



September 3, 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 National Partnership for Women & Families strongly supports the U.S. Department of Labor's (DOL's) proposed rule raising the overtime salary threshold to \$970/week (\$50,440/year) in 2016 and establishing a mechanism to update the threshold automatically on an annual basis (the "proposed rule"). When effective in 2016, the proposed rule would provide or strengthen overtime protections under the Fair Labor Standards Act (FLSA) for nearly 13.5 million salaried workers, 6.9 million of whom are women,¹ boosting economic security for working families across the country.

The National Partnership is a non-profit, nonpartisan advocacy organization with more than 40 years of experience promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. Since our founding as the Women's Legal Defense Fund in 1971, we have fought for every significant advance for equal opportunity in the workplace, and we continue to advocate for meaningful safeguards that prevent discrimination against women and families. As both a non-profit organization employer and advocacy organization, we applaud DOL for issuing a strong proposed rule and urge swift implementation of the final rule.

The FLSA's overtime requirement was intended to establish a standard 40 hour workweek and require premium pay for additional hours worked in order to ensure that lower- and middle-wage workers were not subject to long hours without fair pay. The proposed rule makes three key changes to the current overtime exemption for executive, administrative or professional employees. It (1) raises the salary level threshold to the 40th percentile of weekly earnings for full-time salaried workers, which is projected to be \$970/week or \$50,440/year in 2016; (2) raises the highly compensated employee (HCE) compensation level to the 90th percentile of weekly earnings, which would be roughly \$122,000/year in 2015; and (3) implements a mechanism to automatically update the compensation levels for determining eligibility for and exemptions from overtime pay so that updates are not dependent on future rulemaking. The proposed rule also solicits comments on whether changes to the "duties" test are warranted.

I. The updated salary threshold is appropriate for determining which salaried workers automatically qualify for overtime and will benefit millions of working families.

Currently, a salaried worker is only automatically eligible for overtime pay if her or his salary is less than \$455/week (\$23,600/year). This grievously low threshold means that there are salaried workers paid wages below the poverty level for a family of four who are categorically ineligible for overtime pay regardless of the number of hours they work. The proposed rule would re-establish fairness in workplaces by changing the salary threshold to a projected amount of \$970/week (\$50,440/year) in 2016. This means that a worker who is paid less than \$970/week or \$50,440/year would be assured overtime pay if she or he works more than 40 hours in a workweek. Workers paid more than the salary threshold may also be eligible for overtime pay depending on their job duties.

The proposed salary level of \$970/week (\$50,440/year) in 2016 appropriately distinguishes between overtime-eligible and exempt workers. The overtime exemption was intended to distinguish between workers who earn salaries well above minimum wage and enjoy other privileges, including greater fringe benefits, job security and opportunities for advancement, from workers who need to be protected from exploitation and overwork with overtime pay. The salary threshold requirement is intended to define and delimit employees performing high-level work involving the exercise of discretion. The proposed threshold would entitle 40 percent of the workforce to overtime pay. This is entirely reasonable; in 1978, 65 percent of workers were automatically entitled to overtime pay; today, just eight percent are. Currently bonuses and incentive payments are not included as part of an employee's salary when determining whether an employee meets the salary threshold to be exempt from overtime requirements. This should not change.

Women will be among the most impacted by the proposed rule, including the two-thirds of women who are key breadwinners for their families.² The proposed rule will have beneficial effects for these women. Under the increased salary threshold, 44 percent of single mothers and 32 percent of married mothers who are currently exempt from overtime protections will be automatically eligible for overtime pay in 2016.³ More than a third of all currently exempt women workers, and nearly half of currently exempt black and Hispanic women workers, will be covered.⁴ Updating the threshold could mean hundreds of dollars in additional pay each week for affected workers⁵ and would substantially bolster the economic security of women and their families. Under the proposed threshold, women who have had to struggle to put food on the table even after working more than 40 hours a week will be more likely to receive fair pay for the hours they work.

The proposed rule would also benefit working families by reinforcing the importance of the 40-hour workweek. This is particularly important for the millions of workers who serve as unpaid caregivers for family members, 60 percent of whom are women.⁶ Under the proposed rule, millions of newly covered workers will either receive overtime pay when they work more than 40 hours in a workweek, or will not be required to work more than 40 hours in a week, giving them more time to meet personal, family and caregiving needs.

Additionally, the proposed rule would benefit low- and middle-wage working mothers who are breastfeeding. The Affordable Care Act amended the FLSA to require employers to provide non-exempt employees unpaid break time and private space to express breast milk. Because the proposed rule would increase the number of women who are not exempt, more women would be entitled to these protections. Although an employer cannot reduce an exempt employee's pay based on short breaks under the FLSA, exempt employees are not always able to take the breaks they need to express breast milk for the amount of time and at the intervals that are necessary. This is especially true for lower-paid employees currently classified as exempt but who spend most of their time, for example, stocking shelves or serving customers. When the proposed rule goes into effect, newly non-exempt employees will be guaranteed time and a private space to express breast milk.

II. Adjusting the highly compensated employee (HCE) compensation level ensures that the exemption remains a meaningful standard.

We support adjusting the HCE compensation level to return the HCE threshold to the annualized weekly earnings of the 90th percentile of full-time salaried workers (\$122,148/year in 2015). Under the proposed rule, employees that are paid at least the HCE threshold salary amount would be automatically exempt, regardless of their job duties. The HCE exemption created a simple test to exclude highly paid employees from overtime eligibility, but, like the overtime threshold for lower-paid workers, the value of the threshold has eroded over time. The increase in the HCE threshold is appropriate to ensure that only the most highly paid employees are categorically excluded from overtime requirements, as was the rule's intent when it was adopted in 2004.

III. The salary and compensation levels should be automatically updated to ensure they remain appropriate thresholds.

In order for the basic salary and HCE compensation levels to remain meaningful, the thresholds must be automatically updated on an annual basis. Waiting for rulemaking to raise the salary and compensation levels has meant long gaps between updates while the levels' effectiveness eroded.

Updating the salary and compensation levels annually will mean predictable and incremental changes, benefiting employers and employees alike and creating greater efficiencies for the government. DOL has proposed two methodologies for updating the salary and compensation thresholds: (1) using a fixed percentile of wage earnings or (2) using the CPI-U inflation index. The fixed percentile would be the 40th percentile (90th percentile for HCEs) of wage earnings, and it would be based on the actual salaries of employees published on a quarterly basis. The CPI-U is a commonly used economic indicator measuring inflation based on prices paid by urban consumers for a set basket of consumer goods and services.

We strongly urge DOL to index the salary and compensation levels, and we believe the fixed percentile of wage earnings is the better method. The fixed percentile of wage earnings is strong evidence of changes in prevailing salary levels. It constitutes a reliable source for setting the proposed thresholds. The CPI-U is used to calculate many programs

by the federal government, but it is more volatile and susceptible to economic changes than the fixed percentile method.

IV. The duties test needs to be updated to provide clearer guidance to employers and to prevent misclassification of employees.

The basic salary level test is the initial bright-line test: If an employee is paid wages below the salary threshold, she or he is automatically eligible for overtime; if an employee is paid the salary threshold or higher, she or he must meet the duties test to be exempt from overtime. Although raising the salary threshold will provide greater clarity and reduce misclassification of employees, the duties test should also be revised to include a percentage cap on nonexempt work.

Currently, in order for an employee to be exempt, the duties test requires employers to establish that the employee's "primary duty" is the performance of exempt work. "Primary duty" means "the principal, main, major or most important duty that the employee performs."⁷ The "primary duty" test is not clear. When the final rule was issued in 2004, the U.S. Chamber of Commerce criticized it as "so complicated, even the best-intentioned employer has a hard time being in compliance."⁸ The test, with no requirement that a certain percentage of an employee's duties has to consist of exempt work, may lead to a fast-food establishment employee who spends most of her or his time taking orders or doing inventory being classified as exempt because she or he supervises a few employees.

We urge DOL to adopt California's rule that requires that exempt employees spend at least 50 percent of their time performing exempt work, not including time during which nonexempt work is performed concurrently, in order to be exempt from overtime requirements. DOL should establish a bright-line percentage cap on nonexempt duties to provide clarity to employers and employees alike.

We appreciate the opportunity to submit comments on this rule, which would mean greater economic security for workers and their families. We strongly support the swift implementation of the updated overtime salary and compensation levels and applaud DOL's commitment to fair pay for hours worked. We look forward to working with DOL on this issue. If you have any questions regarding these recommendations, please contact Vicki Shabo, Vice President (vshabo@nationalpartnership.org or 202.238.4832) or Sarah Fleisch Fink, Senior Policy Counsel (sfleischfink@nationalpartnership.org or 202.238.4852) at the National Partnership for Women & Families.

Sincerely,

National Partnership for Women & Families

1 Eisenbrey, R., & Mishel, L. (2015, August). *Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers: Here is a Breakdown of Who They Are*. Economic Policy Institute Publication. Retrieved 18 August 2015, from <http://www.epi.org/publication/breakdownovertimebeneficiaries/>

2 Glynn, S. J. (2014, June). *Breadwinner Mothers, Then and Now*. Center for American Progress Publication. Retrieved 7 August 2015, from <https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>

3 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>

4 Ibid.

5 Ibid.

6 National Alliance for Caregiving. (2015, June). *Caregiving in the U.S.* National Alliance for Caregiving and AARP Publication. Retrieved 7 August 2015, from http://www.caregiving.org/wp-content/uploads/2015/05/2015_CaregivingintheUS_Final-Report-June-4_WEB.pdf

7 29 CFR 541.700.

8 Joyce, A., & Masters, B. (2006, February). Suits on Overtime Hitting Big Firms. *Washington Post*. Retrieved 18 August 2015, from <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/20/AR2006022001518.html>