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**TESTIMONY BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS, UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON
“RESTORING THE VALUE OF WORK: EVALUATING THE DOL’S EFFORTS TO
UNDERMINE STRONG OVERTIME PROTECTIONS”**

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Thank you, Chairman Scott, Ranking Member Foxx and members of the Committee on Education and Labor for the opportunity to participate in today’s hearing, “Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections.”

My name is Anne Babcock-Stiner and I am a licensed attorney and the Senior Vice President for Human Resources at PathStone Corporation, a New York-based nonprofit. I am honored to be here representing an employer that has a rich history of advocating for strong worker protections.

Introduction

PathStone Corporation

PathStone is a 501(c)(3) nonprofit corporation organized under the Not-For-Profit Corporation Law of New York State with a mission of building economic self-sufficiency for families, communities, and individuals. PathStone serves more than 41,000 individuals and families each year through the following main areas of service:

- **Workforce Development:** Enhance the skills, performance and potential of individuals, leading to meaningful employment.
- **Education & Health:** Promote and enhance lifelong learning, healthy living and employability for individuals and families.
- **Emergency & Supportive Services:** Assist individuals and families in crisis to achieve safety and stability, which enable individuals to pursue education and employment.
- **Housing Services:** Financial counseling and resources designed to stabilize living environments and provide the foundation for economic security.
- **Community & Housing Development:** Opportunities for people to live and work in thriving, diverse communities from which they can create family assets and access robust community services.



PathStone builds family and individual self-sufficiency by strengthening farmworker, rural and urban communities. PathStone promotes social justice through programs and advocacy.

PathStone operates 122 offices in seven different states—New York, Vermont, New Jersey, Pennsylvania, Ohio, Indiana and Virginia—as well as in Puerto Rico. PathStone has an annual operating budget of just over \$80 million and has between 550 and 600 employees, depending on the season.

Position Statement

Back in 2016 when the Obama administration proposed raising the salary threshold from \$23,660 to \$47,476, PathStone's initial reaction was that such a dramatic increase would have a negative impact on our operations, particularly in a time of reduced funding. However, as a nonprofit that serves low-wage workers on their journey to economic self-sufficiency, we felt obligated to take a step back and conduct a mission-based analysis of the proposed regulations. This meant that we had to look not only at how the increase would impact our operations, but also how it would impact the people that we serve. We also had to look at how it would impact our own employees, many of whom are low-wage workers. Our analysis led us to the conclusion that we must support the proposed increased salary threshold of \$47,476 and we remain firmly committed to this position today.

Value of the Salary Threshold

Because an employee has to pass both the duties test and the salary level test, an initial exemption determination can be made with just one of the tests. From an employer's perspective, the salary level test is an easily administered, bright line test to determine who is eligible for overtime under federal law—an employee is either above the threshold or below it. The value of the salary level threshold becomes greater when we compare it to the duties test, which is notoriously difficult to apply in practice.

Unlike the salary level test, the duties tests can be ambiguous and it is very easy to make a good faith misclassification. Each duties exemption test has a lengthy list of factors to consider that are spelled out in multiple sources, including DOL regulations, case law and DOL opinion letters. For example, the executive exemption requires that an employer make a determination on 17 different factors. The administrative exemption requires a determination on 32 different factors. Each factor requires an analysis of an employee's job duties and functions, as well as their level of authority and discretion.

Reviewing job duties and functions goes far beyond an examination of job descriptions, work plans and organizational charts. A good faith duties-based classification can be made only after interviewing the employee and their manager to find out what the employee is *actually* doing. The law is quite clear that just because a job description or work plan has primarily exempt duties doesn't mean that the employee is actually doing an exempt job.

The exemption determination process needs to be repeated each and every time an employee's job duties change and each and every time that there is a significant performance issue. For example, if a reduction in funding causes a supervisor to lose one of their two direct reports, their exemption status has to be reviewed and changed. In a time when the needs of our constituents are becoming greater and greater, we as direct service nonprofits are called on to make rapid adjustments in our service delivery models. Each time we do this, job duties shift and exemption statuses must be reviewed. When a program manager is underperforming to the extent that their recommendations are no longer relied on by their director, the manager's exemption status needs to be reviewed. Exemption classifications are made on an individual basis and it is impossible to run a duties test on one job description and then apply the classification to everyone in that position.

Further complicating the process are legal definitions that go against managers' understanding of commonly used language. If you ask any manager what the phrase "primary duty" means, they will invariably say that an employee's primary duty is the duty that they spend the most amount of their time on. When you tell a manager that the legal definition of primary duty is "the most important duty that an employee performs," they will usually

say that all of their duties are important. This results in an extensive back-and-forth between managers and human resources that can be quite time consuming.

In short, because the job duties test is difficult to apply in practice, the bright line salary level test becomes even more important in making exemption determinations. However, the value of the salary threshold as an effective “shortcut” in making an exemption determination is dependent on the level at which it is set. In other words, a salary threshold that is too low doesn’t act as a shortcut.

Reality of a Low Salary Threshold

Only some of employees who are below the salary threshold—those that are close to it—should be reviewed in greater detail to see if their job duties would qualify them for exempt status if their salary is increased, but all employees who are above the salary threshold must be reviewed because their job duties may not qualify them for exempt status. Therefore, a higher salary threshold actually simplifies the task of determining exemption status because it significantly reduces the number of positions that will be subject to the laborious and ambiguous duties test.

A quick review of PathStone’s employee base demonstrates how this pans out. As of the writing of this testimony, PathStone has 598 active employees, 490 which are full-time (including seasonal). We can see how many positions need to be reviewed using the duties test when the salary level is set at three different levels: the current level of \$23,660, the proposed level of \$35,3058 and the Obama proposed level of \$47,476.

Current Threshold:

PathStone has 22 active, full-time employees making less than the current threshold of \$23,660. All of them can be classified as non-exempt based on what is known about their job duties because it is commonly understood that those duties will never been considered exempt (e.g. assistant preschool teacher, cook, receptionist). A blanket non-exempt determination can be made for this group of employees, as there is no legal risk in misclassifying someone as non-exempt and there is little financial risk of the employee working more than 40 hours. No job duties were reviewed for positions under the threshold.

However, the real work lies in evaluating the 468 active, full-time employees who are *above* the salary threshold because their job duties will need to be examined. We can automatically classify 239 as non-exempt, based their salary grade and the likelihood that their duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on their salaries and what is known about their job duties from day-to-day interactions. This means that 176 jobs over the threshold will need to be reviewed.

Grand total of jobs to review at the \$23,660 threshold: 176

Proposed Threshold:

PathStone has 184 active, full-time employees making less than the proposed threshold of \$35,308. One hundred and fifty five of these can be classified as non-exempt based on what is commonly known about their job duties. For the remaining 30, we look to see if their job duties are exempt such that an increase would qualify them for exempt status. Given the limitations of nonprofit budgets, a 5% increase is reasonable. Of the remaining 30 employees that are below the threshold who weren’t categorically disqualified for exempt status based on their job duties, none are within 5% of the \$35,308 threshold. No job duties were reviewed for positions under the threshold.

Again, the real work lies in evaluating the 306 active, full-time employees who are *above* the salary threshold. We can automatically classify 120 as non-exempt based on their salary grade and the likelihood that their job duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on

their salaries and what is known about their job duties from day-to-day interactions. This means that 133 jobs over the threshold will need to be reviewed.

Grand total of jobs to review at the \$35,308 threshold: 133

Proposed Threshold Under Obama:

PathStone has 336 active, full-time employees making less than the \$47,476 threshold proposed by the Obama administration. Two hundred and fifty seven of these can be classified as non-exempt based on what is commonly known about their job duties. For the remaining 79, we look to see if their job duties are exempt such that an increase would qualify them for exempt status. Given the limitations of nonprofit budgets, a 5% increase is reasonable. Of the remaining 79 employees that are below the threshold who weren't categorically disqualified for exempt status based on their job duties, 19 are within 5% of the \$47,476 threshold. This means that 19 jobs under the threshold will need to be reviewed.

Of the 154 active, full-time employees who are above the salary threshold, we can automatically classify 18 as non-exempt, based their salary grade and the likelihood that their duties are non-exempt under our job rating process. Conversely, we can automatically classify 53 as exempt, based on their salaries and what is known about their job duties from day-to-day interactions. This means that 83 jobs over the threshold will need to be reviewed.

Grand total of job to review at the \$47,476 threshold: 102.

It quickly becomes clear that as the salary threshold increases, the number of positions that need to be individually reviewed on a continuous basis decreases. Now that we know who will be reclassified, we can determine how best to implement the change.

Implementation Strategies

When looking at the available implementation strategies, it is important to keep in mind that there is nothing in the regulations that mandates that employees receive a pay increase or even that employees be reclassified to non-exempt.¹

There are several available implementation strategies, many of which are low- or no-cost, when dealing with an employee who is no longer exempt as the result of the increased salary threshold. In response to the proposed regulations in 2016, the Department of Labor issued the *Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act*, in which they outlined several options for responding to changes in the salary level, including raising salaries to maintain the exemption and reclassifying employees as non-exempt and paying overtime and/or reallocating job duties.

In evaluating the various implementation options, the first thing to determine is whether the employee in question actually routinely works more than 40 hours per week. If an employee routinely works 40 hours per week or less, there is little to no financial or operational burden imposed by reclassifying them from exempt to non-exempt.

Increase Salaries to Maintain Exempt Status

¹ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10933 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

For employees who are close to the new salary threshold and who routinely work more than 40 hours per week, the first and most obvious answer is to increase their salaries to the new threshold to maintain their exempt status.

The financial impact of this approach can be mitigated by pairing it with a reallocation of job duties, as described in the example below.

Reclassify as Non-Exempt

For employees who are further away from the new salary threshold, the approach will depend on the degree to which the employee works more than 40 hours per week. For employees who are less likely to routinely work more than 40 hours per week, the most efficient and cost-effective approach would be to reclassify them as non-exempt and pay overtime. While this may sound frightening to employers, there are numerous strategies for mitigating overtime.

Job duties and workloads can be reorganized. Job duties that are required and/or predictable and routine could be assigned at the beginning of a workweek, thus allowing employers to eliminate more discretionary tasks at the end of the week if it appears likely that overtime will be incurred.

Schedules can also be adjusted for employees who regularly work outside of the 9 to 5 workday. For example, outreach workers who routinely work until 7:00 PM so they can attend community meetings to recruit people in need of services could work a regular schedule of 11:00 AM to 7:00 PM.

Job duties can also be reallocated amongst employees in order to reduce overtime. This is particularly effective when job duties are moved from an employee who has been reclassified as non-exempt to an employee who was given an increase to maintain their exempt status. Human resource administrators don't like giving increases to employees solely for compliance reasons and would much rather have a tangible change in work duties as the basis of a salary increase. In these cases, the salary increase can be directly tied to the additional job duties that were shifted from the employee who is being reclassified as non-exempt.

The DOL has identified costs, both quantified and non-quantified, associated with reclassifying an employee as non-exempt, including reduced scheduling flexibility and a potential loss in benefits.² It is important to note, however, that not all employers tie benefit packages to exemption status. At PathStone Corporation, our President & CEO has the exact same benefit package as an entry-level cook at one of our Migrant Head Start programs, save for the fact that he can participate in our 457(b) plan. Furthermore, scheduling flexibility is continuously improved by technology. While non-exempt employees do come with more timekeeping requirements and are indeed more likely to be monitored, technology is making this task significantly easier. A quick Google search of the phrase "time and attendance technology" yields 29,000 hits, one of which was thankfully an analysis of the top 80 time and attendance systems and a guide for selecting the system that best fits your needs.³

While there are indeed quantified costs associated with reclassifying employees as non-exempt, there are also significant benefits, primarily that employees are more likely to enjoy an adequate work-life balance. When employers don't have to pay overtime, there is little incentive for them to ensure that work is completed within 40 hours. There is little incentive for employers to become more efficient when there is no increased labor cost associated with inefficiencies. When employers face the possibility of paying overtime, they find ways to limit the workweek to 40 hours.

² Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10933 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

³ BUSINESS NEWS DAILY, <https://www.businessnewsdaily.com/6730-best-time-and-attendance-systems.html> (last visited June 7, 2019).

And in today's day and age, the need to limit the workweek to 40 hours is significant. Employees need time to tend to the needs of their families, to care for themselves, and to be active and engaged citizens and community members. The demands of simultaneously caring for aging parents and adult children at the same time have become so significant that the phrase "sandwich generation" has been coined. Working fathers report experiencing a high level of conflict in balancing their professional and parenting roles: two of out of three working fathers desire to be an equal caregiver with their partner, but more than half also report that they feel unable to do so with the demands of their jobs.⁴ In 2016, working mothers spent around 25 hours a week on paid work, up from nine hours in 1965. At the same time, they spent 14 hours a week on child care, up from 10 hours a week in 1965.⁵ Millennials (64%) and Gen Xers (68%) are more likely to have a spouse/partner working 35 hours per week than Boomers (44%).⁶

Multiple Strategies Working Together

Implementations strategies can be combined effectively. This is best illustrated by an example:

Program Manager oversees a training and employment program for at-risk youth. Program Manager supervises two workforce developers and one outreach worker. Program Manager is currently exempt under the executive exemption and her salary is \$32,000 per year. Program Manager has to do monthly reporting for funders and organize and manage on-site program audits. These tasks push her over 40 hours per week at least once per month.

Compliance Officer is responsible for ensuring that programs operate within funder and regulatory requirements. While specific program requirements regarding effectiveness and quality of services vary, Compliance Officer monitors the entire organization's leadership, board governance, strategic planning, human resource management and financial operations and oversight. Compliance Officer has no direct reports and is currently exempt under the administrative exemption. Compliance Officer's salary is \$34,000 per year.

A good strategy would be to shift the program reporting duties from Program Manager to Compliance Officer. Program Manager would be reclassified as non-exempt, but she is unlikely to incur overtime now that these job duties have been transferred. Compliance Officer's salary will be raised to the new salary level threshold to preserve her exemption status and to compensate her for the additional job duties.

The Value of Automatic Updates

Some employers oppose automatic updates to the salary threshold because they believe that the marketplace should dictate salaries and because they pose an administrative burden.

These arguments hold little water. First and foremost, the regulations do not dictate salaries or even the payment of overtime. Furthermore, automatic updates allow for predictable and incremental changes. Regulatory predictability is something that all businesses want. History has clearly shown that without automatic updates, we are left with inconsistent implementation that can leave us scrambling to implement significant increases. Since the inception of the salary threshold in 1938, employers have been subject to increases that are between

⁴ Brad Herrington, Jennifer Sabatini Fraone and Jegoo Lee, *The New Dad: The Career-Caregiving Conflict*, Boston College Center for Work & Family, 2017.

⁵ PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2019/05/08/facts-about-u-s-mothers/> (last visited June 7, 2019).

⁶ Ernst & Young, *Global Generations: A Global Study on Work-Life Challenges Across Generations*, 2015.

24% and 193% and that occur as frequently as 5 years apart and as infrequently as 29 years apart.⁷ Increases have never been done in consistent time intervals or at consistent and predictable rates. Conversely, automatic updates grant employers a degree of predictability and allow them to plan more effectively for the future.

The Non-Profit Perspective

There are organizations out there that like to hold up nonprofits as the poster child for employers who will be negatively impacted by increasing the salary threshold. What these groups fail to understand is that nonprofits look beyond a single bottom line. We measure our success on the “triple bottom line” of social change and environmental and financial sustainability.

Without a doubt, nonprofits will face operational challenges in implementing higher salary thresholds. By the DOL’s own analysis, nonprofits will be disproportionately impacted by an increase in the salary threshold when it projects that approximately 7% of nonprofit employees will be affected by the higher salary threshold, compared to 5% of for-profit employees.⁸ This is largely due to the “mismatch” between salary and job duties with nonprofit employees: since nonprofit employees are generally paid lower wages, it is not uncommon to find employees with exempt job duties and non-exempt salary levels.

Not only are nonprofits disproportionately impacted by an increased salary threshold, but the governmental funding model for nonprofits also leaves them vulnerable. The nonprofit sector as a whole earns almost 33% of their revenues from government grants and contracts.⁹ Nonprofits are generally locked into three year grants and contracts with government agencies and will now face increased costs that were not known at the time that the grants and contracts were entered into. In other words, nonprofits will find themselves contractually obligated to maintain existing services at an increased cost. Ironically, “[f]ederal for-profit contractors are entitled to seek ‘labor standards adjustments’ or ‘equitable adjustments’ to protect themselves from government-mandated labor cost increases, but that right is not currently available to non-profits performing work government grants.”¹⁰

When looking at the challenges that lie ahead, we must always remember that nonprofits always operate under their missions—we serve our constituents with our mission in mind, we advocate with our mission in mind, we participate in our communities with our mission in mind and we act as an employer with our mission in mind. PathStone exists to help individuals, families and communities attain economic self-sufficiency, and this includes our own employees. Employees who work at nonprofits are no different than employees working at for-profits. There is no exception, nor should there be one, that allows nonprofits to exploit their workers. As stated by 150+ nonprofits in support of the 2016 proposed increase to \$47,476:

For many nonprofits, including those of us that provide human services or advocate for workers’ rights, poverty reduction, or economic and social justice, this is a critical opportunity to improve the working conditions and the economic lives of the people we serve. At the same time, our own workers and the families they support also deserve fair compensation and greater economic security.

As nonprofit organizations more broadly, we are dedicated to improving the public good. It is time to revisit the idea that working for the public good should somehow mean requiring the lowest-paid among us to support these efforts by working long hours, many of which are unpaid.¹¹

⁸ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10929 (proposed March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

⁹ National Council of Nonprofits, *The Nonprofit Overtime Implementation Conundrum*, 2016.

¹⁰ National Council of Nonprofits, *DOL Proposed Overtime Reforms and the Impacts on Nonprofits*. March 11, 2019.

¹¹ ECONOMIC POLICY INSTITUTE, <https://www.epi.org/nonprofit-organizations-in-support-of-the-department-of-labors-new-overtime-regulations/> (last visited June 7, 2019).