant or decreased for the vast majority of workers even as they have become more productive[5] and attained more education.[6] Between 1973 and 2014, net productivity of the American worker grew by 72.2 percent. Yet hourly compensation, adjusted for inflation, rose by just 8.7 percent, or 0.2 percent annually.[7] Notably, nearly all wage growth was concentrated in the years between 1995 and 2002.

Though not the only driver of wage stagnation, Congress's inattention to the federal minimum wage and failure to raise it regularly accounts for a significant part of this stagnation – as much as two-thirds of the wage gap between low and middle income workers, according to

---

[3] Id.
[4] "Occupational Wage Declines Since the Great Depression," September 2015, http://www.nelp.org/content/uploads/Occupational-Wage-Declines-Since-the-Great-Recession.pdf.
[5] Josh Bivens and Lawrence Mishel, Understanding The Historic Divergence Between Productivity and a Typical Worker's Pay: Why it Matters and Why It's Real, September 2, 2015, http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf.
[6] "It's Time to Raise the Minimum Wage, http://www.nelp.org/content/uploads/Its-Time-to-Raise-the-Minimum-Wage.pdf.
[7] See footnote 5, http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf.

analysis by the Economic Policy Institute (EPI).[8] This failure has had real consequences for working families. Contrary to stereotypes often promoted by minimum wage opponents, the minimum wage is far from a "starting wage" for young workers. Increasingly, older workers are the backbone of the low-wage economy. An EPI analysis of increasing the federal minimum wage to $12 per hour finds that 89 percent of beneficiaries are over the age of 20 (nearly two-thirds of those are 25 years or older, and nearly half over 40 years old[9]) and almost half have some college education under their belts.[10] Nearly one in three workers who starts in a minimum wage job is still earning that wage a year later, and there's a stark rise in the number of people who stay in minimum wage jobs for three years or more.[11] The "lucky" two-thirds who do get raises were still earning within 10 percent of the minimum wage after a year, and two-fifths of 2008's minimum wage workers were still in near-minimum wage jobs a full five years later.[12] Hence, inaction on the federal minimum wage is consigning more and more adult workers to lifetimes of working harder but falling farther behind.

While some pundits and policymakers proffer education as the cause for the aging of the minimum wage workforce, the reality is that a "cruel game of musical chairs"[13] is underway in the United States labor market, with many college-educated workers of all ages now forced to settle for jobs that are much lower-paying than those held by similarly educated workers in past decades. This phenomenon, in turn, pushes less educated and trained workers into even lower-paying jobs or out of the labor market altogether. [14]

As the Washington Center for Equitable Growth has extensively documented,

---

[8] Lawrence Mishel, Causes of Wage Stagnation," January 6, 2015, http://www.epi.org/publication/causes-of-wage-stagnation/.

[9] "Data Tables: Raising the Minimum Wage to $12 by 2020 would lift Wages for 35 Million Workers," http://www.epi.org/publication/data-tables-raising-the-minimum-wage-to-12-by-2020-would-lift-wages-for-35-million-workers/.

[10] See footnote 6; David Cooper and Dan Essrow, "Minimum Wage Workers are Older Than You Think," April 27, 2015, http://www.epi.org/publication/low-wage-workers-are-older-than-you-think/.

[11] Ben Casselman, "It's Getting Harder to Move Beyond a Minimum-Wage Job," October 8, 2015, http://fivethirtyeight.com/features/its-getting-harder-to-move-beyond-a-minimum-wage-job/.

[12] Id.

[13] Marshall Steinbaum and Austin Clemens, "What happened to the job ladder in the 21st Century?" October 2, 2015, http://equitablegrowth.org/cruel-game-musical-chairs-u-s-labor-market/; http://equitablegrowth.org/what-happened-to-the-job-ladder-in-the-21st-century/.

[14] Id.

> [t]he dire experience of these workers with college degrees displacing workers with less formal education stands in strong contrast to the widely–held view in economic and policymaking circles that the main problem facing the U.S. economy is a shortage of highly-educated workers. If college-educated workers were in short supply, then we would expect their wages to rise as employers attempted to lure them away from their competitors. Yet the inflation-adjusted value of the wages of college-educated workers has barely increased in the 21st century.
>
> What's more, between 2000 and 2014 (the last year for which complete data are available), the employment of college-educated workers has increased much more rapidly in low-earning industries than in high-earnings ones. If there weren't enough college graduates to go around, then the opposite should be happening because high-earnings industries would presumably be out-competing low-earnings industries to hire college-educated workers. Our new analysis of the data from the U.S. Census Bureau's Quarterly Workforce Indicators strongly suggests that college-educated workers are more likely to "filter down" the job ladder than to climb it.[15]

Wages are not all that have stagnated for America's workers. The failure of labor standards to keep up with workers' needs even as profits have soared and CEO compensation has skyrocketed is another reason economic security from work has declined for the vast majority of working families.

The United States guarantees lower wage and benefits floors than any similarly situated Western economy, existing standards have not kept pace with inflation and other economic realities, and chronic underfunding of enforcement agencies has diluted the effectiveness of legal protections for millions of workers.[16] The implications of deficient and weakly enforced labor standards are graver for workers of color and women,[17]who are both more likely to experience workplace violations than higher-paid employees and less equipped--financially or otherwise--to vindicate their rights. A frequently-cited and highly-regarded 2009 survey by NELP and partner organizations of more than 4000 low-wage workers in Chicago, Los Angeles and New York found that more than two-thirds had experienced at least one wage violation in the week preceding the survey; 26 percent had not been paid the applicable (federal or state)

---

[15] Marhsall Steinbaum and Austin Clemens, "The cruel game of musical chairs in the U.S. labor market," September 2, 2105, http://equitablegrowth.org/cruel-game-musical-chairs-u-s-labor-market/.

[16] Joseph E. Stiglitz, Rewriting the Rules of the American Economy, An Agenda for Growth and Shared Prosperity, https://www.gsb.columbia.edu/faculty/jstiglitz/download/papers/2015%20Rewriting%20the%20Rules.pdf.

[17] Id.

minimum wage; and of those who had worked overtime hours, 76 percent were not paid the legally-mandated overtime wages.[18] Among those workers experiencing a serious injury on the job, only eight percent filed for workers' compensation benefits; and half of the workers who told their employers about their injuries were subjected to retaliation, including discharge.[19]

There are simple and common-sense policy solutions to wage and other workplace problems and challenges workers face. These include raising the minimum wage, guaranteeing paid sick leave and fair schedules for workers, improving overtime pay protections, and strengthening our rules that guard against workplace illness, injury and death. Numerous states have implemented these or other family-supporting reforms with none of the prophecies of doom materializing.

Opponents of family-supporting policies argue they do more harm than good--burdening employers and killing jobs--and that cutting taxes and gutting regulations are the most effective job-creation strategies. This contention, however, ignores the lived experience: Even with massive tax cuts, a comparatively milder recession than the most recent, and curtailment of regulation during the Bush 43 Administration, net job growth then was less robust than over the past seven years (since the beginning of 2009), when the economy endured much greater loss and turbulence. Between the final full month before President Obama took office (December 2008) and the most recent reported monthly data (November 2015), the economy has added a net 8.1 million new jobs. Over the comparable period in the Bush 43 Administration, the economy added only 5.5 million new jobs (net). Moreover, the Kansas experiment, with Governor Brownback leading the legislature through a process of slashing taxes, yielded near-catastrophe for the state financially and far-below-national-average job growth.[20]

---

[18] Annette Bernhardt, et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1.

[19] Id.

[20] Yael T. Abouhalkah, "New, disastrous Kansas job loss exposes pure folly of Gov. Sam Brownback's tax cuts," September 18, 2015, http://www.kansascity.com/opinion/opn-columns-blogs/yael-t-abouhalkah/article35684450.html.

Nor do regulations cause significant job loss or impose unsustainable costs outweighing the benefits they confer. According to the Bureau of Labor Statistics report on extended mass layoffs (involving more than 50 employees per event) and resulting job separations in 2012 (most recent data), employers cited "government regulation/intervention" as the reason for mass layoffs in less than three-tenths of one percent (0.27 percent) of events, affecting only around five of every 2000 workers separated from work due to mass layoffs that year.[21] An extremely comprehensive 2011 analysis by researchers for the Economic Policy Institute, surveying and summarizing extensive research, concluded that (1) over the ten-year-period between 2000 and 2010, benefits of regulations vastly exceeded their costs; (2) assessments of regulation costs typically fail to consider a variety of factors that not only mitigate costs, but may generate unanticipated benefits (such as new job creation); and (3) estimates of regulations' potential costs both by government and by industry opponents typically overstate the costs, sometimes significantly.[22] A 2014 report by the Center for Effective Government analyzed ten rules (or proposed rules) focused on public health and safety, including OSHA's proposed rule on Occupational Exposure to Respirable Crystalline Silica, and concluded that when fully implemented, the rules would save 10,000 lives, prevent 300,000 cases of occupational injury or illness, and produce a net overall benefit to society of as much as $122 billion.[23] It also bears noting that throughout the recovery, the foremost reason and concern businesses have cited with regard to their hiring is consumer demand, a concern reinforced by the latest reports showing sluggish consumer spending in September and October.[24]

---

[21] BLS Reports, "Extended Mass Layoffs in 2012," http://www.bls.gov/mls/mlsreport1043.pdf (Table 4, "reason for layoff").

[22] Isaac Shapiro and John Irons, Regulation, Employment, and the Economy: Fears of job loss are overblown," April 12, 2011, http://www.epi.org/files/2011/BriefingPaper305.pdf A number of the regulations discussed in this analysis were environmental regulations but the author also included analyses of OSHA regulations, and their conclusions overall are generally applicable to labor market regulation.

[23] July Tran, Ronald White, et al., The Benefits of Public Protections: Ten Rules that Save Lives and Protect the Environment," http://www.foreffectivegov.org/files/regs/benefits-public-protections-2014.pdf.

[24] Phil Izzo, "Dearth of Demand Seen Behind Weak Hiring," July 18, 2011, http://www.wsj.com/articles/SB10001424052702303661904576452181063763332; Joseph Lazarro, "What's Really Ailing Employment: Lack of Demand," February 2, 2011, http://www.dailyfinance.com/2011/02/04/americas-high-unemployment-rate-lack-of-skills-or-jobs/; Frank James, "Economists: Low Hiring Due to Consumer Weakness, Not Policy Doubts," July 18, 2011, http://www.npr.org/sections/itsallpolitics/2011/07/18/138467531/economists-lack-of-hiring-due-to-low-

Against a backdrop of egregious income inequality, stagnant and declining wages, inadequate labor market policies, and Congressional failure to act in response to needed labor market reform, the Obama Administration has acted judiciously and lawfully in exercising its authority to regulate and guide, where feasible, to help ensure that working Americans can support themselves and their families through jobs that provide living wages in safe and healthy environments, free from discrimination. Labor market policy has no more important purpose than protecting and advancing the rights and interests of all of America's workers, particularly those most vulnerable to workplace exploitation and abuse. In pursuing this objective, the Administration has struck the right balance between the interests of all stakeholders--employers, workers, consumers and the public overall--and among the various tools--education and outreach, enforcement and regulation--it has to achieve the underlying goals of our nation's labor and employment laws.

OSHA: A Case Study in the Role and Importance of Labor Market Regulation

Before turning to a broader discussion of some of the Administration's recent labor market initiatives, and as an exemplar of why regulation matters, this section examines the Occupational Safety and Health Administration's (OSHA) standard-setting in support of its mission to protect workers from death, illness and injury on the job. Any discussion of the 45-year history of OSHA must start with the simple and compelling fact that its standards have saved lives, prevented serious injuries and illnesses and, not inconsequentially, also saved money for employers.

Since 1970, when OSHA was created, though the workforce has nearly doubled, workplace deaths have dropped by 66 percent and reported serious workplace injuries have decreased by 67 percent.[25] Indeed, study after study confirms that OSHA's regulations have been successful in reducing workplace injuries, illnesses and deaths. For example, OSHA's blood-borne pathogens standard virtually eliminated hepatitis B fatalities that killed 120

---

consumer-demand-not-policy-doubts; Jeffrey Sparshott, "Slow U.S. Consumer Spending Signals Caution," November 25, 2015, http://www.wsj.com/articles/u-s-consumer-spending-up-0-1-in-october-1448458450.

[25] "Healthier Workers, Safe Workplaces. A Stronger America." https://www.osha.gov/osha40/; https://www.osha.gov/oshstats/commonstats.html;

workers every year;[26] OSHA's basic "lock out/tag out" safety standard reduced fatalities by over 50 percent in its first seven years alone;[27] and OSHA's Grain Handling Standard led to a 70 percent decrease in fatalities from grain explosions.[28]

While this represents great progress, the Bureau of Labor Statistics just reported that 13 workers still die on the job every day in this country and almost three million workers in the private sector suffered a serious job related injury or illness.[29] Clearly more work remains to be done.

In reality, very few OSHA regulations have been promulgated since the beginning of the agency because OSHA's standard-setting process is extremely lengthy. A 2012 report by the U.S. Government Accountability Office found that it could take OSHA up to 19 years to promulgate a standard, with the average taking seven years,[30] because the number of procedural requirements governing the standard-setting process at OSHA is greater than at other agencies. And, OSHA's process also allows for more substantial opportunities for public involvement than other federal agencies.

Since the beginning of the Obama Administration, OSHA has issued only four major standards. The first rule, which was issued in 2010, covered the safety of cranes and derricks.[31] This rule was started in 2003 and finally published in 2010. The promulgation of the final rule was delayed by procedural and analytical requirements that, according to OSHA's risk analysis, resulted in 132 unnecessary deaths and 1,050 preventable injuries.[32]

---

[26] Kent A. Sepkowitz and Leon Eisenberg, Occupational Deaths Among Healthcare Workers, July, 2005, http://wwwnc.cdc.gov/eid/article/11/7/pdfs/04-1038.pdf. See also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3021207

[27] OSHA: The Control of Hazardous Energy (Lockout/Tagout): Notice of the Availability of a Lookback Review Pursuant to the Regulatory Flexibility Act and Executive Order 12866.

[28] OSHA: Regulatory Review of OSHA's Grain Handling Facilities Standard; February 2003 http://www.bls.gov/iif/.

[30] C WORKPLACE SAFETY AND HEALTH: Multiple Challenges Lengthen OSHA's Standard Setting; GAO-12-330: Publicly Released: Apr 19, 2012, http://www.gao.gov/assets/590/589825.pdf.

[31] Cranes and Derricks in Construction: Final Rule, https://www.osha.gov/FedReg_osha_pdf/FED20100809.pdf.

[32] Id. The other three standards OSHA has issued during this administration are Electric Power Generation, Globally Harmonized System (updated Hazard Communication) and Confined Space in Construction.

OSHA rules do not kill jobs, they prevent jobs from killing workers. The evidence does not support the notion that any occupational safety and health regulation issued by OSHA has had overall negative job impacts. Yet with every new OSHA regulation, industry claims the costs will run into the billions, and job losses will be massive. Industry's hollow cries of billion-dollar rules started in the 1970's, during one of the first OSHA rulemaking proceedings, after a number of workers in a Kentucky plant were diagnosed with a rare liver cancer caused by exposure to vinyl chloride, a chemical used to make plastic found in hundreds of products. OSHA subsequently proposed a regulation to reduce worker exposure to vinyl chloride.

As soon as OSHA issued the new proposal, manufacturers predicted that it would destroy the industry and cost millions of jobs. In fact, on June 26, 1974, The New York Times quoted industry spokesmen saying that "the proposed standard was medically unnecessary, technologically unfeasible, and would lead to the loss of as many as 2.2 million jobs." Yet, after the new vinyl chloride regulation went into effect in 1975, the magazine Chemical Week described an industry rushing to "improve existing operations and build new units" to meet increased market demand. The Sept. 15, 1976, issue reported that producers "have installed the equipment needed to meet the worker-exposure requirements set by [OSHA], but without inflating production costs to the point where PVCs growth might be stunted." Notably, the vinyl chloride industry spent only a quarter of the amount OSHA originally estimated it would cost to comply with the standard, and new technologies designed to meet the standard actually increased productivity.[33]

Much more recent, and similarly compelling, evidence shows the positive effect of OSHA standards. In 2012, the Harvard University and University of California at Berkeley Business Schools found that following OSHA inspections that enforce safety standards, worker injuries were reduced with no detectable job losses.[34] They found that following an OSHA inspection, workers compensation claims fell by 9.6 percent and employers saved an average of 26 percent

[33] http://ota.fas.org/reports/9531.pdf

[34] Michael Blanding, OSHA Inspections: Protecting Employees or Killing Jobs?, May 12, 2012, http://hbswk.hbs.edu/item/osha-inspections-protecting-employees-or-killing-jobs.

on workers compensation costs.[35] Thus, complying with OSHA standards not only prevented injuries, it also saved money for the employer.

The sad fact is that far from over-regulating, OSHA has published very few new regulations since its early years. The vast majority of OSHA's current regulations were adopted in 1971, roughly 45 years ago. They came from industry consensus standards that were based on science developed in the 1950's and 1960's. Most of these standards are very old and out of date and do not adequately protect workers. Yet, given the current length of the standard-setting process, it would take hundreds of years for OSHA to update these regulations. Far from a "regulatory onslaught," the real crisis is a "regulatory draught" when it comes to workplace safety and health.

Snapshot of Selected Regulations and Agency Actions

In the discussion that follows, I will not go into detail on each regulatory or executive action taken by the Obama Administration on behalf of workers, but will highlight a few of those most important to working families. These carefully-tailored, thoughtfully-constructed, and common-sense reforms are long-overdue and go to the heart of very serious issues facing working people today. As appropriate and necessary, NELP intends to submit a supplemental statement for the record, to address matters that arise in the hearing.

Before discussing specific regulations, it is important to stress that the federal labor and employment agencies possess and use a variety of approaches to achieve compliance with our nation's basic worker protection laws and further their objectives. These include extensive outreach and education for stakeholder communities (prominently including employers), targeted enforcement to maximize the potential for addressing the most egregious legal violations in a manner that will spur greater compliance across-the-board, informal guidance and interpretations, and regulation developed and implemented through a deliberative process that allows full opportunity for input from affected stakeholders, as well as comprehensive

[35] Id.

review of various factors, including the benefits and costs associated with proposed regulatory action.

With respect to regulation (and as described in the preceding discussion of OSHA), it is not uncommon for regulatory development to consume multiple years at the agency stage alone. Requirements imposed on agencies by various executive orders, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act, along with review of and appropriate response to public comments that, for a major proposed rule, can run into the thousands of pages, as well as comprehensive review by the Office of Management and Budget at both the proposed and final stages, make rulemaking a long and exacting process. Subsequent challenges in Congress and the courts can further delay the process and postpone final implementation of a rule. Given the complexity, rigor and duration of the regulatory process, agencies do not undertake to craft or amend rules cavalierly or without regard to their impact on all those affected by them. Agencies are entitled to a presumption that they have acted reasonably, within their statutory authority, and in pursuit of the goals they are required to pursue.

We turn now to a discussion of specific regulations and other administration actions in the area of workers' rights and protections.

1. Updating the Executive, Administrative and Professional Exemptions for Overtime Pay Eligibility

For decades, America's workers have been putting in more hours for less income, but DOL's proposed regulation governing the so-called "white collar" exemptions to overtime coverage could ensure heightened overtime pay protection for at least 11 million more workers.[36] This reform has been years in the making. When the Fair Labor Standards Act (FLSA) was enacted in 1938, one of its most important provisions was "time-and-a-half pay" for workers who put in more than 40 hours per week. This rule provided a financial incentive for

[36] Defining and Delimiting the Exemptions for Executive, Administrative and Professional, Outside Sales and Computer Employees: Proposed Rule, http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf.

employers not to overwork their employees, encouraged employers to hire more people, and rewarded workers with higher pay when they clocked extra time.

These overtime pay protections are as vital to workers today as they were 77 years ago. But, decades of regulatory neglect have pulled the teeth from these important protections. Currently, only eight (8) percent of salaried white collar workers have guaranteed overtime protection, a huge decline from 1979, when more than 60 percent of the salaried workforce got overtime pay, according to the Economic Policy Institute.[37]

The "Executive, Administrative and Professional" exemptions to the requirement of premium pay for overtime hours were intended to respond to the realities of certain high-level white collar positions. Specifically, in exchange for higher pay, more flexibility in how they spend their work hours, and greater autonomy in performing their jobs, white-collar employees are expected to spend the time required to get the work done, and to do so without any additional compensation at all for overtime hours. But the Labor Department's failure to regularly review and update the tests governing the exemption, and employers' exploitation of regulatory loopholes, have led to more workers being called "managers" and denied overtime pay, even when they spend the majority of their time performing work routinely done by hourly workers.

A gateway problem with the current rule is its outdated salary threshold. In order to be classified as overtime-exempt, an employee must be paid a salary of at least $455 a week, or $23,660 a year. If that sounds low, it's because it is: Full-time, full-year earnings of only $455 per week fall below the poverty line for a family of four and would render many families of such workers eligible for public benefits like Medicaid, SNAP and other forms of public aid. The salary threshold was last adjusted a decade ago, and before that, had last been revised in the mid-1970s. When the Bush 43 Administration's Labor Department set the current threshold, the level it chose was far too low, just barely above the poverty-line for a family of four. At the

[37] Ross Eisenbrey, "The Number of Salaried Workers Guaranteed Overtime has Plummeted Since 1979," July 11, 2105, http://www.epi.org/publication/the-number-of-salaried-workers-guaranteed-overtime-pay-has-plummeted-since-1979/.

same time, the Department eliminated the distinction between the so-called "short duties test" and "long duties test" to determine exempt status of a white collar employee. As a result, considerable confusion exists among workers and employers alike regarding whether individuals are even eligible to be considered for exemption; and because the salary threshold is so low, many exempt white collar individuals who put in excessive overtime hours end up earning less than the non-exempt employees they supervise and manage. No one would voluntarily opt to be classified as exempt, only to earn poverty level wages notwithstanding excessive hours of work.

The Labor Department proposes to address confusion around proper application of the white collar example and to remedy the erosion of overtime pay with a much more realistic weekly salary threshold of $970, or $50,440 annually for a full-time worker. According to EPI, this level will ensure that at least 44 percent of all white collar workers are automatically covered by the FLSA's overtime protections, a share smaller than the percentage of white collar workers who have historically been guaranteed overtime pay but nevertheless much more representative than under the current threshold of the percentage of workers who, because they likely do not enjoy the economic power required to ensure that their hours are not abusively high or their compensation shamefully low, should be guaranteed overtime pay protections.[38]

Wanda Womack from Alabama is one such worker, and one of several profiled in the NELP report, "The Case for Reforming Federal Overtime Rules: Stories from America's Middle Class."[39] While working as a store manager at Dollar General for 11 years, Ms. Womack spent the majority of her workdays ringing up sales, checking inventory, and unloading freight, tasks indistinguishable from those of employees she supervised and managed. She regularly worked 50 to 70 hours per week but earned only $37,000 a year, resulting in an hourly wage that

---

[38] Will Kimball and Lawrence Mishel, "Estimating the Number of Workers Directly Benefiting from the Proposed Increase in the Overtime Salary Threshold," August 3, 2015, http://www.epi.org/publication/overtime-estimates-technical-memo/; see also, Ross Eisenbrey and Lawrence Mishel, "Raising the Overtime Threshold Would Directly Benefit 13/5 Million Workers," August 3, 2015, http://www.epi.org/publication/breakdownovertimebeneficiaries/.
[39] http://www.nelp.org/publication/the-case-for-reforming-federal-overtime-rules-stories-from-americas-middle-class/.

averaged less than that of her employees.[40] Sadly, all the extra hours of work and the hard manual labor that should have been overtime-eligible took quite a toll on Ms. Womack. She suffered from a herniated disc and needed three surgeries to repair her rotator cuff. Unable to lift over 25 pounds any longer, she could not perform her "managerial" duties at Dollar General and was forced to leave her job.[41]

In proposing a reasonable new salary threshold that will be indexed to grow annually, the Labor Department has taken a crucial step to strengthen middle class wages and give overtime regulations their intended scope--and to ensure that exemption from overtime is consistent with the stringent limitations contemplated by the FLSA. Workers in sectors as diverse as retail, food service, accounting, mortgage and finance, banking, and oil and gas inspection will all benefit from the updated rule. Indeed, even the National Retail Federation, one of the chief opponents of updating the outdated overtime rules, acknowledges that these new regulations will not result in job loss, but will create tens of thousands of new jobs in the retail sector alone.[42]

The Labor Department's proposal of a stronger salary threshold that is consistent with the purposes and intended scope of the FLSA and that aligns the threshold more closely with its historic standard is long-overdue. After decades of declining wages and failure to adequately update the white collar exemption rules, the Labor Department should be applauded for acting to restore wages and protections to where they should be for America's workforce.

2. Protecting Workers from Harmful Exposure to Silica Dust

Exposure to silica dust is a significant occupational health hazard where current worker protections are woefully inadequate. Silica causes cancer and silicosis, an incurable, progressive, and too-often fatal lung disease. Knowledge of the dangers of silica dust exposure is not new. As far back as 1937, Secretary of Labor Frances Perkins declared war on silicosis.

---

[40] Id.
[41] Id.
[42] Rethinking Overtime, page 26, https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf

In 1997, OSHA added updating its silica standard to its regulatory agenda because its current silica standard was more than 40 years old, was based on science that is even older and endangered workers lives and health. In 2013, a full 16 years after it first appeared on the regulatory agenda, OSHA finally proposed new protective measures for workers exposed to silica. The proposal would save nearly 700 lives and prevent 1,600 cases of silicosis annually.

The proposed rule contains common sense, flexible measures that employers can use to reduce silica exposure. After the standard was proposed, OSHA provided a full year for the public to provide comments on the proposal to the agency. An initial approximate six-month written-comment period was followed by three weeks of public hearings, and thereafter, by an additional 130-plus days to submit final comments. OSHA is now preparing the final rule, after this exhaustive recent process that builds on decades of study and intensive analysis.

The simple fact is that disease and death from silica dust exposure can be prevented. Common dust control methods such as applying water to control the dust, or adding ventilation can substantially reduce the amount of dust. Allan White, a foundry worker from upstate New York, was diagnosed six years ago with silicosis. He had never smoked and was a healthy guy. Now, however, he has trouble completing simple things, like talking on a cell phone while walking or trying to walk the simple mile home from his job. As he told OSHA, "[t]he progression of silicosis reduces my physical endurance over time and is very difficult to experience."[43]

In 2013, more workers died from silicosis and silica-related diseases than from explosions, being caught in or crushed by collapsing materials such as a trench collapse, or being caught in running equipment or machinery. Workers should not have to sacrifice their health and, ultimately, their lives for a paycheck. We have waited long enough to update this important standard and save 700 lives per year. OSHA should issue this crucial revised standard as soon as possible.

3. Executive Orders Pertaining to Federal Contract Workers

[43] Statement of Mr. Alan White, August 23, 2013, https://www.osha.gov/silica/AlanWhite.pdf.

It should be axiomatic that our tax dollars must not subsidize poverty jobs or jobs with substandard working conditions. Jobs paid for with taxpayers' dollars should lift up workers, not consign them to conditions of poverty. As a first step toward achieving this objective, President Obama issued Executive Order 13658 mandating that as of January 1, 2015, all new federal contract jobs must pay a minimum wage of $10.10 an hour.[44] This is a good first step, but no more than that, for as the Economic Policy Institute's Family Budget Calculator demonstrates, even a wage of $10.10 per hour isn't enough to support a family anywhere in the United States.[45]

Further acting to ensure that public dollars support only good jobs, President Obama also issued Executive Order 13673, "Fair Pay and Safe Workplaces." Companies with significant, repeated and un-remedied violations of labor and employment laws should not be rewarded with federal tax dollars in the form of government contracts. Yet federal contracts are awarded to such companies with shocking frequency.[46] Executive Order 13673 will better ensure that our tax dollars only go to "responsible" companies that have a satisfactory record of performance, integrity, and business ethics, a requirement already in federal law, but not adequately enforced.

---

[44] Executive Order – Minimum Wage for Contractors, https://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors.

[45] Elise Gould, et al. ,"What Families Need to Get By," August 26, 2015, http://www.epi.org/publication/what-families-need-to-get-by-epis-2015-family-budget-calculator/.

[46] As the Senate HELP Committee and the Government Accountability Office have extensively documented, there is a long and unfortunate history of federal agencies continuing to grant contracts to unscrupulous employers who flout federal labor law. Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk, December 11, 2013, http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf; Federal Contractors and Violations of Labor Laws,. http://www.gao.gov/assets/230/221816.pdf; Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors, http://www.gao.gov/assets/310/309785.pdf. And not surprisingly, those that can't be bothered to adequately comply with labor laws also are also more likely to have other performance problems. The Center for American Progress found that of the companies that committed the worst workplace violations over a five-year period and later received federal contracts, one in four had significant performance problems including fraudulent billing, cost overruns, performance problems, and schedule delays costing taxpayers billions of dollars. Karla Walter and David Madland, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers, December 2013, https://cdn.americanprogress.org/wp-content/uploads/2013/12/BadFedContractors-3.pdf.

At the outset, it's worth noting that this EO will apply only to the scant five percent of federal contracts with an estimated value exceeding $500,000.[47] And at the point of a contractor's initial application, there is nothing new – the potential contractor simply has to check a box to certify compliance with applicable labor laws. Next, if the prospective bidder reaches the "responsibility" determination in the procurement process, the company must then disclose whether there have been any administrative merits determinations, civil judgments, or arbitration awards rendered against it within the preceding three-year period for labor law violations. Realistically, companies bidding on contracts of this magnitude should be well-aware of any such determinations made against them, and requiring that they disclose this information in the bid process is far from burdensome.

Finally, after a contract has been awarded, contractors must semi-annually update the information provided about their own labor law violations and obtain the same information for covered subcontracts. If they are scrupulous about their actions, and subcontract to similarly scrupulous contractors, the semi-annual compliance process will be quite simple.

Far from "blacklisting" any companies from federal contracts, the EO and proposed implementing Federal Acquisition Regulation System regulations are intended to further the simple goal of ensuring that in its role as steward of taxpayer funds, the government is not underwriting law-breaking. Holding contractors that seek federal contracts to the modest standard that they obey the law and correct legal violations is not a burden -- it is the bare minimum that taxpayers have a right to expect.

It is also important to note that mere allegations of violations will not bar a company from receiving a contract, nor will the existence of violations per se act as a bar. For example, the EO explicitly states that "…in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility….," and the proposed DOL Guidance likewise recognizes that labor law violations that "could be characterized as inadvertent or minimally impactful" are purposely excluded from consideration.

[47] "FACTSHEET: Fair Pay and Safe Workplaces Executive Order," https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order

Consistent with these directives, affected bidders will be able to submit evidence of mitigating circumstances to procurement officials, including whether they are contesting the citation, appealing the determination, or whether they have already corrected the issue. Indeed, because of the extensive and appropriate reliance on mitigating circumstances, perhaps the most important impact of the EO will be giving prospective and current contractors the tools and incentive they need to come into compliance with federal labor and employment laws.

Most recently, the President has issued an executive order that will require federal contractors to give the employees on those contracts paid sick leave. It will mean 300,000 workers who service federal contracts but cannot earn paid sick days now will soon be able to earn the paid sick time they need to recover from illness, seek preventive care, or care for sick children or other relatives.[48] As a result of this executive order, fewer workers will have to make choices no one should have to make -- between their jobs and their health, or their family's health. Twenty-five jurisdictions – including four states and some of our largest cities – have adopted paid sick days standards[49] and this executive order, too, will make a tremendous difference.

4. The EEOC's Regulatory and Enforcement Agenda

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing many of our nation's anti-discrimination laws with respect to employment, both for the private sector, the federal government, and state and local agencies.[50] Notably, however, many of the laws pertaining to the private sector do not apply to the smallest businesses, for example, those with under fifteen employees.[51] In order to enforce those laws, and give both workers and employers instruction on what actions constitute violations of the anti-discrimination laws, the

[48] "FACTSHEET: Helping Middle-Class Families Get Ahead by Expanding Paid Sick Leave," https://www.whitehouse.gov/the-press-office/2015/09/07/fact-sheet-helping-middle-class-families-get-ahead-expanding-paid-sick

[49] "Current Paid Sick Days Laws," November 4, 2015, http://www.nationalpartnership.org/research-library/work-family/psd/current-paid-sick-days-laws.pdf.

[50] Laws Enforced by the EEOC, http://www.eeoc.gov/laws/statutes/index.cfm.

[51] See, e.g., Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/statutes/titlevii.cfm

EEOC issues both regulations and guidance, depending on the statute it is enforcing and the vehicle it determines to be both authorized and effective.

Within the last two years, the EEOC has issued notices of proposed rulemaking with respect to employee wellness programs and requirements under the Americans with Disabilities Act (ADA)[52] and the Genetic Information and Nondiscrimination Act (GINA).[53] The Notice of Proposed Rulemaking for the ADA was issued on April 20 of this year, with the period for public comments closing on June 19, 2015; 313 comments were filed.[54] The proposed GINA regulations were published on October 30, 2015, and the public comment period is now scheduled to run until January 28, 2016.[55]

There are important interests to be balanced in finalizing the regulations under ADA and GINA. Businesses and workers have obvious interests in wellness programs to enhance workforce health and productivity. At the same time, workers and their families have the right to be confident that these programs are not subterfuges for any form of illegal discrimination, or end-runs around the prohibitions of ADA, GINA and other health privacy laws. And all workers are entitled to assurance that employee wellness programs do not discriminate in any other manner within EEOC jurisdiction. There has already been extensive documentation and debate of these issues, and the final complement of comments submitted on the proposed regulation will likely reflect the fullness of the debate. There is no reason to feel that the EEOC will not properly and lawfully weigh those comments or that its final regulation will do anything other than strike the proper balance between the competing interests.

Enforcement Guidances are likewise crucial documents for both employers and employees. They flesh out the limited outlines provided by legislation, in the process describing in detail the rights and responsibilities of all parties to the employment relationship and

---

[52] https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act

[53] https://www.federalregister.gov/articles/2015/10/30/2015-27734/genetic-information-nondiscrimination-act-of-2008

[54] https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act.

[55] http://www.gpo.gov/fdsys/pkg/FR-2015-12-07/pdf/2015-30807.pdf

providing examples to guide employer compliance and employee examination of employment practices that raise legal questions.

During the Obama Administration, the EEOC has issued guidance related to two issues, criminal records and pregnancy discrimination. The first guidance, issued in April 2012, updated earlier guidance on using arrest and conviction records for screening and hiring employees; this guidance was originally issued by the EEOC when Justice Clarence Thomas was its Chairman. The revised guidance, approved of on a bi-partisan basis with four of the five EEOC Commissioners voting for its adoption, reiterated the long-standing doctrine that improper use of arrest and conviction records in employment decisions may violate Title VII's prohibition of actions that have a disparate impact based on race. The guidance also provided suggested steps employers could take to ensure proper consideration of criminal records in the employment process, so as to insulate themselves from liability.[56] Revised guidance was appropriate and necessary, given the proliferation of background checks as part of the employee selection process, the explosive growth of the background checking industry, the disproportionate engagement communities of color have with the criminal justice system, and the continued imperative, first adopted by the Supreme Court in 1971, in a unanimous opinion written by Chief Justice Burger,[57] and subsequently affirmed repeatedly by Congress and the Courts, to ensure that facially neutral practices that have a disparate impact on groups protected under Title VII are job-related and promote a business necessity. Many criminal background checks fail that test, in the process unfairly and unlawfully excluding many otherwise qualified applicants from employment. The EEOC acted within its statutory authority and performed an important public service in updating and clarifying guidance in this area of such growing importance.

The guidance on pregnancy discrimination was originally issued on July 14, 2014, and updated on June 25, 2015. The updated guidance addressed when failure to accommodate a reasonable accommodation request from a pregnant worker violates Title VII. This revision

[56] "Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964," http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[57] https://www.law.cornell.edu/supremecourt/text/401/424 (Griggs v. Duke Power Company,

aligns the Commission's guidance with the Supreme Court's decision in Young v. United Parcel Serv., Inc., 135 S.Ct. 1338 (2015).[58]

Far from an "onslaught" by the EEOC, its regulatory agenda and guidances during the Obama Administration have been few and painstakingly considered.

5. Extending Federal Minimum Wage and Overtime Pay Protections to Home Care Workers

After four decades of exclusion from the federal minimum wage and overtime protections of the Fair Labor Standards Act, our nation's two-million-plus home care workers are now finally covered by these laws as the result of a Labor Department regulation, issued in September 2013, that extends these basic wage rights to this critical workforce.[59] Long considered a controversial and questionable interpretation of the FLSA's "companionship" -- casual babysitter -- exemption, the prior regulation excluding home care workers was a byproduct of Jim Crow America and came about at a time when home care was a fledgling industry. As the population aged and the home care industry grew (particularly with the introduction of many third-party-providers, including many for-profit agencies), home-based care gained currency as an alternative preferable to institutional care for the elderly and people with disabilities. Home-based care is not only less expensive, but it also improves the quality of life for its recipients. Today, home care work represents one of the fastest-growing occupations in the nation, expected to add among the largest number of new jobs by 2022.

Home care workers are skilled professionals who help their clients meet a range of needs of daily living. If they worked in a nursing home or related institution, these workers would long have been entitled to federal wage protections. In revising and updating its companionship rule, the Labor Department has not simply acknowledged the growth and changing nature of the home care profession; it has ended the anomaly of extending wage protections to workers who labor in institutions, while denying those same protections to

[58] "Enforcement Guidance: Pregnancy Discrimination and Related Issues," http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.
[59] Application of the Fair Labor Standards Act to Domestic Service, Final Rule., https://www.dol.gov/whd/homecare/final_rule.pdf.

workers who provide the same level of care and support, albeit more economically and in a more nurturing environment, in the home.

Correcting a decades-old injustice that has fueled poverty wages and destabilized an increasingly vital workforce, the Department of Labor's regulations entitle home care workers to the federally-protected right to time-and-a-half of their regular hourly wage when they work over 40 hours in a week; compensation for time spent traveling between consumers' homes; and compensation when they wake to care for clients on overnight shifts, among other things. The Court of Appeals for the D.C. Circuit unanimously upheld this regulation as a legitimate exercise of the Labor Department's authority, and the Department is proceeding with implementation and enforcement of the rule.[60]

These regulations recognize that, in particular for the home care industry, quality jobs are essential for quality care. Low pay leads to burnout and high turnover rates that compromise care, which in turn creates economic strains on the home care system. Raising the standards for this industry by creating a floor of federal protections is not only the right thing to do by workers, it is imperative if we are to meet the demands of an aging America and a preference for in-home services and supports.

Conclusion

The Obama Administration, the Labor Department and the Equal Employment Opportunity Commission have acted within their constitutional and legislative authorities in taking a limited number of actions designed to address the challenges and crises workers contend with every day. These actions reflect careful and balanced consideration of varying interests, input from key stakeholders, and solutions tailored to solving longstanding workforce problems. By improving wages and working conditions for tens of millions of workers, these actions will strengthen America's working families, help rebuild the middle class, reduce income

[60] "Federal Minimum Wage and Overtime Protections for Home Care Workers," September 2015, http://www.nelp.org/content/uploads/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf.

inequality, and lead to a healthier and more robust economy in which all who contribute to its success can share more fully in its prosperity.

We are all better off as a result of these actions. Rather than question or undermine them, Congress should support DOL and the EEOC, and where appropriate, as in the case of executive orders, codify these actions into legislation.