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

**SUBMITTED TO**  
**U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**HEARING ON**  
***"Reviewing the Rules and Regulations Implementing  
Federal Wage and Hour Standards"***

**JUNE 10, 2015**

## **Introduction**

Chairman Walberg, Ranking Member Wilson, and distinguished members of the Subcommittee, my name is Nicole Berberich, Human Resources Director of Cincinnati Animal Referral and Emergency (Care) Center in Ohio. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for seven years. On behalf of more than 275,000 SHRM members in over 160 countries, I thank you for this opportunity to appear before the Committee to discuss the rules and regulations implementing federal wage and hour standards. Today, I will focus my comments on the relevance of the Fair Labor Standards Act (FLSA) to the 21st century workplace.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of human resource (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.

As the Human Resources Director for the Care Center, I am charged with: implementing all HR policies and procedures; training employees; overseeing benefits and payroll administration, and ensuring compliance with all labor laws, including determining employee classifications under the FLSA. I have over 11 years of HR experience across multiple industries, including manufacturing and telecommunications.

The Care Center is an emergency and multispecialty practice in Cincinnati and Dayton, Ohio, serving the region since 2000. Emergency veterinary medicine closely parallels emergency medicine for humans and requires similar specialists. Our team of skilled emergency room doctors provide 24-hour care, seven days a week to the patients we serve. Our workforce is diverse and includes surgeons as well as specialists in cardiology and internal medicine, and the only two board-certified specialists in emergency care and critical care in our region, known as "Diplomates" of the American College of Veterinary Emergency and Critical Care.

The Care Center also employs client service coordinators, technician supervisors, internal medicine supervisors, critical care technicians, surgery technicians, and veterinary technicians, among other administration positions. Our facility offers in-house CT scans, radioactive iodine therapy, digital radiography, ultrasonography, echocardiography, minimally invasive surgery and interventional radiology for our patients. In total, the Care Center employs 105 individuals at our two locations, including 34 exempt employees and 71 nonexempt employees. And, I am quite proud to say that we are accredited by the American Animal Hospital Association, earning both traditional and referral accreditation at both locations – currently the only veterinary hospital in the region to hold such distinction of dual accreditation.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees, demonstrate how the FLSA prohibits employers from providing the workplace flexibility that today's employees want, discuss the impact of upcoming changes to FLSA overtime regulations, and share SHRM's efforts to promote effective and flexible workplaces.

## **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.

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.”<sup>1</sup>

Additionally, many states have their own laws pertaining to overtime pay, such as California. 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. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, the classification of an employee as either exempt or nonexempt is determined by whether the employee is paid on a salary basis with a fixed rate of pay, and their duties and responsibilities.

Classification determinations must also be made by looking at each individual job position. Classification decisions for all positions are challenging as they are based on both objective criteria (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 when they should be nonexempt, or vice versa.

Despite the ambiguity of many employment situations, the stakes in improperly classifying employees are high. The U.S. Department of Labor (DOL) frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorney’s 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.

The FLSA is second to only the Family and Medical Leave Act (FMLA) in terms of the number of inquiries received from SHRM members to our HR Knowledge Center help desk. In 2014, SHRM received 14,000 inquiries related to various facets of the FLSA. Approximately 52 percent of these inquiries were related to overtime, overtime exemption and FLSA legal compliance. Approximately 16 percent of the questions were submitted around compensable hours/minimum wage/youth employment minimum wage issues. Another 8-10 percent of inquiries were related to incentive/bonus/tax compliance associated with payroll and compensation. This indicates the challenges employers are already facing with complicated FLSA regulations.

While SHRM appreciates the administration’s recent interest in modernizing the FLSA overtime regulations, it believes that enacting significant changes to the duties test could further exacerbate an already complicated set of regulations for employers, leading to a new wave of litigation. I will discuss the impact of changes to FLSA overtime regulations later in my testimony.

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<sup>1</sup> 29 U.S.C. 203(s)(1)(A)

## **FLSA – a 20th Century Statute**

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. Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Cellphones, tablets, personal digital assistants (PDAs) and other technology allow many employees to perform job duties when and where they choose. Furthermore, as the Millennial generation becomes the majority in the American workforce, the demand for greater use of technology and flexibility will only continue to grow.

Certain policies may have been appropriate in the 1930s but are out of step with a technology-based economy, creating unnecessary regulatory burdens for employers and restricting employers' ability to be flexible and address contemporary employee needs. Small businesses with a one-person HR office, like the Care Center, are likely to experience these burdens disproportionately, which will continue to worsen with expected changes to FLSA overtime regulations later this month.

## **Workplace Flexibility and the FLSA**

The increased diversity and complexity within the American workforce – combined with global competition in a 24/7 economy – suggests the need for more workplace flexibility. C-suite executives, for example, say the biggest threat to their organizations' success is attracting and retaining top talent.<sup>2</sup>

Human resource professionals believe the most effective way to attract and retain the best people is to provide workplace flexibility.<sup>3</sup> Moreover, a large majority of employees – 87 percent – report that the flexibility offered would be “extremely” or “very” important in deciding whether to take a new job.<sup>4</sup> As a Millennial, I can personally attest to the value placed on workplace flexibility by my generation when applying for jobs. As research shows, four in five employees say workplace flexibility is important when considering a new job, but less than one in four have access to high levels of flexibility.

In addition, recent research indicates that employers are voluntarily adopting workplace flexibility options. According to the 2014 National Study of Employers, a report released by the Families and Work Institute (FWI) and SHRM, from 2008 to 2014 workplace flexibility for full-time employees increased. For example, more employers are offering some employees the option to telecommute occasionally, with 67 percent providing this option in 2014 compared to 50 percent in 2008. Small employers like the Care Center tend to be the leaders in providing workplace flexibility, a key trend identified in the 2014 National Study of Employers.

Given the importance of this issue to our members, SHRM continues to lead a dialogue about workplace flexibility that responds to the diverse needs of employees and employers. SHRM released a set of principles in 2009 to help guide policymakers in the development of public policy that meets the needs of *both* employees and employers by incentivizing organizations to voluntarily offer workplace flexibility options. SHRM looks forward to working with this Committee on a 21<sup>st</sup> century workplace flexibility policy.

Specifically, the FLSA presents two challenges for organizations wanting to implement flexible work arrangements. Employers encounter challenges in terms of offering compensatory time to nonexempt employees and structuring biweekly workweeks. Employers also experience limitations with

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<sup>2</sup> Company of the Future Survey (2010). Society for Human Resource Management and the Economist Intelligence Unit.

<sup>3</sup> Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.

<sup>4</sup> National Study of the Changing Workforce (2008). Families and Work Institute.

employees seeking to conduct work remotely from mobile devices. I outline these challenges in more detail below.

### **Compensatory Time**

The FLSA 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 public-sector employers are able to offer this type of flexibility, commonly referred to as “compensatory or comp time.” At the Care Center, many nonexempt employees prefer the option of comp time because additional time for family obligations is valued more highly than overtime pay. Furthermore, as a small business we have to monitor our labor expenses closely and try to identify other ways to attract and retain our workforce through competitive employee benefits. Amending the FLSA would provide our organization with an additional workplace flexibility option to attract top talent, benefiting both employers and employees nationwide.

This comp time option would be made available to all employers and employees if H.R. 465, the Working Families Flexibility Act, was enacted. SHRM strongly supports H.R. 465 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.

Mr. Chairman, the time has come for Congress to approve legislation to grant private-sector nonexempt employees the opportunity to choose for themselves whether to receive cash wages or paid time off for working overtime. SHRM looks forward to working with Congress to advance this important legislation.

### **Biweekly Workweeks**

SHRM is also concerned that the FLSA limits choices for employees interested in modifying the biweekly workweek. Under the FLSA, employers are permitted to allow a nonexempt employee to work four, 10-hour days Monday through Thursday, for a total of 40 hours in a week, and take every Friday off without the employer incurring any overtime obligations. However, if an employee wanted greater flexibility to work a nine-hour day Monday through Friday of the first week for a total of 45 hours, and then work three nine-hour days and one eight-hour day in the second week and take Friday off, the employer would have to pay overtime for the additional hours over 40 hours in the first week. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement.

At the Care Center, I have faced challenges with the FLSA in terms of scheduling nonexempt employees’ hours over two-week periods to match the team needs of the emergency and critical care veterinarians. The Care Center wants to structure the workplace so that our emergency veterinarians work with the same veterinarian technicians and assistants on cases. Working as a dedicated team builds rapport between the doctors and technical staff and cultivates a positive work environment that maximizes patient care.

In a 24/7 emergency care environment, the emergency and specialty veterinarians sometimes work 10-14 hour shifts. Recently, one of our critical care veterinarians developed a schedule to meet the emergency care needs of our clients by working 50 hours in one week and 30 hours in the next. However, due to the restrictions of the FLSA, I was unable to allow the nonexempt veterinarian technicians to work alongside the same veterinarians because of the overtime payments that would be incurred. As a small business with tight labor costs, I have to monitor our overtime payments even though this schedule would be the best for our organization and our patients.

## **Technology Limitations**

I also face challenges under the FLSA when nonexempt employees want to access online work platforms remotely after work hours. Because nonexempt employees are only paid for the hours they work, all hours must be closely tracked in order to remain in compliance with the FLSA. The Care Center has decided to restrict nonexempt employees' access to patient care online platforms from their homes because of challenges associated with tracking those hours and the inability to pay overtime.

As noted, the FLSA was written before the proliferation of smartphones. Phones, watches and other "smart" devices are commonly enjoyed by the Millennial workforce and will continue to present challenges in regards to nonexempt employees. I recently experienced a challenge with technology that I want to share with the Committee.

In February, one of our patients, a boxer named Carmen, made national news for her role in trying to save her owner from smoke inhalation. The dog was found lying across her owner's face seemingly trying to shield him from the fumes during a tragic house fire. Carmen was found unconscious but was taken to our Care Center where she was treated and subsequently recovered. Some of our nonexempt employees wanted to log in from home and check the status of their patient and manage e-mail remotely, but because of the difficulty of tracking nonexempt hours, the Center had to restrict e-mail access because of the overtime hours that would be incurred.

## **President's Call to Update Overtime Regulations**

Today's hearing on the FLSA is particularly timely given that DOL is expected to release proposed regulations to update the FLSA overtime regulations this month.

Currently, under the FLSA, individuals must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, they must be paid on a salary basis (that is, the salary cannot fluctuate) of more than \$455/week (\$23,660 annually); and second, their "primary duty" must be consistent with those common to executive, professional or administrative positions as detailed in section 541 of the FLSA overtime regulations or one of the other statutorily defined exemptions. Employees who meet these criteria are considered exempt from the overtime requirements of the FLSA.

On March 13, 2014, President Barack Obama directed DOL to "modernize and streamline" the FLSA overtime regulations. While proposed regulations haven't been published at this time, one potential change may call for a significant increase to the salary basis amount of \$455 a week to \$910 a week (\$47,320 annually) or more. This means that a substantial number of employees, in a variety of different industries, currently classified as exempt from the overtime requirements would then be subject to the overtime requirements. Also, reports indicate that the DOL is considering changes to the "primary duty" test to require salaried employees to spend a specific percentage of their time performing certain duties.

As a result, we expect many otherwise-exempt employees under the current regulations will lose their exempt status, curtailing their access to workplace flexibility offerings valued by employees and limiting their ability to decide where, when and how work is done.

At the Care Center, I fully anticipate our practice will be impacted by proposed changes to the FLSA overtime regulations. As mentioned previously, employees are attracted to veterinary sciences because of their dedication to animal health, not for high salaries. We have internal medicine and surgery supervisors whom I recently reclassified as exempt employees due to their managerial and

professional responsibilities within our organization. If the salary threshold is doubled, those employees may lose their exempt status and will return to nonexempt status. This segment of my workforce has already voiced concerns about potential reclassification. In their eyes, the exempt classification is seen as a promotion, providing a sense of “workplace status” and greater workplace flexibility to meet work/life needs. Our supervisors are emotionally attached to this professional status and will certainly view reclassification as a demotion to their career.

Furthermore, the Care Center is a 24/7 business. Further changes to the primary duty test, including a required quantification of exempt time or the elimination of managers’ ability to do both exempt and nonexempt work concurrently would greatly impact our workforce. As a small business, managers often have to pitch in and work at the front desk, answer client phone calls and check in on patients. Our emergency, surgery and internal medicine technical supervisors work on the floor as well as manage their departments. If overtime regulations eliminate the ability of an employee to perform concurrent duties and maintain their exempt status, our hospital would have to hire additional employees. Currently, our employees are able to develop managerial skills while also utilizing their technical skills. Removing the ability to perform these concurrent activities would eliminate many opportunities to “home grow” our technicians that have ambitions to become supervisors.

While SHRM appreciates the administration’s interest in modernizing the FLSA overtime regulations, it believes that enacting significant changes to the duties test would further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and nonexempt work concurrently.

As noted, a majority of employees have mentioned the importance of workplace flexibility when deciding whether or not to take a new job. The upcoming regulations are expected to be yet another example of how outdated FLSA regulations fail to meet the needs of the 21st century workforce. Changes to overtime regulations will likely require employers to reclassify millions of salaried employees to hourly employees. Hourly employees are only paid for the hours they work and are often forced to closely track their hours to ensure compliance with overtime requirements, which can lead to less flexibility.

In anticipation of these changes, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), consisting of a diverse group of associations, businesses and other stakeholders representing employers with millions of employees across the country in almost every industry. The Partnership’s members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees and clarity for employers when classifying employees.

### **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 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 non-advocacy 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 When Work Works Award.
- 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 the nature of 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.

### **Conclusion**

The FLSA is a 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 for a different time, and should be evaluated to ensure it still encourages employers to hire, grow and better meet the needs of their employees.

In light of the fact that the Millennial generation will make up the majority of the American workforce in the near future, now is the time to seriously consider amending the FLSA to allow employers expanded workplace flexibility to attract and retain top talent.

As I’ve laid out today, SHRM remains concerned about the challenges presented by the FLSA in terms of workplace flexibility, namely comp time and the biweekly workweek. SHRM is also concerned that upcoming changes to FLSA overtime regulations will further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and nonexempt work concurrently. Substantial changes to the overtime regulations could also further limit workplace flexibility for employees.

Thank you. I welcome your questions.

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