



September 3, 2015

Submitted via www.regulations.gov

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 Department of Labor Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Ziegler:

The National Women's Law Center (the Center) appreciates the opportunity to submit the following comments in strong support of the rule proposed by the Department of Labor (the Department) to update the Fair Labor Standards Act (FLSA) regulations governing exemptions from overtime premium pay. Since 1972, the Center has worked to remove barriers based on gender, open opportunities, and help women and their families lead economically secure, healthy, and fulfilled lives. The Center consistently advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of low-income women and their families.

By raising the salary threshold under which workers are automatically eligible for overtime premium pay to the 40th percentile of weekly earnings for full-time salaried workers, the Department's proposed rule will more effectively ensure that employees entitled to the FLSA's overtime protection receive it, while simplifying the determination of exempt status. The Economic Policy Institute estimates that the proposed rule will provide or strengthen overtime protections for as many as 13.5 million salaried workers,¹ boosting economic security for working families across the country—and taking an important and long overdue step toward fair pay for women, who are disproportionately concentrated in low-wage jobs² and represent the majority of the beneficiaries of the Department's proposal.³ To ensure the continued effectiveness of this change, the Center recommends maintaining the fixed percentile approach to make annual adjustments to the salary threshold.

The Center also supports strengthening the duties test to ensure that employees who are above the salary threshold, but perform a large amount of nonexempt work—and thus are not bona fide executive, administrative, or professional (EAP) employees—receive the overtime protections they deserve.

Finally, the Center recommends that in a future NPRM, the Department propose amending §541.303 of the regulations to apply the salary test that applies to other professional

employees to teachers. This change is especially important for preschool teachers, an overwhelmingly female and poorly paid workforce. In the interim, the Department should strengthen the guidance about “Daycare Centers and Preschools Under the Fair Labor Standards Act” to prevent misclassification of nonexempt early childhood workers.

I. *The proposed overtime salary threshold will help millions of women support themselves and their families.*

The Center supports the Department’s proposed salary threshold. Under the current outdated rules, salaried executive, administrative, and professional employees are only automatically eligible for overtime pay if they are paid less than \$23,660 annually. Millions of women are working long hours for little pay, sacrificing time with their families and struggling to make ends meet. By raising the threshold to \$50,440 in 2016, the proposed regulation would give millions of workers paid modest salaries—disproportionately women—the overtime protections they deserve.

As the Department observes, the current overtime salary threshold has been increased only once since 1975 and is now below the poverty line for a family of four. Today the threshold guarantees overtime pay to only 8 percent of salaried workers, compared to 62 percent in 1975,⁴ and no longer serves as an accurate guide to identify those EAP employees whose higher salaries, increased bargaining power and job autonomy, and “other privileges to compensate them for their long hours of work, such as above-average fringe benefits, greater job security, and better, opportunities for advancement, set[] them apart from the nonexempt workers entitled to overtime pay.”⁵ Raising the minimum salary level required to qualify for the EAP exemptions from \$455 per week to the 40th percentile of weekly earnings for full-time salaried workers (an estimated \$970 per week in 2016) will restore a more appropriate line of demarcation between overtime-eligible employees and potentially exempt EAP employees and secure long overdue protections for millions of workers.

Because women disproportionately occupy jobs at the low end of the salary scale for managerial and professional employees, they will disproportionately benefit from the expansion of guaranteed overtime protection to salaried workers earning up to \$50,440 annually. The Institute for Women’s Policy Research estimates that, under the proposed salary threshold, more than a third of all women workers who are currently exempt from overtime protections—and nearly half of currently exempt Black and Hispanic women workers—will be newly covered in 2016.⁶ Many of these women are breadwinners or co-breadwinners for their families: 44 percent of currently exempt single mothers and 32 percent of currently exempt married mothers will be covered.⁷ For some newly covered workers, overtime protection will mean hundreds of dollars in additional pay each week; for others, it will mean more time outside of work to spend with their families—and as some employers shift schedules to minimize overtime costs, employees who had been involuntarily working part-time may gain the additional hours they want and need.⁸

In addition, because the requirements that the Affordable Care Act established for employers to provide time and space for nursing mothers to express milk at work apply only to employees who are not exempt from overtime,⁹ increasing the number of non-exempt

women—as the proposed rule would do—will also increase the number of women entitled to these important protections. Specifically, employers would be required to provide any newly covered woman with private space and reasonable (unpaid) breaks to express milk within the first year of her child’s life. Although an employer cannot reduce a salaried employee’s pay based on short breaks under the FLSA, many salaried employees classified as exempt under the current regulations may lack the discretion to step away from their posts for 20 to 30 minutes at a time at the necessary intervals to express breast milk—especially lower-paid “white collar” employees who would be automatically entitled to lactation break coverage under the proposed rule. A new mother earning a \$32,000 salary as a retail manager, for example, may currently be required to stay on the sales floor to supervise others and troubleshoot customer complaints for the entirety of her shift; she would benefit not only from guaranteed overtime protection under the Department’s proposal, but also from guaranteed space and protected time to maintain her breastfeeding relationship upon her return to work.

II. *To ensure its continued effectiveness, the Department should update the salary threshold annually so that it is maintained at the 40th percentile of weekly earnings for full-time salaried employees.*

As the Department notes in the preamble to the proposed rule, it has only increased the overtime salary threshold seven times since the EAP regulations were first issued in 1938, with the intervals between increases ranging from five years to an astounding 29 years. The eroded value of today’s threshold validates the Department’s assertion that, “[I]f left unchanged, the [salary] test becomes substantially less effective as wages for overtime-protected workers increase over time.”¹⁰ The Department’s authority to avert this outcome by establishing, through notice-and-comment rulemaking, a mechanism to automatically update the salary level test is clearly encompassed within its authority under 29 U.S.C. 213(a)(1) to establish the salary level test, and the Center agrees that annual updates are appropriate to produce predictable and incremental adjustments.

The Department has amply demonstrated that its reasons for selecting the 40th percentile of weekly earnings for full-time salaried employees as the revised salary threshold are methodologically sound and firmly rooted in historical precedent. The Center agrees with the Department’s assertion that “looking to the actual earnings of workers provides the best evidence of the rise in prevailing salary levels and, thus, constitutes the best source for setting the proposed salary requirement,”¹¹ and we therefore recommend maintaining the “fixed percentile” approach for annual adjustments, so that increases in the threshold are based on earnings growth rather than the less relevant measure of price increases. In addition, because wages have historically risen at a faster rate than prices and are projected to continue to do so, pegging the proposed threshold to the 40th percentile of earnings will be more beneficial to workers.¹²

III. *The Department should strengthen the duties tests to require employees to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption from overtime premium pay.*

By increasing the salary threshold, the proposed rule will make it easier to identify workers entitled to receive overtime by reducing the need for the burdensome duties test that currently applies to many low-wage employees. Under the current rules, many employers abuse the overtime exemption, giving workers a trivial degree of authority so the employer can claim the exemption for workers who actually spend most of their time doing the same (non-exempt) tasks as the employees they “supervise.”¹³ For low-level supervisory employees, a “promotion” may mean not only the loss of overtime pay but a dramatic increase in hours,¹⁴ even as their hourly co-workers cannot get all the scheduled hours they would like. In one study of workers in low-wage jobs in Chicago, Los Angeles, and New York City, researchers found that 76 percent of workers who worked more than 40 hours in a week were not paid the legally required overtime rate.¹⁵ Increasing the salary threshold would reduce the violations of existing wage and hour laws that are currently rampant in the private sector and routinely go unchecked.

The proposed rule will curb these abuses by establishing a more appropriate demarcation line between overtime-protected and potentially exempt EAP employees, considerably expanding the number of employees automatically eligible for overtime and therefore not subject to a duties test at all. However, the Center shares the Department’s concern that, even with an updated salary threshold, “in some instances the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense.”¹⁶ We urge the Department to strengthen the duties tests to ensure that employees with salaries above the threshold are only deemed exempt from overtime protections if they spend a certain minimum percentage of their time on those duties that qualify them for exempt status. California provides an instructive model: under California’s overtime rules, EAP employees may not be considered exempt unless they spend more than 50 percent of their time performing exempt work, without counting time during which non-exempt work is performed concurrently.¹⁷ A similar test adopted at the federal level would further minimize the risk that workers will be misclassified and denied the overtime protections they are due.

IV. *The Department should propose amending the regulations to apply the salary test that applies to other professional employees to teachers and clarify existing rules to prevent misclassification of nonexempt early childhood workers.*

One large group of professional employees will not benefit from the increase in the salary threshold for EAP employees: teachers. Although the FLSA does not categorically exempt teachers from its minimum wage and overtime requirements or from the salary test,¹⁸ §541.303(d) of the regulations provides that the salary requirements that apply to most other professionals do not apply to teachers, including explicitly teachers of kindergarten and nursery school pupils.¹⁹

This NPRM neither proposes any changes to nor invites comments on §541.303, so the Center is not proposing that the Department amend this section when it finalizes these proposed regulations. However, the Center recommends that the Department move quickly to propose changes to this provision. Applying the salary test to teachers will help ensure

fair pay for this predominantly female and modestly paid profession, especially for the thousands of preschool teachers who have increased their professional qualifications but still do not receive a livable wage.

Both child care workers and preschool teachers are poorly paid and overwhelmingly female occupations. The Bureau of Labor Statistics reports that the average annual wage for “childcare workers” in 2014 was \$21,710, making them among the lowest paid workers in America; the average annual wage for “preschool teachers, except special education,” was \$32,040.²⁰ Average salaries for both occupations are thus far below the proposed \$50,440 threshold for exempt professional employees.

The average salary for kindergarten teachers, except special education, was \$53,480,²¹ modestly above the threshold; but since this is the *average* salary, many kindergarten teachers necessarily receive salaries below it. Women make up 96 percent of childcare workers and 97 percent of preschool and kindergarten teachers.²²

The average salaries of elementary, middle, and secondary school teachers are all below \$60,000 annually,²³ and many teachers earn far less. The average *starting* salary of teachers nationwide in 2012-2013 was \$36,141, according to a survey by the National Education Association.²⁴ Women make up 81 percent of elementary and 57 percent of secondary school teachers.²⁵

The Bureau of Labor Statistics does not report salary information for adjunct professors, but there is evidence that this growing category of professionals is also poorly paid.

Payscale.com reports that the median salary for adjunct professors is a little over \$31,000 annually.²⁶ A study of pay and working conditions of the adjunct professor workforce in New England by the Service Employees International Union (SEIU) found that the median compensation per course was \$3,750 for master’s level courses and \$5,225 for doctoral level courses.²⁷ This means that an adjunct professor with a heavy course load of 12 courses per year may have an income of just \$45,000.²⁸

Amending the regulations to require that teachers’ salaries, like those of most other professionals, must meet the salary test for them to be exempt from FLSA overtime rules would ensure that these professionals, overwhelmingly women, receive the pay they deserve.

In the interim, the Department should strengthen the guidance to child care centers and preschools and undertake enforcement actions to prevent misclassification of nonexempt early childhood workers. As the Supreme Court has said, exemptions from overtime protection must be narrowly construed,²⁹ but the Department’s current Fact Sheet #46, “Daycare Centers and Preschools Under the Fair Labor Standards Act (FLSA),”³⁰ may encourage child care and early education programs to incorrectly classify child care workers who are not exempt even under the current regulations as exempt teachers.

The current regulations require that two requirements must be met for a teacher to be exempt: the employee’s primary duty must be teaching, §541.303(a), and (s)he must be employed in an “educational establishment” as defined in §541.204(b).

Section 541.204(b) states that:

The term ‘educational establishment’ means an elementary or secondary school system.... Under the laws of ... many states it includes also the introductory programs in kindergarten. Such education in some states may also include nursery school programs in elementary education....

Current regulations thus require that to be treated as exempt teachers, early education teachers must work in an “educational establishment” that is part of a state’s “elementary school system.” This does not mean that only preschool teachers who work in a program in a public school can be treated as exempt. The majority of state preschool programs serve some children in settings outside the public schools, and in several states the majority of children enrolled in state-funded preschool programs are served in settings other than public schools.³¹ But the regulation does require that for “teachers” in an early childhood program to be treated as exempt, the program must be part of an educational system.

In contrast, Fact Sheet #46, the advisory on FLSA requirements for “daycare centers and preschools” says nothing about the educational establishment requirement for exempt early childhood teachers. It states:

Daycare centers and preschools provide custodial, educational, or developmental services to preschool age children to prepare them to enter elementary school grades. This includes nursery schools, kindergartens, head start programs, and any similar facility primarily engaged in the care and protection of preschool age children. Individuals who care for children in their home are not considered daycare centers unless they have employees to assist them with the care of the children.

This introductory paragraph could easily create the misimpression that all facilities “primarily engaged in the care and protection of preschool age children,” with the sole exception of individuals who care for children in their home without the assistance of employees, are like “nursery schools, kindergartens, and head start programs”—that is, educational establishments whose “teachers” may be treated as exempt.

The later paragraph on “Preschool Teachers,” which attempts to explain the “duties” test for preschool teachers increases the risk that early childhood employees will be misclassified. The Department’s Fact Sheet states:

Bona fide teachers in preschool and kindergarten settings may qualify for exemption from the minimum wage and overtime pay requirements as “professionals” under the same conditions as a teacher in an elementary or secondary school. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in this activity as a teacher in [sic] educational establishment. It should be noted that, although a preschools [sic] may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs for the facility’s children would ordinarily not meet the requirements for exception as teachers under the applicable regulations.

Although this paragraph states, consistent with the regulation, that “teachers are exempt if their primary duty is teaching in educational establishment,” it further states that “preschool employees whose primary duty is to care for the physical needs for the facility’s children would *ordinarily* not meet the requirements for exception as teachers under the applicable regulations.” This erroneously suggests that, although it might not “ordinarily” be the case, employees whose primary duty is not teaching could be treated as exempt.

The growing recognition of the importance of the early years to a child’s development, increased efforts by some early childhood programs to improve their quality, and efforts by workers in the early childhood field to improve their skills and credentials, are welcome developments. But establishing and maintaining high quality care and early education requires a decently compensated workforce.³² The Department should review its regulations, guidance, and enforcement activities to ensure that the early childhood workforce receives the pay it deserve.

* * *

The Center commends the Department for proposing this critical expansion of overtime protections under the FLSA, which will benefit millions of women, men, and families throughout the country. We urge the Department to proceed to issuing and implementing a final rule without delay. We also urge the Department to continue its efforts to improve pay and working conditions by issuing an additional NPRM that would make the salary test applicable to teachers and by ensuring, through stronger guidance and enforcement, that the nonexempt early childhood workforce receives the overtime protections it is entitled to.

Sincerely,



Joan Entmacher
Vice President for Family Economic Security



Julie Vogtman
Senior Counsel & Director of Income Support Policy

¹ Lawrence Mishel & Ross Eisenbrey, EPI, Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers (Aug. 2105), available at <http://s4.epi.org/files/pdf/90214.pdf>. See also Ross Eisenbrey & Larry Mishel, EPI, Raising the Overtime Threshold would Directly Benefit 13.5 Million Workers: How EPI's Estimates Differ from the Department of Labor's (Aug. 2015), available at <http://s2.epi.org/files/pdf/90408.pdf>.

² See, e.g., NWLC, Underpaid & Overloaded: Women in Low-Wage Jobs (July 2014), available at <http://www.nwlc.org/resource/underpaid-overloaded-women-low-wage-jobs>.

³ See Ross Eisenbrey & Will Kimball, EPI, 6.9 Million Women Would Directly Benefit from Raising the Overtime Salary Threshold to \$50,440 (Aug. 2015), available at <http://www.epi.org/publication/6-9-million-women-would-directly-benefit-from-raising-the-overtime-salary-threshold/>. See also Heidi Hartmann et al., IWPR & MomsRising, How the New Overtime Rule Will Help Women & Families (Aug. 2015), available at <http://www.iwpr.org/publications/pubs/how-the-new-overtime-rule-will-help-women-families>.

⁴ Ross Eisenbrey & Will Kimball, EPI, An Updated Analysis of Who Would Benefit from an Increased Overtime Salary Threshold (June 2015), available at <http://www.epi.org/blog/an-updated-analysis-of-who-would-benefit-from-an-increased-overtime-salary-threshold/>.

⁵ 80 Fed. Reg. 38519.

⁶ Hartmann et al., *supra* note 3.

⁷ *Id.*

⁸ See *id.*

⁹ See 29 U.S.C. §§ 207(r), 213.

¹⁰ 80 Fed. Reg. 38538.

¹¹ 80 Fed. Reg. 38533.

¹² Hartmann et al., *supra* note 3.

¹³ See, e.g., Judy Conti, NELP, The Case for Reforming Federal Overtime Rules: Stories from America's Middle Class (Dec. 2014), available at <http://nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf>.

¹⁴ *Id.*

¹⁵ Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), available at <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

¹⁶ 80 Fed. Reg. 38518.

¹⁷ See Cal. Lab. Code §§ 515(a), (e); Cal. Code Regs tit. 8, § 11070, subs. 1(A), 2(K); *Heyen v. Safeway Inc.*, 157 Cal. Rptr. 3d 280, 302 (Cal. Ct. App. 2013).

¹⁸ See 29 U.S.C. §213(a)(1).

¹⁹ See §541.303(b).

²⁰ Bureau of Labor Statistics, May 2014 National Occupational Employment and Wage Estimates United States, occupation codes 39-9011 and 25-2011, respectively, available at http://www.bls.gov/oes/current/oes_nat.htm#39-0000,

²¹ *Id.*, occupation code 25-2012.

²² Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Employed persons by detailed occupation, sex, race and Hispanic or Latino ethnicity. available at <http://www.bls.gov/cps/cpsaat11.htm>.

²³ BLS, National Occupational Employment and Wage Estimates, *supra* note 22, occupation codes 25-2021, 25-2022, and 25-2030.

²⁴ National Education Association, 2012-2013 Average Starting Teaching Salaries by State, available at <http://www.nea.org/home/2012-2013-average-starting-teacher-salary.html>.

²⁵ BLS, Labor Force Statistics, *supra* note 22.

²⁶ Payscale.com, Adjunct Professor Salary United States, available at http://www.payscale.com/research/US/Job=Adjunct_Professor/Salary (last visited Sept. 2, 2015).

²⁷ SEIU Adjunct Action, *The High Cost of Adjunct Living: Boston* (2013), available at <http://www.seiu509.org/files/2013/12/The-High-Cost-of-Adjunct-Living-in-Boston-12113.pdf>.

²⁸ *Id.*

²⁹ See *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950) and *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).

³⁰ Available at <http://www.dol.gov/whd/regs/compliance/whdfs46.htm>

³¹ See Steve Barnett, et al, National Institute for Early Education Research, *The state of preschool 2014: State preschool yearbook* at 172(2015), available at http://nieer.org/sites/nieer/files/Yearbook2014_full2_0.pdf. The NIEER Yearbook uses several criteria to define “state preschool programs,” including that the initiative is funded, controlled, and directed by the state, that early childhood education is the primary focus, that it offers a group learning experience to children at least two days per week, and is distinct from the state’s system for subsidized child care, although preschool initiatives may be coordinated and integrated with the subsidy system. *Id.* at 19.

³² See Marcy Whitebook, et al, *Worthy Work, STILL Unlivable Wages: The Early Childhood Workforce 25 Years after the National Child Care Staffing Study* (2014), available at <http://www.irle.berkeley.edu/cscce/wp-content/uploads/2014/11/ReportFINAL.pdf>.