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Submitted via www.regulations.gov

Melissa Smith
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-AA20, Comments in Response to Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

The National Women's Law Center (the Center) writes to urge the Department of Labor (the Department) to defend the final overtime regulations issued by the Department in 2016 (the 2016 Final Rule) and maintain the salary threshold established therein. Since 1972, the Center has worked to remove barriers based on gender, to open opportunities for women and girls, and to help women and their families lead economically secure, healthy, and fulfilled lives. The Center 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.

Under the Fair Labor Standards Act (FLSA), the Department has the power to “define and delimit” the exemption from federal overtime coverage for “executive, administrative, and professional” (EAP) employees.¹ The Department has long maintained that an employee cannot be deprived of overtime protections on the basis of the EAP exemption if her employer does not pay her a salary that is indicative of “bona fide” EAP status.² Accordingly, for more than 75 years, the Department's regulations have specified a minimum salary level for employees to be eligible for the EAP exemption—but in recent decades, this threshold had eroded so much that it has broken down as a meaningful measure to distinguish between exempt and nonexempt employees. Thus, in 2015, the Department began seeking comments on a proposal to raise this salary threshold from the outdated, then-applicable level of \$23,660 per year. In its final rule issued in 2016 (the 2016 Final Rule), the Department restored the effectiveness of the salary threshold as an indicator of “bona fide” EAP status by raising it to \$47,476 and providing for periodic, automatic increases—and in so doing, provided or strengthened overtime protections

¹ 29 U.S.C. § 213(a)(1).

² See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., “EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN” REDEFINED, REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER (HAROLD STEIN) AT HEARINGS PRELIMINARY TO REDEFINITION 8 (Oct. 10, 1940) [hereinafter STEIN REPORT].

for as many as 12.5 million people (6.4 million of whom are women),³ boosting economic security for working families across the country.

The Department released the 2016 Final Rule following years of research, analysis, and deliberation, with ample opportunity for all stakeholders to participate in the process. Over 270,000 public comments—the vast majority supportive—were submitted. The 2016 Final Rule updates outdated regulations and lowers the risk and costs of litigation by providing a bright line rule for businesses to follow and rely upon in determining their FLSA obligations and shaping their overtime policies. It also provides millions of modestly-paid workers with needed economic stability—and more dollars in their paychecks, which is in turn likely to stimulate consumer spending. Revisiting the salary threshold is a waste of time and public resources that prioritizes the desires of corporate America above the needs of millions of working women and men who have already waited too long for the overtime pay they deserve. While enforcement of this critically needed rule has been stalled by litigation, we strongly urge the Department to focus its energies on defending the Final Rule in its current form in the court proceedings rather than revisiting its provisions through this Request for Information or any future rulemaking.

The Center urges the Department to defend and maintain the 2016 Final Rule in its entirety, including the salary threshold. First and foremost, we urge the Department to appeal the most recent ruling from the Eastern District of Texas in *State of Nevada, et al. v. United States Department of Labor* (Case 4:16-CV-731, 8/31/17). In this ruling, the court fundamentally misconstrued the Department’s authority to issue a salary threshold for the EAP exemption and utterly failed to consider any of the robust economic analysis prepared by the Department in support of the 2016 Final Rule. Regardless of the particular salary threshold at issue, it is crucial for the Department to defend its legal authority to establish the threshold at the level it deems appropriate based on the evidence before it—and more broadly, to issue economically supported regulations. In addition, the Court’s conclusion that the 2016 Final Rule is invalid because the salary level it established supplants an analysis of an employee’s job duties is belied by the rulemaking record, which showed that there are 6.5 million white collar salaried workers earning above the new salary threshold who do not meet the requirements of the duties test for the EAP exemption and therefore are overtime-eligible as a result of the application of that test.⁴ The Department’s long-term institutional interest in ensuring that its regulations face legally appropriate review in the courts transcends the particular set of regulations in question, and we therefore strongly encourage the Department to appeal this ruling to the Fifth Circuit.

No less important than assuring the Department’s authority to establish the 2016 Final Rule, however, is maintaining the 2016 Final Rule itself. As the Department has observed, prior to 2016 the overtime salary threshold had been increased only once since 1975. Moreover, the single update to the threshold, made in 2004 without any mechanism for automatic increase, was accompanied by changes to the structure of the duties test. While the Department has long recognized that the likelihood that an employee holds an EAP position increases—and the need for an in-depth inquiry into her duties to verify EAP status decreases—as her salary rises, the 2004 Rule undermined this traditional inverse relationship by pairing a low salary threshold with

³ Ross Eisenbrey & Will Kimball, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People*, ECON. POLICY INST. 4 (May 2016), <http://www.epi.org/files/pdf/107106.pdf>.

⁴ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32413 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

a weak duties test. By the time the Department proposed its update in 2015, the applicable \$23,660 threshold was below the poverty line for a family of four and covered just 8 percent of salaried workers—down from 62 percent in 1975.⁵ This inadequate salary threshold provides no meaningful guide as to whether an employee is likely to perform nonexempt tasks, but in light of the weakness of the duties test, it does invite abuse from employers: a promotion to “shift supervisor” for a salary of just \$24,000 a year might cost a woman her overtime pay even if she is required to work 50 hours a week and performs many of the same tasks as the employees she “supervises.”

In the 2016 Final Rule, the Department restored the traditional balance between the strength of the duties test and the height of the salary threshold—and thereby restored the effectiveness of the threshold in tending to identify those 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.”⁶ Setting the salary threshold at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census region (currently the South), as the Final Rule does, re-establishes a reasonable standard to ensure that those whose positions are not highly compensated enough to fall within the EAP exemption under the FLSA are not deprived of the overtime pay that the law guarantees them when they work more than 40 hours in a week. And by establishing a mechanism to update the threshold every three years, the Department ensured the value of the threshold will not erode as it has in the past, creating stability and predictability for both employees and employers.

Lowering the salary threshold established by the Final Rule in any way—including through a mechanism to establish thresholds that vary by region, by industry, or on another basis—would require a strengthened and updated duties test that more closely examines whether an individual’s primary duties are properly considered executive, administrative, or professional. And altering or eliminating the automatic updates to the salary threshold established by the Final Rule would over time similarly undermine the effectiveness of the threshold in providing a reasonable and consistent guide to distinguish between overtime-eligible and potentially exempt employees.

Women will be among the workers most negatively affected if the salary threshold is lowered. Because women disproportionately occupy jobs at the low end of the salary scale for managerial and professional employees, they disproportionately benefit from the provision of overtime protection to salaried workers earning up to \$47,476 annually. The Institute for Women’s Policy Research estimated that, under the slightly higher salary threshold originally proposed by the Department (\$50,440), more than a third of all women workers who had been exempt from overtime protections—and nearly half of exempt Black and Hispanic women

⁵ Ross Eisenbrey & Will Kimball, *An Updated Analysis of Who Would Benefit from an Increased Overtime Salary Threshold*, ECON. POLICY INST. (June 26, 2015), <http://www.epi.org/blog/an-updated-analysis-of-who-would-benefit-from-an-increased-overtime-salary-threshold/>.

⁶ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38516, 38519 (proposed July 6, 2015).

workers—would be newly eligible for overtime in 2016.⁷ Many of these women are breadwinners or co-breadwinners for their families: 44 percent of previously exempt unmarried mothers and 32 percent of previously exempt married mothers would be covered.⁸

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—which is particularly important for the millions of workers who serve as unpaid caregivers for family members. (Sixty percent of these unpaid family caregivers are women.) Moreover, 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.⁹ Reducing the salary threshold (including through variation by region, industry, or other standard), or eliminating the Final Rule’s automatic increases in the threshold, would necessarily harm the women, men, and families who would otherwise newly benefit from critically important overtime protections.

* * *

In its RFI, the Department poses 11 specific questions regarding the EAP employee exemption. The Center appreciates the opportunity to submit the following comments, in which we have responded to those questions that align with our expertise and raise issues of particular import to lower-income women and their families. As to the remainder, the Center endorses comments submitted by the National Employment Law Project and the Economic Policy Institute, and we also direct the Department to consider the additional detail provided throughout the comments submitted by those expert organizations.

I. *The salary threshold adopted in 2004 is not an appropriate baseline for updating the standard salary level. [Question 1]*

The Department has asked whether it would be appropriate to use the salary threshold adopted in 2004 as a basis for adjusting the 2016 Final Rule’s salary level, either by updating the 2004 threshold for inflation or by applying the 2004 Rule’s methodology to arrive at a new level. It would not.

The Department has long recognized that what an employer pays an employee is “the best single test” of whether that employee’s duties rise to the level of executive, administrative, or professional.¹⁰ The higher an employee’s salary, the greater the likelihood that she holds an EAP position—and the less extensive an inquiry into her duties need be to verify that this is the case. Prior to 2004, the Department used the “long” and “short” tests to determine who was exempt from overtime protections: the long test combined a low salary threshold with a rigorous duties test that restricted the amount of nonexempt work an employee could do while remaining

⁷ Heidi Hartmann et. al., *How the New Overtime Rule Will Help Women & Families*. INST. FOR WOMEN’S POLICY RESEARCH 8 (Aug. 2015), [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Women%20and%20Overtime%20\(Final\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Women%20and%20Overtime%20(Final).pdf).

⁸ *Id.* at 4.

⁹ *Id.* at 15.

¹⁰ STEIN REPORT, *supra* note 2, at 8.

exempt, while the short test combined a higher salary level with an easier duties test that did not restrict the amount of nonexempt work.

In 2004, however, the Department eliminated this structure and established a single, low salary threshold (\$455 per week or \$23,660 per year, akin to the long test salary level) to be paired with a weak “standard” duties test analogous to the short test. By combining a low salary level test with a light duties test, the Department in 2004 abandoned the traditional methodology’s inverse relationship between the height of the salary threshold and the strength of the duties test—and ensured that the exempt status of the vast majority of full-time salaried employees would turn solely on a weak duties test. Like previous iterations, the 2004 Rule also failed to provide any mechanism to automatically increase the salary threshold, so that it covered fewer workers every year.

By the time the Department issued its notice of proposed rulemaking on the overtime rule in 2015, the flaws of the 2004 Rule were readily apparent. While Congress exempted only “bona fide executive, administrative, and professional employees” from overtime protection under the FLSA,¹¹ the 2004 Rule led employers to classify as exempt a far greater population. The mismatch between the 2004 Rule’s low salary threshold and standard duties test allowed, by the Department’s later estimation, well over 700,000 overtime-eligible employees to be misclassified as exempt under the EAP exemption.¹²

The Department corrected this mismatch by promulgating the 2016 Final Rule, which retains the standard (short) duties test while essentially restoring the higher short-test salary threshold. Looking to the 2004 salary threshold and/or the deficient methodology used to establish it to revise the 2016 threshold downward would necessarily perpetuate the problematic mismatch created in 2004—unless the Department also overhauled the duties test to make it far more vigorous and demanding than it currently is. Objection from the business community to just such an overhaul was a factor in the Department’s decision to restore the proper balance between the salary threshold and the duties test through an increase to the former rather than adjustments to the latter.¹³

In establishing the 2016 Final Rule, the Department engaged in extensive economic analysis and balanced the interests of a wide range of stakeholders to arrive at a salary threshold that effectively complements the existing duties test to accurately identify the executive,

¹¹ 29 U.S.C. § 213(a)(1).

¹² In fact, the Department analyzed only those employees who earned above the 2004 Rule’s salary threshold and *below* the 2016 Final Rule salary threshold, *see* 81 Fed. Reg. at 32463. Thus, because some employees are likely misclassified even though they earn above the 2016 threshold, the Department’s findings represent only the minimum number of misclassifications.

¹⁴ *See* 81 Fed. Reg. at 32414 (explaining in the 2016 rulemaking that the final salary threshold “strikes an appropriate balance between protecting overtime-eligible workers and reducing undue exclusions from exemption of bona fide EAP employees,” and “does so without necessitating a return to the two-test structure or imposing a quantitative limit on nonexempt work—alternatives that many [employer-side] commenters strenuously opposed”); 81 Fed. Reg. at 32445-46 (observing that “most employer organizations strongly oppos[ed] any changes” to the standard duties test). *See also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22126-27 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) (explaining in 2004 rulemaking the concerns raised by employers that prompted the Department to eliminate the more rigorous long duties test and its 20 percent cap on nonexempt work).

administrative, and professional employees whom Congress intended to exempt from overtime coverage under the FLSA. The 2004 Rule is clearly deficient by comparison and should not be used as a touchstone for any future rulemaking.

II. *Using multiple standard salary levels would unnecessarily complicate overtime compliance and enforcement. [Questions 2 & 3]*

The Center urges the Department not to establish salary thresholds applicable to the EAP exemption that vary by region, industry, category of EAP status, or on another basis.

As the Department explained when it rejected the adoption of “different salary levels for different areas of the country (or urban and rural areas) or for different kinds or sizes of businesses” in the 2004 rulemaking, adopting multiple salary levels on these bases is not “administratively feasible because of the large number of different salary levels this would require.”¹⁴ Given the appropriate relationship between the salary threshold and the duties test explained above, the introduction of multiple salary thresholds would also require the introduction of multiple duties tests to avoid widespread misclassification. And the highly complex exemption framework produced would be challenging for the Department to enforce, for businesses to implement, and for working people to understand.

Moreover, it is possible to account for variation across regions, for example, while maintaining a single nationwide salary threshold—which is precisely what the Department did in the 2016 Final Rule. The Rule sets the threshold at the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region, which is currently the South. The Department originally proposed draft language that set the threshold based on national weekly earnings rates. But after the notice and comment period, the Department adjusted the final standard downward to ensure that the overtime threshold was workable for lower-wage regions. In the final regulations, the Department concluded that this adjustment would ensure that the salary test for EAP exemption “is practicable over the broadest possible range of industries, business sizes and geographic regions.”¹⁵ As a result, lowering the threshold any further would harm working people, even in the lowest-wage states.

III. *The most effective measure for determining exempt status is the one the Department set out in its 2016 Final Rule, which retains a vital role for the duties test in that determination. [Questions 4 & 5]*

The Department asks how its definition of the EAP exemption should relate—if at all—to the traditional long test/short test methodology, and whether the salary threshold established by the 2016 Final Rule works effectively with the standard duties test. The Center affirms that the 2016 Final Rule represents the best approach to restore the appropriate inverse relationship between the height of the salary level and the strength of the duties test that was inherent in the separate

¹⁴ 69 Fed. Reg. at 22171. The Department observed in 2004 that “[r]egional and population-based salary differentials were also previously considered and rejected in prior revisions of these regulations,” and “were considered unworkable because they would increase enormously the difficulties of administration and enforcement,” and it concluded that “no new arguments or rationales were advanced during this rulemaking that would overcome the same shortcomings and previously-reached conclusions.” *Id.* at 22238.

¹⁵ 81 Fed. Reg. at 32408 (internal citations omitted).

long and short tests, while maintaining the simplicity of a single pairing and assuring that each component of the test plays an important role in the determination of EAP exempt status.

While we find the 2004 Rule flawed as noted above, we take issue not with the 2004 Rule’s effort to simplify the determination of exempt status through adoption of a single salary threshold and standard duties test, but rather with the mismatch between the height of the threshold relative to the strength of the duties test adopted in 2004. As the Department observed in promulgating the 2016 Final Rule, “a wide cross-section of commenters opposed the idea of reintroducing the long test/short test structure that existed before the 2004 rulemaking,”¹⁶ which could be complex and inefficient to apply in practice, increasing the risk of noncompliance and misclassification. In contrast, establishing a single salary-level element of the test for EAP exemption streamlines the determination of exempt status by creating an objective, easy to apply, and predictable bright line rule that can improve compliance and reduce misclassification—as long as it is set an appropriate level.

The salary level established in 2004 was not in fact appropriate, but the \$47,476 threshold set in 2016 (with a mechanism for automatic increases) was. The updated threshold re-establishes a reasonable standard to ensure that those whose positions are not highly compensated enough to properly fall within the EAP exemption under the FLSA are not deprived of the overtime pay that the law guarantees them when they work more than 40 hours in a week—a standard that, as the Department recognized, “takes on greater importance when there is only one duties test that has no limitation on the amount of nonexempt work that an exempt employee may perform.”¹⁷

Restoring the value of the salary threshold, however, in no way eclipses the role of the duties test in the determination of exempt status. While the salary threshold is meant to weed out the easy cases of non-exemption from the more borderline ones, the duties test is intended to determine which employees may earn above the threshold but should qualify for overtime protection by virtue of the reality of their duties. As the Department explained in the preamble to the 2016 Final Rule, nearly half (47 percent) of all salaried white collar workers who do not satisfy the duties test for EAP exemption earn above the \$47,476 salary threshold, and for these 6.5 million workers, the duties test—rather than the salary-level test—determines their nonexempt status.¹⁸ The Department determined that a considerably smaller share (22 percent) of salaried white collar workers who do satisfy the duties test for EAP exemption earn below \$47,476 and will be newly eligible for overtime as a result.¹⁹ Moreover, among those workers, “many . . . would have failed the long duties test and are currently inappropriately classified because of the mismatch between the current standard duties test and the standard salary level.”²⁰ It is also critically important to recognize that the salary test and the duties tests are not alternative, but rather complementary, tests; both an employee’s salary *and* her duties must be indicative of “bona fide” EAP status for her to be denied the protections of the FLSA.²¹

¹⁶ 81 Fed. Reg. at 32444.

¹⁷ 81 Fed. Reg. at 32400.

¹⁸ 81 Fed. Reg. at 32413.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* (“The salary level test and duties test have always worked *in tandem* to distinguish those who Congress intended the FLSA to protect from those who are “bona fide” EAP employees.” (emphasis added))

The Center believes that the Department appropriately balanced the salary level test and the duties test in the 2016 Final Rule, dutifully exercising its “broad authority to ‘defin[e] and delimit’ the scope of the [EAP] exemption” as Congress intended.²² Through its exhaustive rulemaking process, the Department determined—and the Center agrees—that pairing the standard duties test with a higher salary level threshold was the best way to balance ease of administration and compliance with the purpose of the EAP exemption under the FLSA. Reducing the salary threshold below the level established in the 2016 Final Rule would disrupt that carefully calibrated balance and require a longer, more rigorous duties test to restore it.

IV. *Employers were preparing for implementation of the 2016 Final Rule successfully and were ready to transition to the \$47,476 salary threshold. [Question 6]*

In anticipation of the December 1, 2016, effective date of the 2016 Final Rule, employers around the country were preparing to successfully implement its provisions. Employers had a number of options in determining how to implement the rule, as the Department acknowledges in this RFI, and employers nationwide were ready to choose which compliance measures worked best for them. Several large corporations, including Walmart and Starbucks, raised salaries for thousands of employees in advance of the rule’s effective date,²³ while others, including major fast food chains and franchises, made plans to convert salaried workers to hourly workers and pay them for their overtime hours (in some cases accounting for anticipated overtime in the new hourly rate).²⁴ Smaller businesses also prepared for compliance, as they pledged salary increases, began converting some managers to hourly employees, and improved time tracking systems for their workforce.²⁵

Despite the rule’s unclear future in light of the ongoing litigation and this Department’s expressed skepticism toward retaining the 2016 Final Rule, many businesses, large and small, have voluntarily retained the internal policy changes made in preparation for the rule.²⁶ Employers of all sizes have characterized the changes as sound policy choices that smart employers should make and a positive step for work-life balance, corporate culture, and employee satisfaction. Business owners expressed hope that the policy changes resulting from the planned implementation would be a “positive thing for our employees,” would “prompt a cultural shift” in management relations, and would help “attract[] and retain[] the best talent.”²⁷

²² See *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

²³ See Lydia DePillis, *Last-Minute Injunction Creates a Patchwork of Compliance with Overtime Rule That’s Now Likely Dead*, HOUS. CHRON. (Nov. 30, 2016), <http://www.houstonchronicle.com/business/texasnomics/article/Last-minute-injunction-creates-a-patchwork-of-10644275.php>.

²⁴ See Jed Graham, *Overtime Rule Fallout: Fast Food Managers Told To Punch Clock*, INV. BUS. DAILY (Aug. 11, 2016), <http://www.investors.com/news/fast-food-firms-say-managers-must-now-punch-clock/>.

²⁵ See, e.g., Alexia Elejalde-Ruiz, *Chicago Employers in Limbo After Court Blocks Obama’s Overtime Pay Rule*, CHI. TRIB. (Nov. 23, 2016), <http://www.chicagotribune.com/business/ct-overtime-rule-employers-adapt-1127-biz-2-20161123-story.html>; Kumasi Aaron, *Stalled Overtime Law Still Having Impact*, NBC 26 (Dec. 28, 2016), <http://www.nbc26.com/news/national/stalled-overtime-law-still-having-impact>.

²⁶ See, e.g., DePillis, *supra* note 23; JD Malone, *Ohio-Based Restaurant Chains Still Following Obama Overtime Rule That Was Put on Hold*, COLUMBUS DISPATCH (Dec. 28, 2016), <http://www.dispatch.com/content/stories/business/2016/12/29/1-stay-of-higher-salary-threshold-rule-for-ot-came-too-late-for-many-businesses.html>.

²⁷ See DePillis, *supra* note 23; Alicia Freese, *About Time? New Overtime Rule Worries Vermont Employers*, SEVEN DAYS (Vt.) (Nov. 9, 2016), <https://www.sevendaysvt.com/vermont/about-time-new-overtime-rule-worries-vermont->

Many businesses are reporting little to no cost associated with the implementation, with major retailers such as Kroger and Dollar General reporting expenses of less than 1-cent and 3-4 cents per share, respectively.²⁸ According to a survey conducted by the small-business network Manta, 84 percent of small businesses reported in December 2016 that they would move forward with providing overtime to employees based on the new rule.²⁹

There are of course employers who elected not to implement the rule after the November 2016 injunction was issued, or who did so with only a portion of their workforce. But the hesitation of a minority of employers to bring their overtime policies into the 21st century does not justify rolling back the \$47,476 salary threshold that gives millions of workers paid modest salaries—disproportionately women—the overtime protections they deserve.

V. *A duties-only test for EAP exemption would be confusing for both employees and employers and ultimately undermine the intent of the FLSA. [Question 7]*

The Center urges the Department to reject a duties-only test. Abandoning the Department’s longstanding methodology, which balances the duties test with a salary level test, threatens working families’ ability to receive the overtime protections they deserve.

The Department has long held that when an employer claims an employee should “be classified as an executive employee and therefore exempt from the protections of the [FLSA], the best single test of the employer’s good faith in attributing importance to the employee’s services is the amount of money he pays for them.”³⁰ The salary component of the EAP exemption—at least as updated by the 2016 Final Rule—provides a clear, objective, and straightforward bright line rule that is easy for employers to apply and for employees to understand, ensuring that those employees whose pay is too low to appropriately fall within the EAP exemption are guaranteed the benefit of overtime protections. By contrast, a duties-only test would open the door for employers to exploit qualitative and subjective standards, and potentially deny hundreds of thousands of hard working employees the overtime pay they deserve.

In the Center’s 2015 comments in response to the Department’s notice of proposed rulemaking (NPRM), we called on the Department to not only raise the salary threshold but also to strengthen the duties test, echoing the Department’s concern that, “even with an updated salary threshold, ‘in some instances the current [duties] 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.’”³¹ Then and now, we recognize that the risk of

[employers/Content?oid=3811138](#); *Sheetz to Raise the Minimum Salary of Employees Despite Judge’s FLSA Injunction*, FOX43 (Nov. 30, 2016), <http://fox43.com/2016/11/30/sheetz-to-raise-the-minimum-salary-of-employees-despite-judges-flsa-injunction/>.

²⁸ See, e.g., Ruth Simon & Rachel Emma Silverman, *Some Employers Stick with Raises Despite Uncertainty on Overtime Rule*, WALL ST. J. (Dec. 20, 2016), <https://www.wsj.com/articles/some-employers-stick-with-raises-despite-uncertainty-on-overtime-rule-1482242402>; Jed Graham, *How Overtime Pay Ruling Affects Wal-Mart, Dollar Tree, Fast Food*, INV. BUS. DAILY (Nov. 23, 2016), <http://www.investors.com/politics/how-overtime-ruling-effects-wal-mart-dollar-tree-fast-food/>.

²⁹ Jeremy Quittner, *Injunction Be Damned! Businesses Forge Ahead with Overtime Changes*, FORTUNE (Dec. 5, 2016), <http://fortune.com/2016/12/05/injunction-be-damned/>.

³⁰ STEIN REPORT, *supra* note 2, at 19.

³¹ 80 Fed. Reg. at 38518.

misclassification exists despite an increased threshold, and a stronger duties test—such as the California model, under which EAP employees may not be considered exempt unless they spend more than 50 percent of their time performing exempt work—would reduce that risk.

Without a salary threshold at all, then, a duties test far stronger than the California model would be necessary; indeed, abandoning the salary level test in favor of a duties-only test would dictate a complete reworking of the substance of the duties test. In order to prevent the massive misclassification discussed above and appropriately carry out Congress’s statutory mandate that only bona fide EAP employees be exempt from overtime protection, the Department would need to formulate a highly rigorous duties test and expand its enforcement proceedings. By allowing a fully subjective test to be the sole determiner of exempt status, the Department would subject millions of working people to the manipulation of employers seeking to skirt the rules and exacerbate the misclassification of exempt employees as nonexempt.

VI. *The Department should ensure that the overtime salary threshold is automatically updated at least every three years based on wage growth, as provided for in the 2016 Final Rule. [Question 11]*

The Center urges the Department to retain the 2016 Final Rule’s triennial automatic indexing in order to prevent the salary level test from becoming outdated and ineffective over time. As the Department observed in 2016, “even a well-calibrated salary level that is fixed becomes obsolete as wages for nonexempt workers increase over time.”³² Yet since the EAP regulations were first issued in 1938, the intervals between increases to the salary threshold have ranged from five years to an astounding 29 years. These lapses between rulemakings have resulted in EAP salary thresholds that—like the level in place since 2004—are based on outdated data, are too low to help employers assess which employees are unlikely to meet the duties test for the EAP exemption, and are likely to leave large numbers of workers vulnerable to misclassification as exempt. Either far more regular rulemaking or automatic indexing is required to ensure that the salary test remains effective—and especially given the time and cost associated with such regular rulemaking, the Department correctly determined in 2016 that an automatic indexing mechanism was necessary to ensure that the value of the salary test, once properly established, would not erode.

The Center also continues to strongly support the specific indexing mechanism chosen by the Department—i.e., maintaining the salary level at the 40th percentile of weekly earnings of fulltime salaried workers in the lowest-wage Census region. As we explained in our comments on the proposed rule in 2015, we agree with the Department’s assertion in the NPRM that “looking to the actual earnings of workers provides the best evidence for the rise in prevailing salary levels,”³³ and thus constitutes the best basis for both establishing the salary threshold in the rule and updating that threshold in the future. Indeed, because the FLSA sets a minimum *wage* standard, it is logical to link any increase in the salary threshold to wages, not prices—and because the exemptions are intended to cover only the higher-paid employees in the workforce, the salary threshold should rise along with rising wages overall.

³² 81 Fed. Reg. at 32430.

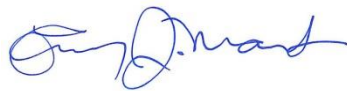
³³ 80 Fed. Reg. at 38519.

Finally, we urge the Department to maintain updates at least every three years; in fact, the Center supported annual updates in our comments on the 2015 NPRM. While we believe that the shift to triennial updates represents, as the Department asserted in the 2016 rulemaking, “an appropriate balance between ensuring that the salary level remains an effective ‘line of demarcation’ and not burdening employers or their workforces with possible changes to exemption status on a yearly basis,”³⁴ updating the threshold any less frequently would allow the salary level to erode too significantly and undermine its effectiveness in the years between updates.

* * *

The 2016 Final Rule—and the salary threshold it established—was exhaustively researched, analyzed and commented on by thousands of experts, businesses and private citizens. It was crafted with the primary purpose of protecting working people and their families and is consistent with the Department’s traditional methodology, which reflects an inverse relationship between the strength of the duties test and the height of the salary-level test. Lowering the threshold would result in stripping hardworking women and men of the overtime protections they need to support themselves and their families. We urge the Department to uphold its mission “to foster, promote, and develop the welfare of the wage earners” of the United States by defending the 2016 Final Rule in its entirety and maintaining the salary threshold established therein.

Sincerely,



Emily Martin
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³⁴ 81 Fed. Reg. at 32438.