



November 7, 2023

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Submitted via regulations.gov

Re: Comments on Notice of Proposed Rulemaking, RIN 1235-AA39, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

Dear Ms. DeBisschop:

All workers, including Black and brown workers, deserve the right to earn a living without overwork or exploitation. As an organization dedicated to a just and inclusive economy, Dēmos strongly supports updating federal regulations to restore and extend overtime protections. However, we urge the Department to finalize a stronger rule than the one proposed.

The Fair Labor Standards Act (FLSA) generally requires employers to pay covered employees at least one-and-one-half times their regular rate of pay for any hours worked over 40 in a workweek.¹ Overtime protections were established to discourage employers from overworking a few employees without additional pay but to instead hire additional employees.² However, numerous statutory exemptions carve out millions of workers from these critical protections.³

One such exemption carves out from overtime protections “employee(s) employed in a bona fide executive, administrative, or professional capacity”⁴ as “defined and delimited”⁵ by the Secretary of Labor (“white-collar” exemption). This exemption is based on the idea that such employees have enough individual power in the workplace to guard against being

¹ 29 U.S.C. § 207(a)(1).

² See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981); *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009).

³ 29 U.S.C. § 213(a), (b).

⁴ 29 U.S.C. § 213(a)(1).

⁵ 29 U.S.C. § 213(a)(1).



overworked and underpaid.⁶ But for too long, Labor Department regulations that set out who falls under the white-collar exemption have been woefully out of date, leaving too many workers without the overtime protections they deserve.

Under the Labor Department’s regulations, employees are exempt under the white-collar exemption if they are paid a fixed salary higher than a set salary threshold and perform certain job duties. At one time, the overtime salary threshold and the duties test served as a meaningful dividing line between exempt and non-exempt employees. In 1975, more than 60 percent of full-time salaried workers were eligible for overtime based on their earnings.⁷ But in the decades since, the salary threshold has not been meaningfully updated, eroding its effectiveness as a test for the white-collar exemption.

Increasing the salary threshold would have a disproportionate impact on Black and Hispanic salaried workers. We know that Black and Hispanic workers are less likely to be excluded from overtime protections under the white-collar exemption. This is because they are more likely to be hourly workers or to earn lower salaries that are below the salary threshold compared to their white counterparts.⁸ However, among workers who are excluded from overtime protections under the white-collar exemption, Black and Hispanic workers are more likely to gain overtime protections when we increase the salary threshold because of their lower earnings compared to their white counterparts.⁹

The Biden Administration has a real opportunity to help prevent millions of workers, including Black and brown workers, from being overworked and underpaid. We commend the Labor Department for proposing to restore and extend overtime protections but strongly urge the agency to finalize a rule that does more for workers.

The Department of Labor has proposed setting the standard salary threshold to the “35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region,”¹⁰ which the Department projects to be \$60,209 in the first quarter of 2024.¹¹

⁶ See generally Seth D. Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 HOFSTRA LAB. & EMPLO. L.J. 19, 98–100 (2000).

⁷ Celine McNicholas, Samantha Sanders, and Heidi Shierholz, *What’s at stake in the states if the 2016 federal raise to the overtime pay threshold is not preserved—and what states can do about it*, Economic Policy Institute, 2 (Nov. 2017), <https://files.epi.org/pdf/136291.pdf>.

⁸ Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 88 Fed. Reg. 62152, 62196 (Sept. 8, 2023); Ross Eisenbrey and Lawrence Mishel, *The New Overtime Salary Threshold Would Directly Benefit 13.5 Million Workers*, Economic Policy Institute 1 (Aug 2015), <https://www.epi.org/publication/overtime-threshold-would-benefit-13-5-million/>.

⁹ *Id.*

¹⁰ 88 Fed. Reg. 62152.

¹¹ 88 Fed. Reg. FN 3.



While this is better than current standards, workers need more. We urge the Department to set the salary threshold to meet the high-water mark of 1975 when the relevant salary threshold was set at the 55th percentile of earnings of full-time salaried workers nationwide. The Department could phase in this higher salary threshold over a few years.

The Department has also proposed “automatically updating the salary levels, with an exception for pausing future updates under certain conditions [as] the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status.”¹² And while automatic updates are much needed for the reasons outlined in the Department’s proposal, three years is too long to wait. As the proposal notes “the number of affected workers decreases from year to year between automatic updates as the real value of the salary and compensation levels decrease.”¹³ Based on the Department’s projections of triennial updates, as many as 300,000 workers would lose overtime protections in a year without an update.¹⁴ We urge the Department to adopt annual updates as a better approach to ensuring the salary threshold keeps pace with employee pay.

Lastly, our nation’s educators, including preschool and kindergarten teachers, deserve the same protections as most other professionals. The Department must take this opportunity to eliminate regulatory language that exempts teachers based on their duties, regardless of their pay. According to research from the Economic Policy Institute, this would have a disproportionate impact on teachers of color. While 25 percent of all teachers are teachers of color, an estimated 29 percent of teachers who would be impacted by this rule change are teachers of color.¹⁵

We appreciate the opportunity to comment on the proposed rule.

Sincerely,

Udochi Onwubiko
Director of Economic Justice
Demos

¹² 88 Fed. Reg. 62154.

¹³ 88 Fed. Reg. 62223.

¹⁴ 88 Fed. Reg. Table 30—Comparison of Projected Costs and Transfers With and Without Automatic Updating.

¹⁵ John Schmitt, Heidi Shierholz, and Jori Kandra, *Expanding overtime protection for teachers under the Fair Labor Standards Act* 14 (November 22, 2021), <https://files.epi.org/uploads/239399.pdf>.