



September 4, 2015

Mary Ziegler  
Director of the Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue N.W, Room S-3502  
Washington, DC 20210

Re: RIN 1235-AA11, Comments in Support of DOL's Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Ziegler:

The Center for Effective Government (CEG) is writing to express its strong support for the U.S. Department of Labor's (DOL's) proposal to update the rules implementing the overtime provisions of the Fair Labor Standards Act. A national organization that connects national policy issues with the concerns of everyday Americans, CEG is committed to a government that effectively supports the aspirations and wellbeing of working people. Modernizing our national employment standards will help to ensure the economic security of American families. We are pleased that the Department is working to restore the overtime protections for millions of American workers that have been allowed to erode since 1975.

**We support your commitment to raise the overtime salary threshold and to index it annually in the future.<sup>1</sup> Both of these actions are clearly within the authority provided under the FLSA and through court interpretations since that time.<sup>2</sup>** Your proposal to raise the salary level below which a worker cannot be called "exempt" from overtime to \$50,440 in 2016 is a welcome advance from current policy and will help millions of salaries workers who are unfairly forced to work more than 40 hours of week without extra pay.

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<sup>1</sup> U.S. Department of Labor, Wage and House Division, (July 6, 2015) *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, Docket ID WHD-2015-0001.

<sup>2</sup> *Powell v. United States Cartridge C.*, 339 U.S. 497, 516 (1950); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728,739 (1981); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).



**However, we believe the salary threshold you propose is too low. We believe pegging the threshold to the equivalent of the 60th percentile of weekly earnings for full-time salaried workers (rather than the 40<sup>th</sup> percentile the Department has proposed), will better meet the goals of the FLSA and restore overtime protections to enough of the workforce to guard against misclassification abuses.**

As you recognized in your Notice of Proposed Rulemaking, the FLSA has two objectives: (1) to spread employment more broadly by incentivizing employers to hire more individual employees instead of demanding existing employees work longer hours, to reduce involuntary unemployment; and (2) to reduce overwork and its detrimental effect on the health and wellbeing of workers and their families.

We would add another: to restore the right to a 40 hour week that millions of generations of working men and women fought for. Working people deserve the right to “eight hours of work, eight hours of rest, and eight hours for what we will.” And with so many parents in the workforce and longer commute times, we need overtime rules to protect time with family and children.<sup>3</sup> Your proposed rule would provide more time protections to the parents of over an estimated 9 million children.<sup>4</sup> A higher threshold would help even more families find a healthy balance between work and family time.

When the FLSA was signed into law, President Roosevelt and key members of Congress assumed that eventually every worker in America, except those in the agricultural sector and management, would have a 40 hour work week.<sup>5</sup> In fact, **at its peak, overtime rules covered 62 percent of the workforce**, but this percentage has fallen dramatically since its peak in 1975, thanks to deliberate “misclassification” of salaried workers as “management.” **To protect the same percentage of salaried workers as in 1975, the threshold should be \$69,000 a year in 2013 dollars.**<sup>6</sup>

The Weis Report of 1949<sup>7</sup> noted that salary thresholds must be high enough to cover the “great bulk” of workers or they would not be effective in preventing the misclassification of overtime-eligible workers. But today, the poverty threshold has fallen so low that it represents less than the poverty threshold for a family of four. The exemptions in the FLSA were not supposed to apply to workers so close to the poverty level.

**We further encourage DOL to adopt the California “duties test” model as part of the new rule.** California has established a standard that says any employee who spends more than 50 percent of her

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<sup>3</sup> Glynn, S. (2014, June). *Breadwinner Mothers, Then and Now*. Center for American Progress publication. Retrieved 5 August 2015, from <https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

Hartmann, H. et al. (2015, August). *How the New Overtime Rule Will Help Women & Families*. Institute for Women’s Policy Research & MomsRising Publication. Retrieved 11 August 2015, from <http://www.iwpr.org/publications/pubs/how-the-new-overtime-rule-will-help-women-families>

<sup>4</sup> Mishel, L., & Eisenbrey, R. (2015, August). *Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers*. Economic Policy Institute Publication. Retrieved 5 August 2015, from <http://s4.epi.org/files/pdf/90214.pdf>

<sup>5</sup> Bernstein, J. & Eisenbrey, R., (2014, March), *New Inflation-Adjusted Salary Test Would Bring Needed clarity to FLSA Overtime Rules*. Economic Policy Institute.

<sup>6</sup> Heidi Shierholz, (2014, July) “It’s Time to Update Overtime Pay Rules,” Economic Policy Institute <http://s2.epi.org/files/2014/ib381-update-overtime-pay-rules.pdf>

<sup>7</sup> “Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Presiding Officer Harry Weiss,” U.S. Dept. of Labor (June 30, 1949).

time performing “non-exempt” work (i.e., executive, administrative or professional work) cannot be excluded from receiving overtime pay after 40 hours of work. The test is simpler than the current FLSA test and would cover more workers whose bosses may seek to exempt their employees by changing their job title.<sup>8</sup> We have not heard of any problems associated with enforcing this simplified duty rule. It would, for example, prevent assistant managers from being exempted from overtime protections if they spend a majority of their time doing the same tasks as other workers (stocking shelves, waiting on customers, etc.).

**A strong majority of Americans support raising the overtime threshold. Two thirds want the salary threshold to be even higher than our recommendation.** According to a recent national survey, nearly eight in ten Americans support raising the overtime threshold above \$23,000 per year, and **65 percent support raising it to \$75,000**— a level far higher than the threshold in the proposed rule.<sup>9</sup>

We applaud DOL for proposing to expand overtime protections under the FLSA. The regulations that govern overtime pay have not been updated in a meaningful way in four decades. Working people and their children need government protections to ensure they have time for rest and family and leisure.

CEG urges the Department to proceed in issuing and implementing a final rule without delay, with our recommended revisions.

Sincerely,

Katherine McFate  
President and Chief Executive Officer  
Center for Effective Government

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<sup>8</sup> California Labor Commissioner’s Office, Labor code section 515 (a-f), <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=00001-01000&file=500-558>

<sup>9</sup> (2015, May). *National Survey Results*. Public Policy Polling. Retrieved 7 August 2015, from <http://www.americansunitedforchange.org/page/-/PPP-Overtime%20Pay-%205-12-2015.pdf>