

Statement for the Record

Committee on Education and the Workforce U.S. House of Representatives

Subcommittee on Workforce Protections Hearing: “Bad for Business: DOL’s Proposed Overtime Rule” November 28, 2023

The Center for Law and Social Policy (CLASP) is grateful for the opportunity to submit this statement for the record of the hearing “Bad for Business: DOL’s Proposed Overtime Rule” held by the U.S. House Committee on Education and the Workforce on November 28, 2023.

CLASP is a national, nonpartisan, nonprofit advancing anti-poverty policy solutions that disrupt structural and systemic racism and sexism and remove barriers blocking people from economic security and opportunity. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, workforce development, and economic justice stakeholders, including labor unions and worker centers, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs.

CLASP seeks to improve the quality of jobs for low-income workers, especially workers of color, women, immigrants and youth. Our work includes working with policymakers to raise wages, increase access to benefits, implement and enforce new and existing labor standards, and ensure workers can strengthen their voice through collective bargaining. Quality jobs enable workers to balance their work, school, and family responsibilities—promoting economic stability and security.

On September 8, 2023, the Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM), *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*. The NPRM proposes to update and revise the regulations issued under section 13(a)(1) of the Fair Labor Standards Act, which provide an exemption from minimum wage and overtime pay requirements for executive, administrative, and professional employees. The proposed rule increases the standard salary level and the highly compensated employee total annual compensation threshold, and indexes them to provide automatic updates. **CLASP strongly supports the DOL’s proposed rule to update and revise these regulations.**

DOL’s Proposed Rule

The Fair Labor Standards Act (FLSA) provides that most hourly workers performing manual labor or working in service industries are guaranteed overtime protection at time-and-a-half when they work more than 40 hours a week. However, eligibility for salaried workers varies by their pay and the type of work

they perform. Specifically, individuals whose primary job duty is deemed to be “executive, administrative, or professional” are not guaranteed overtime protection if they earn above a certain amount on a weekly basis. These are known as the executive, administrative, or professional (EAP) exemptions, or “white collar” exemptions. The original premise behind the overtime threshold and exemptions was that these types of employees do not need overtime protections because—as evidenced by the nature of their work and the salaries they command—they have sufficient bargaining power with their employers.¹

The overtime threshold, along with the duties test, is intended to set a guardrail so that employers do not incorrectly classify lower-paid salaried employees as overtime-exempt. However, the current overtime salary threshold is only \$684 per week, or \$35,568 annually for a full-time employee working year round.² This level is much too low to provide a true incentive for employers to balance the additional hours they ask of their workers with the costs of 1) overtime pay, or 2) raising salaries to the new salary threshold. That incentive is inseparable from a fundamental principle embodied in the FLSA—overtime protections were enacted to compensate workers fairly for all hours worked, or to spread employment so that employers who need long hours of work hire more people rather than overworking those they already employ.

If employers misclassify a worker as overtime exempt, a worker can be required to work long hours without the benefit of additional pay or without actually engaging in the job responsibilities required for exempt status. This can lead to employers misclassifying workers as an executive, administrative, or professional to avoid paying overtime.³ For example, an assistant manager at a fast food restaurant with a salary of \$36,000 could be required to work 55 hours a week without any additional pay. She could be denied any overtime pay because she is deemed to be an “executive,” even if she spends most of her time cooking fries, operating a cash register, and sweeping floors. Raising the federal overtime threshold would enable her to be compensated for the extra hours she worked.

The DOL’s new proposed rule would raise the overtime salary threshold to the “35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the south)” - currently \$1,059 per week, or \$55,068 annually for a year round worker. A worker earning less than \$1,059 per week/\$55,085 annually would become automatically eligible for overtime pay when they work more than 40 hours in a week. This will apply to employees even if they are classified as an executive, administrative, or professional, which includes managers, supervisors, and highly credentialed professionals.⁴

¹ *Why it’s time to update overtime pay rules*, The Economic Policy Institute, Aug. 2014, <https://www.epi.org/publication/time-update-overtime-pay-rules-answers-frequently/>.

² *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, US Department of Labor, Sept. 2019, http://www.dol.gov/whd/overtime/fs17a_overview.htm.

³ Sam Ross-Brown and Amanda Teuscher, *Why the DOL’s New Overtime Rule is Such a Big Deal*, The American Prospect, Sept. 2015, <http://prospect.org/article/why-dols-new-overtime-rule-such-big-deal>; Jared Bernstein and Ross Eisenbrey, *New inflation-adjusted salary test would bring needed clarity to FLSA overtime rules*, Economic Policy Institute, Mar. 2014, <https://www.epi.org/publication/inflation-adjusted-salary-test-bring-needed/>.

⁴ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees [Proposed Rule]*, 88 Fed Reg. 62152, Sept. 2023, <https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees>.

The proposal also calls for indexing the thresholds to wage growth, by providing automatic updates every three years to ensure that the threshold's protection does not stagnate. Automatic indexing provides a timely and efficient updating to reflect current earnings data.

According to the DOL, if the proposal is finalized, it would provide new overtime protections to 3.6 million workers, and it is projected to increase the wages of working people by \$1.3 billion annually.⁵ The overtime salary threshold has not been properly updated for nearly 50 years and this proposed salary threshold is modest and well within the boundaries of historical precedent.

History of Overtime Rules

1938 to 1975

In 1938, Congress passed the Fair Labor Standards Act (FLSA), establishing the twin pillars of an economy of shared prosperity: a minimum wage and overtime protections. By setting a federal minimum wage and a limit on the number of hours in a standard workweek, the FLSA was designed to help ensure that workers would not face exploitation or overwork, and would be able to secure their fair share of the productivity growth generated by their labor.

Under the FLSA, overtime eligibility for salaried workers varies by their level of pay and the type of work they perform. Most salaried workers who earn below a certain threshold are automatically eligible for overtime. Salaried workers who earn above the threshold and are classified as executives, administrators, or professionals can be exempt from overtime, despite the fact that their actual wages may be very low.⁶

The premise behind the overtime threshold and exemptions was that bona fide executives, administrators, or professional employees do not need overtime protections because—as evidenced by the nature of their work and the salaries they command—they have sufficient bargaining power with their employers. This premise, however, has been undermined by the significant decrease in the real value of the overtime threshold since 1975.⁷

During the decades following the enactment of the FLSA, wages and productivity rose in near lock-step. However, over the past 45 years, wages and income have diverged from productivity as the value of the minimum wage and overtime pay has eroded. According to the Economic Policy Institute, from 1979 to 2021, productivity increased by 64.6 percent, while wages only grew by 17.3 percent.⁸

One reason pay has lagged behind productivity is the shrinking number of workers eligible for overtime pay—a trend driven partly by the federal government's failure to raise the overtime threshold.⁹ Since 1975, the overtime threshold has only been raised modestly twice, and currently sits at \$35,568 annually.¹⁰

⁵ *Ibid.*

⁶ *Fact Sheet #17A*, 2019.

⁷ *Why it's time to update overtime pay rules*, The Economic Policy Institute, Aug. 2014, <https://www.epi.org/publication/time-update-overtime-pay-rules-answers-frequently/>.

⁸ *The Productivity–Pay Gap*, The Economic Policy Institute, Oct. 2022, <https://www.epi.org/productivity-pay-gap/>.

⁹ Lawrence Mishel, Elise Gould and Josh Bivens, *Wage Stagnation in Nine Charts*, The Economic Policy Institute, Jan. 2015, <https://www.epi.org/publication/charting-wage-stagnation/>.

¹⁰ Alexia Fernández Campbell, *1.3 million winners and 2.8 million losers from Trump's new overtime rule*, Vox, Sept. 2019, <https://www.vox.com/identities/2019/9/24/20835653/trump-overtime-pay-rule-explained>.

1975 to 2004

In the years following the passage of the FLSA, the threshold for overtime protection was gradually raised—even outpacing inflation. From 1938 to 1975, the threshold was raised every five to nine years by both Democratic (Truman and Kennedy) and Republican (Eisenhower, Nixon and Ford) presidents. Since 1975, the overtime threshold was only updated moderately twice prior to today—in 2004 by the Bush administration and in 2019 by the Trump Administration—and as a result has been eroded by inflation.¹¹

Unfortunately, the methodology for 2004 Bush administration overtime rule change was also deeply flawed. The Bush DOL modified the overtime rules by raising the salary threshold and changing the duties test. As Heidi Shierholtz, the President of the Economic Policy Institute stated in her testimony to this Committee in 2019, “Prior to the 2004 rule, there were two sets of tests, each of which involved a duties test and a salary test. The duties test and salary test within each set had always worked together. One set of tests was the “long-test” set, which combined a low salary threshold with a stringent duties test... The other was the “short-test” set, which combined a high salary threshold with a much more lenient duties test.” If an employer wanted to assert that a relatively low-paid employee was exempt from overtime, they would have to demonstrate more rigorously that the duties were in fact executive, administrative, or professional in nature.¹²

Schierholtz continues, “In the 2004 rule, the Department included just one set of tests. For this set of tests, the Department created a “standard” duties test that was essentially the more lenient “short test” for duties. To remain consistent with the prior methodology, the Department should have paired this duties test with a higher salary threshold consistent with a short duties test. Instead, they used a low salary level consistent with a long duties test.”¹³

The 2004 rule was unnecessarily complicated and obscured which workers were overtime exempt. It was the first update to place the threshold below the average wage—placing the new overtime threshold at 28 percent below the 2004 average wage.¹⁴ This standard made it easier for employers to—unintentionally or not—misclassify employees. In addition to the decline in real value of the threshold, overtime protections have long been weakened by employers that misclassify their employees as executive, administrative, or professional, even if they spend only a small portion of their time performing these duties, in order to avoid paying overtime.¹⁵

2016

In 2016, the Obama administration issued a rule to raise the threshold, increasing it from \$23,660 to \$47,476, lower than what the threshold would have been had it kept up with inflation.¹⁶ Unfortunately, the

¹¹ Sapna Mehta and Andrew McWilliam, *Past Time for Overtime: How Expanded Access To Overtime Protections Will Boost Wages For Working Families In New York City*, Office of the New York City Comptroller, May 2016, <https://comptroller.nyc.gov/wp-content/uploads/documents/PastTimeForOvertime.pdf>.

¹² Heidi Shierholz, *Restoring the Value of Work*, Economic Policy Institute, Jun. 2019, <https://www.epi.org/publication/restoring-the-value-of-work-evaluating-dols-efforts-to-undermine-strong-overtime-protections>.

¹³ *Ibid.*

¹⁴ Brendan Duke, *America’s Incredible Shrinking Overtime Rights Need an Update*, Center for American Progress, Jun. 2014, <https://www.americanprogress.org/article/americas-incredible-shrinking-overtime-rights-need-an-update/>.

¹⁵ Ross-Brown and Teuscher, *Why the DOL’s New Overtime Rule is Such a Big Deal*, 2015.

¹⁶ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule]*, 81 Fed. Reg. 32444, May 2016, <https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees>.

rule was invalidated with a federal court declaring that the DOL had exceeded its authority to apply the salary test.¹⁷ As noted earlier, the DOL had previously adjusted the salary threshold seven times prior since 1938, with no court ruling it was against the law's intent.¹⁸ The Obama rule also covered far fewer workers than the threshold had covered in the past.¹⁹

2019

In 2019, the Trump Administration issued a watered-down version of the Obama rule, raising the salary threshold to \$35,568, well below what it would need to be to keep up with inflation. It meant that 2.8 million of the 4.1 million workers who expected to get overtime benefits under the Obama rule didn't receive them.²⁰

Economic Benefits

The new overtime rule will put more money into the pockets of hard working workers if their employers want to continue having them work beyond 40 hours per week. This not only bolsters workers' lives and communities, but it also fuels economic growth. For employers who do not want to pay the required overtime pay, the new rule is an incentive to adopt employment practices that respect workers' time and contributions such as hiring more workers. The FLSA overtime protections were enacted to prevent overwork and compensate workers fairly for all hours worked, and to spread employment so that employers who need long hours of work hire more people rather than overworking those they already employ.

As work is valued, the influx of funds will increase income tax revenue, and also spur local economic growth, since studies show workers paid lower-wages are most likely to put their increased earnings back into the local economy.²¹

By indexing the overtime threshold, employers will have the predictability of regular, modest adjustments to overtime eligibility that keep pace with earnings. This will allow them to plan year to year. Employers will know exactly what to expect and when to expect it, which provides businesses the crucial predictability they need to plan for the future.

Conclusion

The DOL proposed rule is an important step toward updating the overtime regulations and addressing the low salary threshold set by the last administration in 2019. This updated rule will increase the number of workers who will be automatically entitled to overtime compensation, restoring the original intent of FLSA. It will help increase economic security for millions of workers struggling to make ends meet despite working full time jobs.

The modest nature of this proposed rule demonstrates the need for Congress to take action to provide the full measure of overtime protections that workers need. **CLASP calls on Congress to move forward the**

¹⁷ Campbell, *1.3 million winners*, 2019.

¹⁸ *Defining and Delimiting the Exemptions*, 2016.

¹⁹ *What you need to know about the new overtime pay law*, Economic Policy Institute, May 2016, <https://www.epi.org/publication/what-you-need-to-know-about-the-new-overtime-pay-law/>.

²⁰ Campbell, *1.3 million winners*, 2019.

²¹ Ben Zipperer, *The Impact of the Raise the Wage Act of 2023*, Economic Policy Institute, July 2023, <https://www.epi.org/publication/rtwa-2023-impact-sheet/>.

Restoring Overtime Pay Act, championed by Senator Sherrod Brown (D-OH) and Representative Mark Takano (D-CA). The bill would permanently enshrine overtime protections into law by pegging the overtime salary threshold to the 40th percentile of wages in the lowest wage census region. The bill also requires automatic updates every three years to ensure the level keeps pace with changes in prices and wages. Passing this bill would help finish the job that DOL is starting.

We thank you for the opportunity to submit this written statement for the record. If you have any questions regarding this topic, please contact Sapna Mehta, Senior Policy Analyst with the Education, Labor & Worker Justice Team at CLASP at smehta@clasp.org.