Statement

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Hearing on

The 21st Century Workforce: How Current Rules and Regulations Affect Innovation and Flexibility in Michigan's Workplaces

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CHAIRMAN WALBERG, RANKING MEMBER SCOTT AND HONORABLE MEMBERS OF THE SUBCOMMITTEE:

On behalf of the members of the HR Policy Association, thank you for the opportunity to appear before the committee today to provide the Associations' views on the 21st Century workforce and how current rules and regulations affect innovation and flexibility in Michigan's workplaces. I am Mark Wilson, Vice President, Health and Employment Policy, and Chief Economist for the Association.

The HR Policy Association represents the most senior human resource executives in more than 360 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Reform of the 1938 Fair Labor Standards Act (FLSA) to reflect the 21st century workplace has been a long-standing goal of the Association, and most, if not all, of the HR Policy Association member companies struggle to provide the kind of workplace flexibility sought by today's workforce without running afoul of the FLSA's arcane and dysfunctional requirements that were written almost 80 years ago.

The FLSA Is Out of Sync With Today's Workplace In considering the FLSA, it is important to understand the state of the American workplace when the law was enacted. In the 1930's, the workplace was characterized by:

- A fixed beginning and end to both the workday and workweek in most American workplaces;
- With the exception of certain occupations (*e.g.*, repairmen, truck drivers, outside sales persons), the vast majority of work was performed in the employer's workplace because the technology allowing the performance of jobs from remote locations was not yet available;
- A far more stratified and predictable designation of occupations, as compared to today's workplaces where concurrent exempt and non-exempt duties are performed by a wide variety of employees, and there is a more rapid evolution of job descriptions and duties;
- Far fewer jobs requiring advanced knowledge in a field of science or learning that was customarily acquired by a four year college degree;
- Businesses and occupations which were primarily focused on and carried out within the United States, as opposed to the on-going globalization of markets and the corresponding expansion of the workday to accommodate different time zones;
- A greater preponderance of manual labor because of the relative absence of technology and mechanization that has transformed the way work is performed today; and
- Relatively little use of private litigation as a means to enforce federal laws and policies.

The FLSA was passed before the first commercial TV broadcast (1939), the first commercial jet airline (1949), and the founding of the first computer company (1949). To contrast today's workplace with the one that existed when the FLSA was passed, consider automotive production. In the 1930s, at the height of the Ford Motor Company's production of its popular Model A, the huge River Rouge plant, which embodied the then leading-edge concept of consolidated, integrated manufacturing, employed over 100,000 workers and churned out a finished Model A every 49 seconds.[1] By contrast, in 2013 a GM facility in Kansas City, Kansas, employed 3,877

workers, and produced one of five different models of cars every 58 seconds.[2] With the introduction of modern computing technology, robotics, and the shift to highly decentralized, just in time global production and logistics schemes, today's auto plants would be almost unrecognizable to workers in the 1930s, whom the law was originally designed to protect. With technology and robotics, many of today's workers, who previously relied upon physical methods of production, now use their minds and computers to an extent that was beyond the imagination of most science fiction writers 80 years ago.

Today, in fact, the entire concept of work is changing as the United States moves to highly automated manufacturing using fewer employees and an expanded service economy that is heavily dependent on technology and much more mobile. Perhaps the best illustration of how the FLSA has failed to keep up with the rapidly evolving workplace and impedes innovation is its computer professional provision. In 1990, Congress directed the Department of Labor to publish regulations to treat similarly skilled computer employees as exempt under section 13(a)(1) of the FLSA,[3] and then in 1996 Congress froze the definition of "computer professionals" in place[4] when less than 40 percent of Americans owned a cell phone, let alone a smart-phone, less than 3 percent of U.S. homes had broadband access,[5] and Facebook didn't exist.[6] Today over 90 percent of Americans own smart-phones,[7] over 70 percent of U.S. homes have broadband,[8] and over 70 percent of U.S. adults regularly use social networking sites.[9] Needless to say, how and where work gets done has changed dramatically, and the FLSA rules for computer professionals are woefully outdated.

Another example is the FLSA's rules for inside sales employees. Today, inside salespeople "virtually" make outside sales calls on clients using the same technology outside salespeople use (*e.g.*, laptops, smart-phones, and the Internet) to visit and call on customers. And, in many cases, the inside salespeople utilize complex engineering principles.

Even the most traditional industries have undergone dramatic transformations in how and where work is done. For example, electric utility companies in the process of shifting from coal-fired to new generation turbine or combined gas cycle power plants have had to radically rethink workforce training, roles and responsibilities and staffing. Whereas workers in the old coal plants were typically divided into several different job categories, with many performing largely hands-on, physical tasks throughout the facility, the new plants are run almost entirely by a small group of employees working primarily in a single room filled with computers and instruments that control and monitor the plant. The employees at these facilities are multi-skilled, technically educated, highly paid professionals who effectively operate the facilities, often taking on roles ranging from operating equipment to handling purchasing, documentation, scheduling, and working with vendors. As one of our member company has told us, "They're operating more like asset owners."

Yet, despite all these changes within American workplaces and industries during the last half century, the basic structure of the FLSA has never been fundamentally reexamined. The FLSA and its regulations simply have not kept pace with changes in the workplace. For example, the purpose of the FLSA's executive, administrative, and professional exemptions is to recognize that certain employees have such a level of responsibility, skill, education/training, scheduling uncertainty/flexibility, and pay level, that they warrant being exempt under the basic principles of the law, but the current regulations do not recognize this because they don't accurately capture the modern workplace. Our interest is not to move more employees into exempt roles, but to see that the rules and regulations carry out the original intent of the law in our new global, wireless

world ─ and that they are clear and easy to comply with. In 2004, the previous administration made a laudable attempt to address a number of areas that needed to be updated and clairfied, but while the resulting changes were minor improvements, they did not go far enough to fix most of the problems. Even the Department of Labor admitted at that time that it could not update the rules for computer professionals without Congress first amending the law.

The FLSA Restricts Workplace Flexibility and Digital Innovation The preference of today's workforce for greater flexibility as to when and where they perform their work is universally acknowledged, and it goes without saying that this desired flexibility is often possible only through the digital technology that was unavailable when the FLSA was enacted.

The overwhelming majority of today's employees embrace the digital workplace. A recent Gallup poll showed that "full-time U.S. employees are upbeat about using their computers and mobile devices to stay connected to the workplace outside of their normal working hours. Nearly eight in ten (79%) workers view this as a somewhat or strongly positive development. . . . Nearly all workers say they have access to the Internet on at least one device, whether a smart-phone, laptop, desktop, or tablet, so it may be that they enjoy the convenience of easily checking in from home instead of putting in late hours at the office. They may also appreciate the freedom this technology offers them to meet family needs, attend school events, or make appointments during the day, knowing they can monitor email while out of the office or log on later to catch up with work if needed."[10]

Yet, the FLSA deters, and often prevents, an employer from providing this flexibility to nonexempt employees by requiring employers to track all "hours worked" (or portions of varying lengths thereof), which poses a challenge for employers if the employees wish to perform some or all of their duties away from the workplace. This can involve telecommuting, where some or all of the workday is spent by the employee away from the site at home or elsewhere. It may also involve the employee doing some work at home outside of normal working hours, which modern communications technology makes possible in today's digital workplace. In such cases, tracking the exact time spent working becomes an extremely difficult task. Even where an employer is aware of certain activities, it is not always possible for the employer to know how much time was spent engaged in the activity.

Even when nonexempt employees confine their work activities within normal working hours, they may occasionally check their smartphones outside of normal working hours for work-related emails, text messages, and meeting invitations. When they do, it raises the question as to whether that time is counted towards "hours worked," and some attorneys have even argued that they may also demarcate the beginning or ending of the workday, thus requiring time spent commuting to also be counted as time worked.

Because of these challenges, and the potential threat of litigation, many employers have taken steps to prevent their nonexempt employees from doing any work outside the workplace by denying them the employer-provided smartphones that exempt professional and administrative employees are given and denying access to their email accounts and other components of the company's information system. In occupations such as off-site repair, where the use of Blackberries, iPhones or other personal digital assistants (PDAs) is essential, some employers require the employee to keep these devices at one of the employer's locations after hours, picking it up and dropping it off there, regardless of the location of site visits. Regrettably this inconveniences employees, reduces workplace flexibility and makes it more difficult for

employees to manage their work/life balance, but large employers simply cannot risk exposing themselves to potentially multi-million dollar class-action lawsuits.

Of course, these issues do not arise where an employee is eligible for one of the FLSA's executive, administrative or professional exemptions. Unfortunately, many employees that view themselves and others as an executive, administrative or professional employee (such as loan underwriters, HR recruiters, insurance fraud investigators, and mortgage loan officers) often do not fall clearly within the often vague contours of the FLSA regulations. Although sometimes their status is clear, other times it is arguable enough to support a misclassification lawsuit, with the accompanying costs of litigation and/or settlement. Moreover, the number of such lawsuits has exploded over the past 20 years, increasing 514 percent from 1991 to 2012.[11]

In view of these realities, it should be no surprise that when employers are compelled to reclassify employees from exempt to non-exempt status, there is often bitter employee resentment. Employees realize, eventually if not at the outset, that it may mean little, if any, extra pay (possibly even less) accompanied by less flexibility in their scheduling and an inability to take advantage of the virtual workplace.

The FLSA Restricts Access to Training Opportunities At a time when upgrading the skills of American workers is a priority, the FLSA's regulations discourage employers from offering optional training to their employees. Because of the increased attention that must be paid to the hours worked by the nonexempt employees under the FLSA, they are at a competitive disadvantage in the workplace compared to exempt professionals and administrative employees. Since many training opportunities are considered compensable time under the FLSA, and where those opportunities would put the nonexempt employee into an overtime situation, their access to those training opportunities may be limited; the same is not true for their exempt colleagues.

Nonexempt employees may also be routinely excluded from off-site meetings or trips that could be beneficial to both them and the company because of the administrative difficulty of determining what time is compensable and the actual cost, once determined. This inability to participate in off-hours or off-site events can stunt the career growth of nonexempt employees who lose the benefit of these activities. In addition, in team situations where nonexempt employees are actively involved in deciding how the work is to be performed, the employer often has to discourage them—to the point of imposing discipline—from engaging in "after hours" work discussions with their exempt co-workers.

The FLSA exempt/nonexempt caste system that is based on job classifications is increasingly out of sync with corporate cultures that depend on teamwork. Moreover, in many workplaces, being exempt is viewed, rightly or wrongly, as being part of the professional ranks which many employees aspire to achieve. This is particularly true for positions that appear to be similar from an employee's point of view, but where it is difficult to determine the degree of discretion and independent judgment that separates exempt and nonexempt workers.

Force-Fitting Outdated FLSA Regulations to Modern Occupations As employers struggle to apply the 1938 law and its regulations to the modern workplace, their problems are exacerbated by the outdated "duties tests" under the various "white collar" exemptions. Perhaps even more difficult to manage are the large and growing number of occupations whose duties do not squarely fit within any of the exemption rules. For example:

- Entry-level Degreed Engineers and Accountants The FLSA regulations state that to be an exempt professional, an employee must perform "work requiring advanced knowledge in a field of science or learning" involving the "consistent exercise of discretion and judgment." Often, as new graduates start their first jobs, how much discretion and judgment they exercise as they follow the highly complicated rules and principles of the profession and/or directions from those to whom they report, is quite subjective and extremely difficult to determine. At the same time, an employee that has obtained a sufficient level of training for purposes of the exemption could subsequently fail to adequately perform his or her responsibilities, and in effect, would not consistently exercise discretion and judgment. The quandary faced by the employer is determining at what point new engineers and accountants who, by every other standard—including lucrative starting salaries—would clearly be considered a professional, cross the threshold into the blurry FLSA definition of an exempt professional. The same is true with many other entry level positions that require a degree even to be considered for the opening.

- Computer Employees The FLSA regulations include an exemption for "computer employees" but the definition is rooted in the technology of 1992, a time before many people had Internet access or email, let alone use of the sophisticated software technologies of today.[12] Thus, many of today's critical IT duties, such as information security, enterprise-wide database administration, systems integration and ensuring the overall integrity and continuity of IT systems and applications are not part of the exemption even though individuals performing these duties are clearly highly-skilled and well-paid computer employees. Even basic concepts like "debugging" and the Internet are not part of the current outdated FLSA language.

- Inside Sales The outside sales exemption was written into the 1938 FLSA to account for traveling salespeople, whose time could not be accurately tracked and verified by employers, as opposed to employees who conduct sales from "inside" the company or in a "fixed office" location. The different treatment of inside and outside salespeople is artificial, outdated and unfair in today's economy. Inside and outside salespeople, while performing the same function with similar metrics, are treated inequitably under the law. The reliance on a "fixed" office location for determining exemption status is outdated, given today's work environment. In this day and age, inside salespeople "virtually" call on clients the same way outside salespeople do: by e-mail, tele/videoconference, smart-phones, and laptops, none of which requires a fixed office location. In many cases, they are dealing with highly engineered products and services that require a significant amount of expertise and understanding when dealing directly with the customer to configure the product or design and implement the service to the customer's needs. The compensation structure for inside and outside sales roles should equitably support pay for performance based on sales targets and achievement, and should not solely be based on the location from which work is performed or solely on the hours worked. Thus, the outside sales exemption needs to be broadened to reflect today's workplace realities and available technology.[13]

- Determining Sufficient Credentials For professional employees to be exempt, the advanced knowledge required for the exemption must be "customarily acquired through a prolonged course of specialized intellectual instruction." It is not clear what "customarily" means. As currently interpreted by some courts, an employer could have

employees performing complicated engineering duties who would have to be paid and treated differently if they acquired their knowledge and expertise in different ways. In reality, the issue should be whether the knowledge has either been acquired or not; how it was acquired should be irrelevant. The illogic of the present interpretation can be seen in a recent Second Circuit Court of Appeals decision holding that an engineer with 20 years experience who was a member of the American Society of Mechanical Engineers and performed work that involved complicated technical expertise and responsibility was non-exempt because, although the employee had enrolled in some courses at various universities and had 20 years of work experience as an engineer, he did not have a college degree.

- DOL's Own Struggles Particularly nettlesome is determining what level of "discretion and independent judgment" employees must have to qualify for the administrative exemption. Sometimes, not even the Department of Labor's Wage and Hour Division (WHD) can make up its mind. For example, on September 8, 2006, the WHD determined that mortgage loan officers are bona fide administrative employees who are exempt under the FLSA. Yet, on March 24, 2010, WHD reversed itself and determined that they do not qualify for the exemption. Then in 2013, the U.S. Court of Appeals for the District of Columbia Circuit reinstated the 2006 Department of Labor guidance advising that mortgage loan officers are actually exempt from overtime requirements in the FLSA. If the WHD cannot consistently determine who is a bona fide administrative employee, how are employers supposed to figure it out without costly and unnecessary litigation? Meanwhile, the Department's own inability to distinguish between who is and who is not exempt has been exposed by a grievance brought against the Department, involving the exempt status of more than 1,900 employees, that was ultimately settled with the awarding of back pay to a number of them. In addition to a large number of administrative employees, those reclassified as nonexempt included highly paid computer professionals, paralegals, litigation support specialists, and pension law specialists, as well as highly paid WHD compliance specialists.[14]

Potential Impact of Department of Labor Rulemaking Because of the above concerns, employers are understandably alarmed about the possibility that the Department of Labor's pending FLSA rule will establish a minimum percentage of time that employees must spend performing exempt duties, which would substantially compound the difficulty of correctly classifying the exempt status of managers, professionals and administrative employees. A rigid duties test based on a minimum percentage of time spent performing exempt duties would be exceedingly onerous and potentially unworkable.

Many employees today perform a broad range of exempt and nonexempt tasks throughout the day and workweek due, in part, to the extraordinary technological advances since 1938. Some industries also have fluctuating and unpredictable periods of demand that would make a rigid duties test unworkable. For example, certain retail industries experience unanticipated spikes in demand due to weather and natural disasters that require salaried managers to assist hourly associates fill in gaps at the cash register, fill orders, or stock shelves. This can also be caused by unscheduled absences of employees due to illness, family needs or other causes. In such instances, a strict duties test would harm the business's functionality and ability to serve its customers by tying the hands of managers who are not able to exceed an allowed percentage of time performing such non-exempt tasks.

Conclusion The disconnect between the FLSA and the modern workplace will continue to grow if the law is left unchanged. It will increase tensions among employers, employees, and regulators, with the only true beneficiary being the plaintiff's bar. Congressional attempts at incremental reforms stalled in the 1990s, leaving a bitter taste in many policymakers' mouths and making them reluctant to make another attempt. Yet the pressure will steadily increase, and it will become a problem that is increasingly more difficult to ignore.

Endnotes

[1] Vaclav Smil, *Made in the USA: The Rise and Retreat of American Manufacturing* (Massachusetts: Massachusetts Institute of Technology, 2013).

[2] "Fairfax Assembly Plant," General Motors, accessed June 11, 2014, http://media.gm.com/media/us/en/gm/company_info/facilities/assembly/fairfax.html.

[3] Pub. Law No. 101-583.

[4] Pub. Law. No. 104-188.

[5] "Wireless History Timeline," CTIA-The Wireless Association, accessed June 11, 2014, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-history-timeline.

[6] Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

[7] Pew Research Center, *Cell Phone Ownership Hits 91% of Adults*, http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/.

[8] Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

[9] Pew Research Internet Project, *Smartphone Ownership 2013*, http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

[10] Gallup, Most U.S. Workers See Upside to Staying Connected to Work, April 30, 2014, available at: http://www.gallup.com/poll/168794/workers-upside-staying-connected-work.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Business%20-%20Economy%20-%20Technology%20-%20USA%20-%20Workplace.

[11] Government Accountability Office, "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," GAO-14-69, December 18, 2013.

[12] Senator Kay Hagen introduced bipartisan legislation (S. 1747) to update the computer employee exemption in the 112th Congress.

[13] Over the last 10 years, legislation attempting to change the FLSA language non-exempt status for inside sales people was introduced and passed by the full House in the 105th, 106th and 107th Congresses.

[14] *See*, Law Offices of Snider and Associates, *Department of Labor FLSA Overtime Grievance*, http://www.sniderlaw.com/pages/FLSADOL.html.