[MS-0398.040.013.014]

NATIONAL ASSOCIATION of COUNTIES

440 First St. NW, Washington, DC 20001
202/393-6226

STATEMENT OF

THE HONORABLE LEON WILLIAMS

SUPERVISOR, SAN DIEGO COUNTY, CALIFORNIA

ON BEHALF OF

THE NATIONAL ASSOCIATION OF COUNTIES

BEFORE THE

HOUSE LABOR STANDARDS SUBCOMMITTEE

2261 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC

WEDNESDAY, SEPTEMBER 16, 1992

REGARDING THE APPLICATION OF THE

FAIR LABOR STANDARDS ACT

TO STATE AND LOCAL GOVERNMENTS

THANK YOU FOR THE OPPORTUNITY TO TESTIFY MR. CHAIRMAN. I AM LEON WILLIAMS, SUPERVISOR IN SAN DIEGO COUNTY AND PRESIDENT ELECT OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES. TODAY, I AM PLEASED TO APPEAR ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES* TO DISCUSS THE VIEWS OF COUNTY OFFICIALS NOT ONLY IN CALIFORNIA BUT NATIONWIDE. BEFORE I GET STARTED, I WANT TO COMMEND YOU FOR HOLDING THIS HEARING AND FOCUSING NATIONAL ATTENTION ON A CRITICAL ISSUE THAT WE BELIEVE COULD COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS. THIS COMES AT A TIME WHEN MANY OF OUR COUNTIES ARE FACING A FISCAL CRISIS. WITH CUTS IN BOTH FEDERAL AND STATE AID, URBAN AND RURAL COUNTIES HAVE BEEN FORCED TO RAISE PROPERTY TAXES, REDUCE THEIR WORKFORCES AND CUT PUBLIC SERVICES IN ORDER TO AVOID BUDGET SHORTFALLS.

THE ISSUE BEFORE US TODAY IS WHO IS ENTITLED TO OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT? IT IS CLEAR IN THE ACT, THAT CONGRESS INTENDED FOR ADMINISTRATIVE, EXECUTIVE AND PROFESSIONAL EMPLOYEES TO BE EXEMPT FROM THE OVERTIME PAY REQUIREMENTS. HOWEVER TO QUALIFY FOR THE EXEMPTION, THESE EMPLOYEES MUST COMPLY WITH A DUTIES TEST AND A SALARY TEST WHICH ARE CONTAINED IN FEDERAL REGULATIONS. IN A NUMBER OF RECENT LAWSUITS, COURTS

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* THE NATIONAL ASSOCIATION OF COUNTIES IS THE ONLY NATIONAL ORGANIZATION REPRESENTING COUNTY GOVERNMENT IN THE UNITED STATES. THROUGH ITS MEMBERSHIP, URBAN, SUBURBAN AND RURAL COUNTIES JOIN TOGETHER TO BUILD EFFECTIVE, RESPONSIVE, COUNTY GOVERNMENT. THE GOALS OF THE ORGANIZATION ARE TO: IMPROVE COUNTY GOVERNMENT; SERVE AS THE NATIONAL SPOKESMAN FOR COUNTY GOVERNMENT; ACT AS A LIAISON BETWEEN THE NATION'S COUNTIES AND OTHER LEVELS OF GOVERNMENT; ACHIEVE PUBLIC UNDERSTANDING OF THE ROLE OF COUNTIES IN THE FEDERAL SYSTEM.

HAVE INTERPRETED THE REGULATIONS TO MEAN THESE EMPLOYEES ARE NOT EXEMPT IF THE COUNTY OR PUBLIC EMPLOYER:

- HAS A PAY POLICY THAT PROHIBITS PAY FOR HOURS NOT ACTUALLY WORKED;

- REQUIRES EMPLOYEES TO USE ACCUMULATED ANNUAL OR SICK LEAVE WHEN THEY ARE ABSENT FROM WORK FOR LESS THAN A FULL WORK DAY;

- REQUIRES EMPLOYEES TO FILL OUT TIME SHEETS SHOWING HOURS ACTUALLY WORKED;

- REQUIRES EMPLOYEES TO WORK ACCORDING TO A FIXED WORK SCHEDULE;

- PROVIDES EMPLOYEES COMPENSATORY TIME OFF OR THEIR HOURLY RATE OF PAY FOR OVERTIME WORK;

- HAS A POLICY THAT SUBJECTS EMPLOYEES TO DISICIPLINARY SUSPENSION WITHOUT PAY FOR REASONS OTHER THAN INFRACTIONS OF SAFETY RULES; AND

- REQUIRES EMPLOYEES TO SEEK PERMISSION FROM THEIR SUPERIORS BEFORE LEAVING WORK DURING THE DAY.

- INDEED, IN THE COUNTY OF SAN DIEGO CASE, THE COURT HELD

THAT ANY ACCOUNTABILITY OF HOURS SPENT ON OR OFF THE JOB WOULD RESULT IN THE EMPLOYEES LOSING THEIR EXEMPTION, AND THUS, ENTITLED TO TIME AND A HALF OVERTIME PAY.

MR. CHAIRMAN, IF THESE DECISIONS APPLIED TO ALL PUBLIC EMPLOYERS, INCLUDING THE FEDERAL GOVERNMENT, MOST OF OUR HIGHLY PAID EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES WOULD BE ENTITLED TO TIME-AND-A-HALF "OVERTIME" PAY. MANY OF THESE EMPLOYEES EARN ANNUAL SALARIES BETWEEN $50,000 AND $110,000. WE DO NOT BELIEVE THESE RECENT COURT RULINGS ARE CONSISTENT WITH CONGRESSIONAL INTENT OF THE FAIR LABOR STANDARDS ACT. THIS HISTORIC LEGISLATION WAS INTENDED TO ENSURE FAIR AND DECENT WAGES TO THE NATION'S RANK AND FILE WORKERS. IT WAS FURTHER INTENDED TO PROVIDE AN INCENTIVE FOR EMPLOYERS TO HIRE MORE HOURLY EMPLOYEES RATHER THAN INCREASE THE WORKING HOURS OF EXISTING WORKERS. NOWHERE IN THE ACT IS IT IMPLIED THAT CONGRESS INTENDED FOR HIGHLY PAID ADMINISTRATIVE, EXECUTIVE AND PROFESSIONAL EMPLOYEES TO BE PAID TIME-AND-A-HALF. HOWEVER, MANY STATE AND LOCAL GOVERNMENTS HAVE BEEN HELD LIABLE FOR HUGE SUMS IN BACK PAY FOR "OVERTIME" FOR THESE EMPLOYEES. UNLESS CONGRESS MOVES QUICKLY TO ENACT A LEGISLATIVE SOLUTION, STATE AND LOCAL LIABILITY WILL CONTINUE TO ADD UP VERY RAPIDLY AND ADVERSELY AFFECT PUBLIC SERVICES.

BECAUSE OF THE RECENT COURT INTERPRETATIONS, THE FLSA IS NO LONGER THE PROTECTIVE SHIELD THAT CONGRESS INTENDED. INSTEAD, IT

- PROTECTS AND REWARDS PERSONS WHO WERE NEVER INTENDED TO BE THE BENEFICIARIES OF THE ACT.

- FORCES PUBLIC EMPLOYERS TO DIVERT RESOURCES TO THE PAYMENT OF UNWARRANTED WINDFALLS TO THESE UNINTENDED BENEFICIARIES, WHICH LEAVES FEWER RESOURCES AVAILABLE TO FAIRLY COMPENSATE -- AND INDEED, TO RETAIN -- THE RANK AND FILE WORKERS WHO WERE AND REMAIN THE INTENDED BENEFICIARIES OF THE ACT.

- HURTS THE VERY PERSONS (RANK AND FILE WORKERS) IT WAS INTENDED TO PROTECT (AND, LET ME SAY PARENTHETICALLY LEST THE POINT ESCAPE ATTENTION, WHEN WORKERS ARE NOT FAIRLY COMPENSATED AND WHEN THEY ARE LAID OFF, THE PUBLIC IS HURT AS WELL).

- CAUSES PUBLIC EMPLOYERS TO VIOLATE BASIC, FUNDAMENTAL PRINCIPLES OF PUBLIC ACCOUNTABILITY IN AN EFFORT TO CONFORM TO THE "FUZZY LOGIC" OF COURT INTERPRETATIONS.

- SETS THE STAGE FOR AN EVENTUAL POLITICAL BACKLASH AGAINST NOT JUST THE FLSA, BUT AGAINST LABOR AND AGAINST CONGRESS WHEN THE FISCAL RAMIFICATIONS OF THE ACT BECOME MORE WIDELY KNOWN.

THIS CRISIS ORIGINATED WITH THE 1990 FEDERAL APPEALS COURT RULING IN THE CASE OF ABSHIRE V. COUNTY OF KERN. AS A RESULT OF THIS COURT DECISION, STATE AND LOCAL GOVERNMENTS ARE FACING SUBSTANTIAL LIABILITY FOR BACK PAY TO THEIR HIGHER PAID

PROFESSIONALS, ADMINISTRATORS AND EXECUTIVES.

THE PLAINTIFFS IN THE ABSHIRE CASE SERVED IN PROFESSIONAL, ADMINISTRATIVE OR EXECUTIVE POSITIONS. BASED UPON THEIR STATUS, KERN COUNTY EXEMPTED THEM FROM THE "OVERTIME" PROVISIONS OF THE FLSA.

HOWEVER, IN DETERMINING WHETHER AN EMPLOYEE IS, INDEED, EXEMPT FROM THE FLSA, DEPARTMENT OF LABOR REGULATIONS REQUIRE THAT SUCH EMPLOYEES BE PAID ON A "SALARY BASIS." THE REGULATIONS IMPOSE VARIOUS REQUIREMENTS TO SATISFY THE "SALARY BASIS" TEST, INCLUDING THE REQUIREMENT THAT AN EXEMPT EMPLOYEE'S SALARY CANNOT BE REDUCED FOR ABSENCES OF LESS THAN A DAY -- THAT IS, IF SUCH ABSENCES ARE ACCOUNTED FOR, THEN THE EMPLOYEE IS AN HOURLY EMPLOYEE AND THUS NOT EXEMPT FROM THE FLSA. THE COUNTY OF KERN, SIMILAR TO MOST PUBLIC EMPLOYERS WITH PAYROLL SYSTEMS WHICH ACCOUNT FOR ALL PUBLIC TAX DOLLARS SPENT, HAS A POLICY WHICH SUBJECTED AN EMPLOYEE'S PAY TO POSSIBLE REDUCTIONS FOR ABSENCES OF LESS THAN A DAY. BECAUSE OF THIS PAYROLL POLICY, THE ABSHIRE COURT RULED THAT NONE OF THE PLAINTIFF EMPLOYEES WERE EXEMPT FROM THE OVERTIME PROVISIONS OF THE FLSA. THUS, ALL WERE ENTITLED TO TIME-AND-A-HALF-PAY FOR ALL OVERTIME WORKED.

SIMPLY PUT, BECAUSE OF KERN COUNTY'S ATTEMPT TO PRACTICE PUBLIC ACCOUNTABILITY BY NOT PAYING PROFESSIONAL, ADMINISTRATIVE AND EXECUTIVE EMPLOYEES FOR TIME NOT WORKED, THE COUNTY IS NOW PENALIZED UNDER THE FLSA BY HAVING TO PAY THESE EMPLOYEES A FINANCIAL WINDFALL THEY DID NOT DESERVE. THE ISSUE HERE IS NOT

WHETHER PROFESSIONAL, ADMINISTRATIVE AND EXECUTIVE EMPLOYEES SHOULD RECEIVE "OVERTIME" COMPENSATION -- CLEARLY, THE NATURE OF THEIR RESPONSIBILITIES DICTATE THAT THEY SHOULD NOT. THE ISSUE HERE IS WHETHER DOL HAS PROMULGATED A REGULATION WHICH DENIES TO PUBLIC EMPLOYERS THE BENEFIT OF THE EXEMPTION AVAILABLE TO THE PRIVATE SECTOR MERELY BECAUSE THE SPECIAL, FIDUCIARY OBLIGATION OF PUBLIC EMPLOYERS TO THEIR TAXPAYING CITIZENS REQUIRES ENHANCED RECORD-KEEPING.

THIS POINT WAS CLEARLY MADE BY SENATOR KASSEBAUM, WHO STATED THE FOLLOWING IN SUPPORT OF HER BILL, S.3089 WHICH ADDRESSES THIS FLSA PROBLEM:

> "THIS SINGLE COURT CASE HAS PLACED STATE AND LOCAL GOVERNMENTS IN A VERY DIFFICULT POSITION. IF THEY PROVIDE THE ACCOUNTABILITY TO WHICH THE PUBLIC IS ENTITLED, THEY EXPOSE THEMSELVES TO RISK OF LIABILITY OF MILLIONS OF DOLLARS AT A TIME WHEN THEY CAN LEAST AFFORD TO DO SO."

THIS IS EXACTLY WHAT IS HAPPENING IN THE COUNTY OF SAN DIEGO, AS WELL AS NUMEROUS OTHER STATE AND LOCAL GOVERNMENTS NATIONWIDE. THIS CRITICAL SITUATION ALREADY IS GROWING WORSE. AS I MENTIONED EARLIER, SINCE THE ABSHIRE DECISION, THERE HAVE BEEN A SERIES OF COURT RULINGS WITH AN EVEN GREATER IMPACT ON STATE AND LOCAL GOVERNMENTS. THESE COURTS HAVE HELD THAT HIGHLY PAID PROFESSIONAL, ADMINISTRATIVE AND EXECUTIVE PUBLIC EMPLOYEES ARE NOT EXEMPT AND MUST BE PAID BACK WAGES IN THE FORM OF TIME-AND-A-HALF PAY FOR ALL HOURS IN EXCESS OF 40 HOURS PER WEEK FOR THE

PAST 2 TO 3 YEARS. THE BASIS OF THESE COURT RULINGS IS THAT PUBLIC AGENCY PAYROLL SYSTEMS, ESTABLISHED PURSUANT TO PRINCIPLES OF PUBLIC ACCOUNTABILITY, DO NOT SATISFY THE COURT'S OWN VIEWS OF THE DEPARTMENT OF LABOR "SALARY BASIS" REGULATIONS.

THE COURT RULINGS DRASTICALLY EXPAND THE DETRIMENTAL IMPACT OF THE APPLICATION OF THE FLSA BEYOND THE ABSHIRE RULING. SUCH DECISIONS ARE EXPOSING PUBLIC SECTOR ENTITIES TO SUBSTANTIAL RETROACTIVE AND PROSPECTIVE OVERTIME LIABILITIY FOR HIGHLY PAID PROFESSIONAL, ADMINISTRATIVE AND EXECUTIVE EMPLOYEES.

THE COUNTY OF SAN DIEGO ALREADY IS ENGAGED IN 4 FLSA LAWSUITS INVOLVING 962 PLAINTIFFS. THE FEDERAL DISTRICT COURT HAS RULED AGAINST THE COUNTY IN 2 OF THE LAWSUITS, AND IT IS EXPECTED TO RULE THE SAME WAY IN THE OTHER 2. THE COUNTY IS FACING AN OBLIGATION OF APPROXIMATELY $8-10 MILLION IN BACK WAGES FROM THESE 4 LAWSUITS.

A FURTHER CRITICAL CONCERN IS THAT THE COUNTY CONTINUES TO FACE MORE POTENTIAL CLAIMS FOR BACK WAGES FROM OTHER EXEMPT PROFESSIONAL, MANAGERIAL, AND EXECUTIVE EMPLOYEES WHO ARE NOT PART OF THE CURRENT LAWSUITS. THE COUNTY EMPLOYS APPROXIMATELY 17,580 EMPLOYEES. OF THESE EMPLOYEES, 6,732, OR 38.3%, ARE EXEMPT AND SERVE IN "WHITE-COLLAR" PROFESSIONAL, ADMINISTRATIVE, AND EXECUTIVE POSITIONS. THE REMAINING 10,848, OR 61.7%, ARE COVERED BY THE FLSA AND SERVE IN RANK AND FILE POSITIONS. BASED ON THESE NUMBERS, THE COUNTY FACES POTENTIAL BACK WAGE LIABILITY OF APPROXIMATELY $23 MILLION FROM THE EXEMPT PROFESSIONALS,

MANAGERS, AND EXECUTIVES.

IF THIS STAGGERING SUM OF MONEY IS AWARDED TO HIGHLY PAID EXEMPT EMPLOYEES IT WILL HAVE A DEVASTATING IMPACT ON THE FINANCIAL RESOURCES OF THE COUNTY. THIS COULD NOT COME AT A WORSE TIME. THE COUNTY OF SAN DIEGO ALREADY IS FACING A SEVERE FINANCIAL CRISIS, AND THIS FLSA LIABILITY WILL FURTHER CRIPPLE OUR ABILITY TO DELIVER ADEQUATE LAW ENFORCEMENT, HEALTH AND SOCIAL SERVICES TO COUNTY RESIDENTS. SUCH A FISCAL SITUATION ALSO PREVENTS US FROM OFFERING ANY WAGE INCREASE TO OUR EMPLOYEES, INCLUDING OUR RANK AND FILE EMPLOYEES WHOM THE FLSA IS INTENDED TO BENEFIT. OVERTIME WORK ALREADY HAS BEEN SUBSTANTIALLY CURTAILED, AND WE ARE TRYING OUR BEST TO AVOID MASSIVE LAYOFFS. IT WOULD BE A TRAVESTY OF PUBLIC POLICY FOR FLSA COVERED EMPLOYEES TO SUFFER FINANCIALLY WHILE HIGHLY PAID PROFESSIONAL, ADMINISTRATIVE AND EXECUTIVE EMPLOYEES RECEIVE UNINTENDED FINANCIAL WINDFALLS.

THESE COURT RULINGS HAVE PROMPTED THE COUNTY TO BEGIN MAKING MODIFICATIONS TO ITS PAYROLL PRACTICES FOR MANAGERS AND EXECUTIVES. ONE OF THESE CHANGES IS INTENDED TO COMPLY WITH THE COURT REQUIREMENT THAT THE COUNTY NOT "DOCK" THE PAY OF ITS EXEMPT EMPLOYEES FOR TIME NOT WORKED LESS THAN A DAY. THE EFFECT OF THIS CHANGE IS TO INSTRUCT SUCH EMPLOYEES TO NOT REPORT ABSENCES OF LESS THAN ONE DAY -- THAT IS, TO COLLECT REGULAR PAY FOR TIME AT THE DOCTOR, AT THE DENTIST, RUNNING ERRANDS OR DOING ANYTHING ELSE. HAVING TO MAKE SUCH A CHANGE WAS A BITTER PILL TO SWALLOW SINCE IT RUNS COUNTER TO OUR DUTY OF ACCOUNTING FOR ALL PUBLIC EXPENDITURES.

EVEN MORE TROUBLESOME IS THE COURT'S CONCLUSION THAT AN EMPLOYER'S PAYROLL SYSTEM MAY NOT ACCOUNT FOR ACTUAL TIME SPENT ON THE JOB BY EXEMPT EMPLOYEES. THE COUNTY IS RELUCTANTLY EXPLORING WAYS TO MODIFY ITS PAYROLL SYSTEM TO REMOVE TIME ACCOUNTING FOR EXEMPT EMPLOYEES.

THESE ARE NOT ACCEPTABLE SOLUTIONS AND IN OUR VIEW THIS IS NOT THE INTENT OF THE FLSA. BUT AT THIS POINT, THE COUNTY IS LEFT WITH LITTLE CHOICE. EITHER WE MAKE THE CHANGES REQUIRED BY THE COURTS OR WE PAY TIME-AND-A-HALF "OVERTIME" TO ALL OF OUR PROFESSIONALS, MANAGERS, AND EXECUTIVES. THE MOST CRITICAL POINT, HOWEVER, IS THAT ANY PAYROLL CHANGES MADE WILL BE PROSPECTIVE IN APPLICATION AND WILL NOT RESOLVE THE TREMENDOUS RETROACTIVE LIABILITY FACING THE COUNTIES, AS WELL AS STATE AND LOCAL GOVERNMENTS NATIONWIDE.

THE CONGRESS MUST ACT IMMEDIATELY TO RESOLVE THIS CRISIS BROUGHT ABOUT BY COURT INTERPRETATIONS OF THE FLSA. THE DEPARTMENT OF LABOR IS UNABLE TO PROVIDE THE RETROACTIVE RELIEF REQUIRED TO ADDRESS THIS PROBLEM. IT RECENTLY ISSUED A FINAL RULE REVISING THE "SALARY BASIS" TEST. IT ALSO SUBMITTED PROPOSED LEGISLATION RECENTLY TO CLARIFY THAT PUBLIC EMPLOYEES MAY HAVE THEIR SALARIES AND ACCRUED LEAVE REDUCED FOR ABSENCES OF LESS THAN A DAY WITHOUT LOSING THEIR EXEMPTION FROM THE OVERTIME PAY REQUIREMENTS. NEITHER THE FINAL RULE NOR THE PROPOSED REGULATIONS GO FAR ENOUGH. THEY ONLY ADDRESS THE PROBLEMS RAISED BY THE ABSHIRE COURT. NACO JOINED OTHER PUBLIC INTEREST GROUPS IN A SERIES OF MEETINGS WITH DEPARTMENT OF LABOR OFFICIALS TO URGE THAT

REGULATIONS BE ADOPTED TO ADDRESS OTHER PROBLEMS THAT HAVE ARISEN SINCE THE ABSHIRE DECISION. UNFORTUNATELY, THE REGULATIONS AND PROPOSED LEGISLATION WILL NOT SOLVE THE PROBLEM. WE SERIOUSLY DOUBT THAT THEY WILL EVEN CURTAIL THE NUMBER LAWSUITS BEING FILED. IF THE DEPARTMENT OF LABOR'S PROPOSED LEGISLATION IS ADOPTED, EXEMPT EMPLOYEES WILL STILL BE ABLE TO SUE THEIR PUBLIC EMPLOYERS FOR BACK PAY FOR "OVERTIME" IF THEY ARE REQUIRED TO FILL OUT TIME SHEETS OR RECEIVE THEIR HOURLY RATE OF PAY FOR "OVERTIME" WORK. LEGISLATION ADDRESSING RETROACTIVE AND PROPPECTIVE "OVERTIME" PROBLEMS MUST BE ENACTED AT ONCE TO CLARIFY CONGRESSIONAL INTENT AND STOP THE MISAPPLICATION OF THE FLSA.

WE STRONGLY URGE YOUR IMMEDIATE AND FULL SUPPORT OF LEGISLATION SIMILAR TO H.R. 5112. SUCH LEGISLATION WOULD ADDRESS NOT ONLY THE PROBLEMS CAUSED BY THE ABSHIRE DECISION BUT PROBLEMS CAUSED BY THE OTHER DECISIONS AS WELL. EQUALLY IMPORTANT, IT WOULD REPRESENT SOUND PUBLIC POLICY AT A TIME WHEN THE PUBLIC MISTRUST OF GOVERNMENT AT ALL LEVELS IS VERY HIGH. IT WOULD PERMIT STATE AND LOCAL GOVERNMENTS TO CONTINUE WITH PAYROLL SYSTEMS THAT ARE ESTABLISHED ON PRINCIPLES OF PUBLIC ACCOUNTABILITY -- SYSTEMS THAT LOCAL TAXPAYERS UNDERSTAND AND RELY ON TO PROTECT THEM. GOVERNMENT EMPLOYERS CANNOT AFFORD TO PAY EMPLOYEES FOR TIME NOT WORKED BECAUSE OF AN ARTIFICIAL STANDARD SUCH AS THE "SALARY BASIS" TEST. SUCH A TEST HAS PROVEN TO BE INEFFECTUAL, CONFUSING AND COUNTER PRODUCTIVE. IT MUST BE MODIFIED FOR THE PUBLIC SECTOR. WE URGE YOUR SWIFT ACTION TO ENACT AN APPROPRIATE SOLUTION TO THIS CRISIS.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS AT THE APPROPRIATE TIME.

COUNTY OF SAN DIEGO

FLSA FISCAL IMPACT
ON COUNTY EXPENDITURES

SEPTEMBER 16, 1992

	Number of Employees	% of Total Employees	Average Annual Salary Range	Average Annual Salary Range + Overtime Pay *	Estimate of Total Potential FLSA Overtime Liability *
Exempt "White Collar" Employees					
Executives	95	0.5%	$60,000-$115,000	$65,200-$125,000	$ 3,813,300
Professionals and Administrators	6,637	37.7%	$25,000-$80,000	$27,200-$87,000	$19,586,700
Non-Exempt Employees					
Rank and File FLSA Covered Employees	10,848	61.7%	$17,000-$55,000	$18,500-$59,800	N/A
					$23,400,000

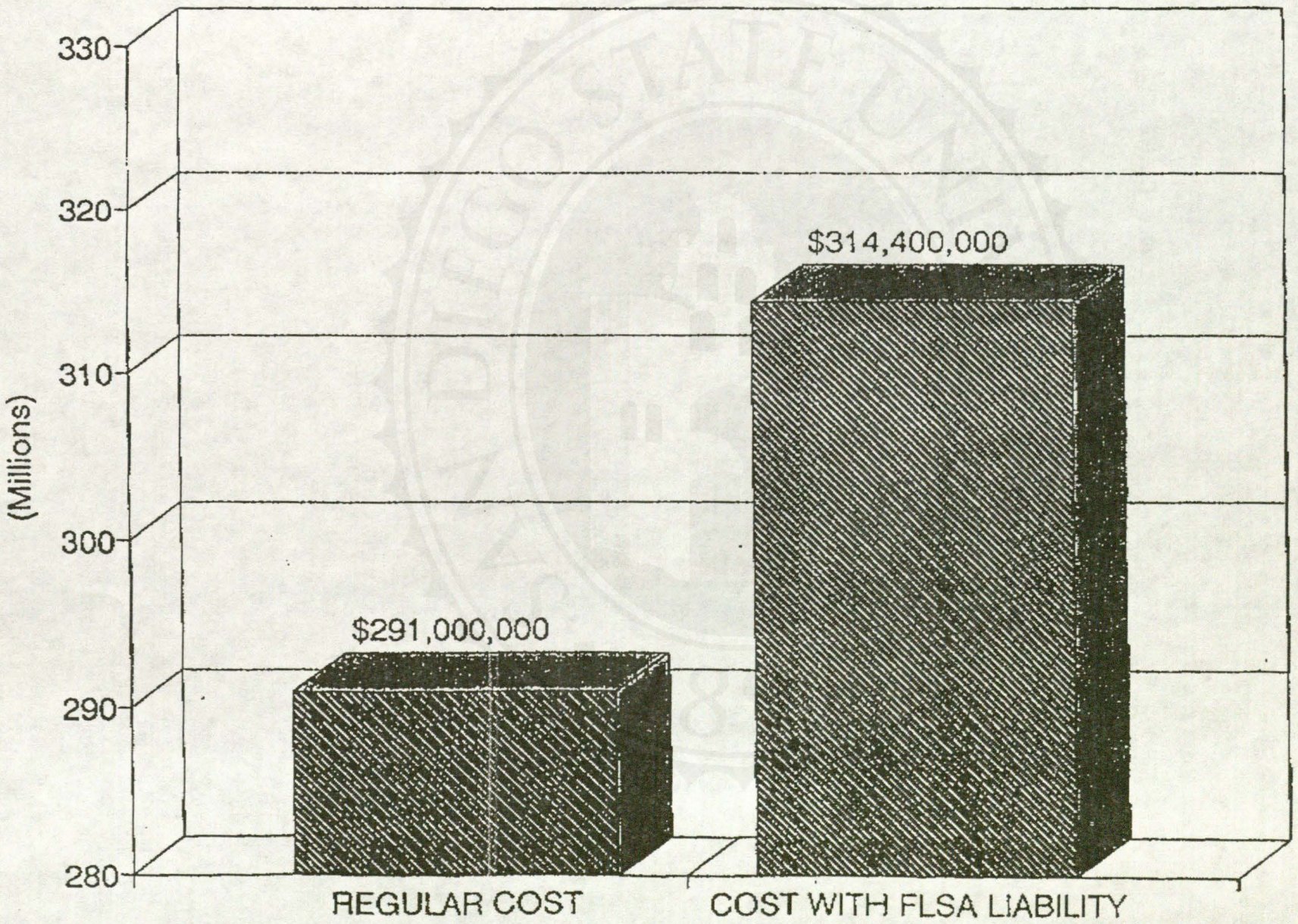
* Based upon Court ruling that exempt employees are entitled to time and a half overtime because County's payroll system is inconsistent with "salary basis" test.

EXAMPLE: The following represents just one example of the potential financial windfall available to an Executive employee because of the Court's FLSA ruling in the lawsuits against the County of San Diego.

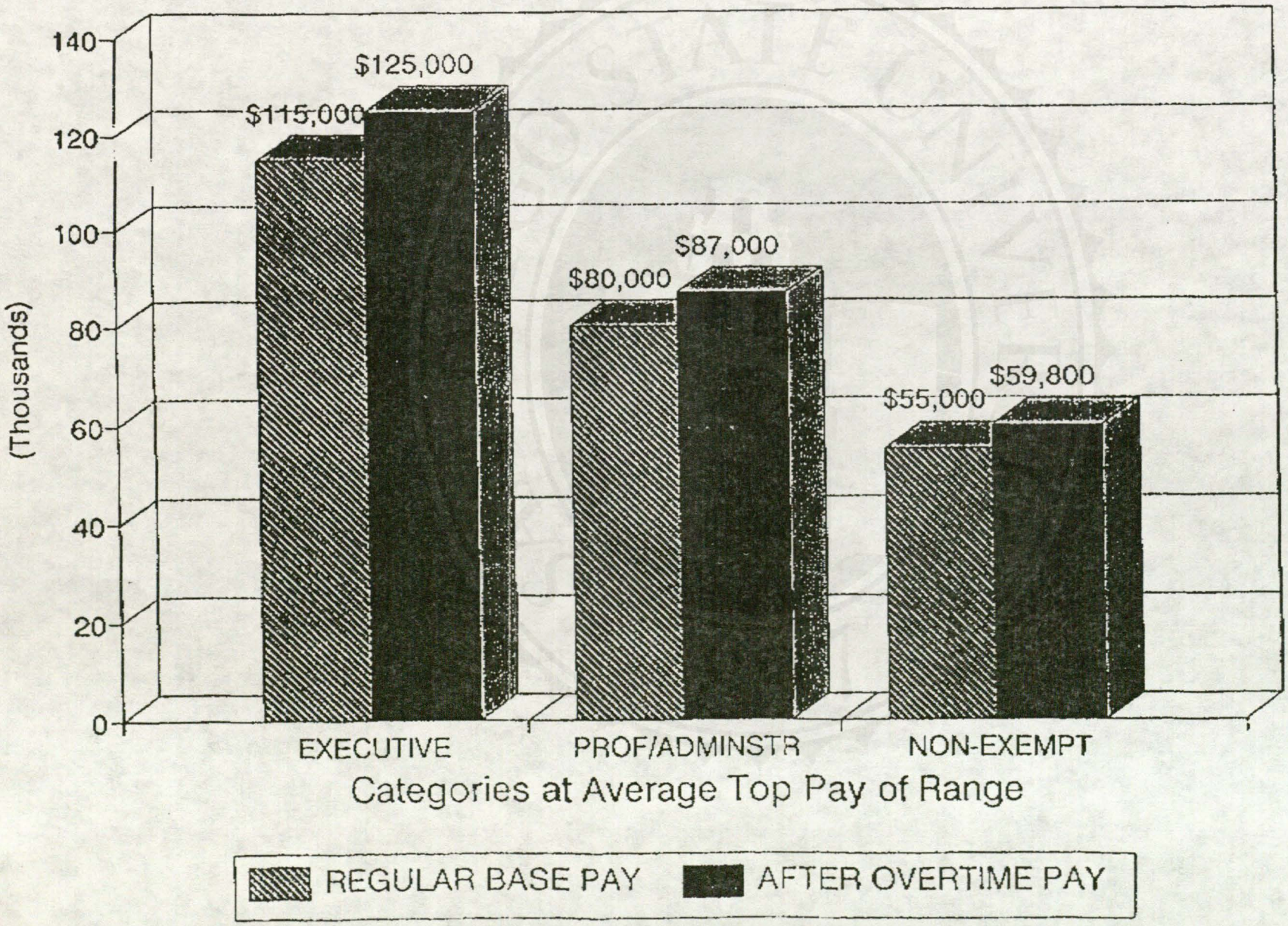
Potential FLSA Overtime Liability for a Department Head

	Annual Salary	Annual Salary + Overtime	Estimated Annual Over-Time Liability	Back Pay Award of 3 Years		Liquidated Damages		Total Liability
Executive Employee (Department Head)	$87,500	$95,075	$7,575	$22,720	+	$22,720	=	$45,450

TOTAL EXEMPT SALARIES-SAN DIEGO COUNTY
Before and After FLSA Liability Payment



TOP PAY RANGES - SAN DIEGO COUNTY
Before and After Overtime Pay



City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

September 11, 1992

BY FEDERAL EXPRESS AND FAX (202) 393-2630

Larry Jones
Associate Legislative Director, Labor/Employment
National Association of Counties
440 First Street NW 8th Floor
Washington, D.C. 20001

RE: Legislation to Relieve Public Entities From the Salary Basis Test: H.R. 5112; S. 1670; S. 3089

Dear Mr. Jones:

I write in support of legislation to relieve public entities of the enormous potential liabilities they face due to application of the Department of Labor's "salary basis test." It is my hope you can present this letter in the upcoming subcommittee hearings concerning this issue.

The City and County of San Francisco employs over 28,000 persons. When San Francisco first learned that the FLSA would become applicable to its employees in 1986, an exhaustive survey was conducted to determine who was properly exempt from overtime requirements under the Act. During this survey process, San Francisco's managers attended a number of training sessions, and conferred with experts and counterparts in other cities and counties to learn the requirements of the FLSA. During this process, the salary basis test was never highlighted as an issue of concern.

For decades, the City and County of San Francisco has required City employees to be accountable to the citizens of San Francisco. This requirement of accountability is embodied in our governing Charter, which provides: "No officer or employee shall be paid for a greater time than that covered by his actual service...." (S.F. Charter § 8.400(g).)

I believe that one of the fundamental principles of public service is public trust. This means accountability to the public. This means that citizens can expect that employees who are paid through taxpayer dollars are working for the entire period they are paid to work.

The City and County of San Francisco now faces two lawsuits which challenge these principles. The lawsuits are premised on interpretations of a Department of Labor regulation, 29 C.F.R § 541.118, which set forth a salary basis test for exemption from overtime requirements. The lawsuits appear to be similar to the dozens which have followed the Ninth Circuit decision Abshire v. County of Kern.

The first case is entitled James Stewart, et al. vs. City and County of San Francisco, et al., USDC No. C90-3206 CAL (N.D. Cal.). The second case is entitled Donald Chan, et al. vs. City and County of San Francisco, et al., USDC No. C91-0922 CAL (N.D. Cal.).

These cases are virtually identical. They involve over 400 highly compensated administrative, executive and professional City employees who now claim they should be paid overtime compensation for all hours worked over forty in a week. The employees claim that the City's longstanding public accountability requirements mean they are not paid on "a salary basis." According to the employees, the City should treat them as hourly employees subject to overtime requirements.

The economic consequences of these cases could, in my opinion, be enormous. These 400 employees (and more are joining the lawsuits) could obtain a backpay judgment exceeding hundreds of thousands, if not millions, of dollars. This comes at a time when San Francisco faces a serious budget crisis, and the prospect of future layoffs seems certain.

These cases do not involve employees who should be considered "hourly." Employees participating to date in these cases include the Director of Public Health's Dental Division, the Director of Clinical Services for Public Health and the former General Manager of the Department of Telecommunications. I have attached an Appendix to this letter of various employees participating in this case. A number of employees enjoy current annual salaries exceeding $65,000. In fact, several employees earn over $90,000, and one earns over $100,000 annually.

I believe it would be an absurd technicality to require San Francisco taxpayers to pay these employees overtime compensation under the circumstances. Yet, courts throughout California are

summarily granting judgment to employees under similar circumstances.

I cannot believe Congress intended this unjust result when passing legislation to apply FLSA to public entities in 1985. Indeed, there is nothing in the Congressional record which would support this result.

This situation cries out for legislation. In my opinion, there is no reasonable way one can reconcile sound principles of public accountability with any salary basis test. For these reasons, on behalf of the City and County of San Francisco and its citizens, I strongly urge Congress to pass legislation relieving public entities from compliance with the salary basis test and resulting past liabilities.

Very truly yours,

Louise Renne

LOUISE H. RENNE
City Attorney

cc: Congressman Lowery
(by FAX)

64871

EXAMPLES OF CLASSES REPRESENTED IN
JAMES STEWART, ET AL. v. CITY AND COUNTY OF SAN FRANCISCO, ET AL.
USDC NO. C90-3206 CAL
DONALD CHAN, ET AL. v. CITY AND COUNTY OF SAN FRANCISCO, ET AL.
USDC NO. C91-0922 CAL

Department	Classes Represented	Salary Range[1/]
Juvenile Probation	1821 Management Information System Manager	71,436
Public Utilities Commission	9142 Transit Manager III	77,700
	9754 Staff Assistant XI, Special Project	98,475
	8221 Chief, Protective Services, Public Utilities Commission	79,527
Controller	1880 Chief of Systems	87,670
Department of Public Health	2212 Director, Dental Division	96,648
	2250 Director of Clinical Services	109,777
	2143 Hospital Assistant Administrator	79,214
Department of Public Works	5122 Assistant, City Architect	93,464
Tele/ communications	1150 General Manager, Department of	89,941
Airport	5174 Administrative Engineer	74,698
	5256 Mechanical Engineer	69,426
	5504 Project Manager II	74,385
	5208 Civil Engineer	69,426
	9260 Airport Assistant Deputy Director, Facilities Operations and Maintenance	85,660
	1865 Supervisor, Special Project	71,436
	5210 Senior Civil Engineer	80,388
	5230 Traffic Engineer	69,426
Controller	1875 Senior Systems Programmer	73,576
	1866 Systems and Procedures	71,436
Department of Public Health	2246 Assistant Director of Clinical Sciences I	69,739

1/ These figures are taken from the Approximate Annual Maximum column in the 1992-1993 Salary Standardization Ordinance.

Department	Classes Represented	Salary Range
Department of Public Works	5210 Senior Civil Engineer	80,388
	5256 Mechanical Engineer	69,426
	5506 Project Manager III	88,244
	5174 Administrative Engineer	74,698
	5258 Senior Mechanical Engineer	80,388
	5208 Civil Engineer	69,426
	5249 Senior Sanitary Engineer	80,388
	5212 Principal Engineer	93,073
District Attorney	1821 Management Information Systems Manager	71,436
Fire Department	5215 Fire Protection Engineer	74,429
Hetch Hetchy	5240 Electrical Engineer	69,426
Mayor	9792 Assistant to Mayor VI	70,183
Port	5504 Project Manager II	74,385
	5256 Mechanical Engineer	69,426
Public Utilities Commission	5210 Senior Civil Engineer	80,388
	5208 Civil Engineer	69,426
	1824 Principal Administrative Analyst	68,043
	5240 Electrical Engineer	69,426
	5506 Project Manager III	88,244
	5212 Principal Engineer	93,073
	5177 Safety Officer	75,429

64561

COUNTY OF SAN DIEGO

Washington Office

202, 737-7523

FAX Transmittal

DATE: September 18, 1992

PLEASE DELIVER TO:

Name: SUPERVISOR LEON WILLIAMS

FROM:

Name: ROGER HONBERGER

Subject: DRAFT LETTER TO CONGRESSMAN MFUME

FAX Number: 619/557-4025 ~~202/737-6788~~

Number of pages (not including this form): ONE

Leon- This is a first draft of the letter you asked me to put together this morning. Please feel free to change or add anything I may have forgotten. Thanks for you help this week!

Rh