NATIONAL WOMEN'S LAW CENTER
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Submitted via www.regulations.gov

Amy DeBisschop
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 Proposed Rule; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. DeBisschop:

The National Women's Law Center (the Center) opposes the above-referenced rule proposed by the Department of Labor (the Department), which would substantially reduce the overtime salary threshold established in regulations issued by the Department in 2016 (the 2016 Final Rule). While the Center appreciates that the Department intends to raise the salary level for the "executive, administrative, and professional" (EAP) exemption under the Fair Labor Standards Act (FLSA), the proposed increase from $23,660 to $35,308 per year is entirely inadequate. We urge the Department to adopt a much higher salary threshold or, at a minimum, significantly revise the duties test to ensure that employees who can pass it are truly bona fide exempt EAP employees, with sufficient executive authority or independent discretion to manage their jobs and their hours.

The National Women's Law Center has worked for more than 45 years to advance and protect women's equality and opportunity and has long sought to remove barriers to equal treatment of women in the workplace. 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, communities of color, and others who face historic and systemic barriers to equality and economic security.

Women and people of color will be among the workers most negatively affected if the salary threshold for the EAP exemption is set at an inadequate level. Because women and people of color 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 the $47,476 level established by the 2016 Final Rule—which would be close to $51,000 by 2020 under the rule's provision for automatic increases.[1] The Economic Policy Institute (EPI) has shown that under the current NPRM's proposed salary threshold, 8.2 million workers who would have benefited from new or strengthened overtime protections under the 2016 Final Rule will be left out, losing $1.2 billion dollars each year.[2] Of these 8.2 million, a majority (4.2 million) are women, and a disproportionate share (3

[1] HEIDI SHIERHOLZ, ECON. POLICY INST. (EPI), MORE THAN EIGHT MILLION WORKERS WILL BE LEFT BEHIND BY THE TRUMP OVERTIME PROPOSAL 2 (Apr. 2019), https://www.epi.org/files/pdf/165984.pdf.

[2] *Id.* EPI's count of workers who would have benefited from the 2016 Final Rule and will be excluded by the current proposal is far larger than the Department's estimate of 2.8 million workers because EPI's estimate 1) uses more updated (pooled 2016–2018) data, benchmarked to 2018 wage and employment levels, and inflates employment and wage levels based on CBO economic projections for 2018–2020 to account for employment growth and other changes in the three years between 2017 and 2020; and 2) accounts for salaried workers who are *not* EAP workers and *should* have overtime protections under the old threshold, but because

million) are people of color.[3] Of the 2.7 million parents left behind, more than half (1.4 million) are mothers.[4] The Institute for Women's Policy Research estimated that, under the salary threshold originally proposed by the Department in 2015 ($50,440), more than one-third of all women workers who had been exempt from overtime protections—and nearly half of exempt Black and Latina women workers—would be newly eligible for overtime in 2016.[5]

For some working people, overtime protection means hundreds of dollars in additional pay each week; for others, it means more time outside of work to spend with their families. Each of these benefits is critically important for women, especially those with caregiving responsibilities: nearly two-thirds of mothers are breadwinners or co-breadwinners for their families,[6] and women also shoulder the bulk of unpaid work within the home, spending more time caring for children and other family members, and performing household labor, than their male counterparts.[7] The majority of Black and Latina breadwinning mothers are single parents working to provide for their families[8]—and typically are doing so for lower pay than white men, men of color, and white women.[9] Coverage under the FLSA's overtime provisions also has unique benefits for new mothers, because the Affordable Care Act's protections requiring employers to provide time and space for nursing mothers to express milk at work apply only to employees who are not exempt from overtime pay.[10] Moreover, when employers shift schedules to minimize overtime costs, part-time workers—most of whom are women—may have greater access to additional hours they want and need.[11] The proposed rule's reduction to the threshold established in the 2016 Final Rule and elimination of the Final Rule's automatic increases to that threshold therefore particularly harm millions of women and families who otherwise would newly benefit from the vital guarantee of overtime protections.

In 2015, the Center submitted comments commending the Department's original proposal to raise the overtime salary threshold as "an important and long overdue step toward fair pay for women." In 2017, the Center submitted comments in response to the Request for Information (RFI) that the Department issued in advance of the current NPRM, urging the Department to focus its energies on defending the 2016 Final Rule in court proceedings rather than revisiting its provisions in any future rulemaking. And

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they earn a salary above the threshold, are vulnerable to being misclassified by their employer as overtime-exempt. Overtime eligibility is clarified and therefore strengthened for these workers when the new threshold is above their salary levels. *See id.* at 3.

[3] *Id.* at 2, 5.

[4] *Id.*

[5] HEIDI HARTMANN ET. AL., INST. FOR WOMEN'S POLICY RESEARCH, HOW THE NEW OVERTIME RULE WILL HELP WOMEN & FAMILIES 8 (Aug. 2015), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Women%20and%20Overtime%20(Final).pdf.

[6] SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM (May 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/. In 2017, 41 percent of mothers were sole or primary breadwinners for their families, earning at least half of their total household income; an additional 23 percent were co-breadwinners, i.e., married mothers earning at least 25 percent of total household income.

[7] *See id.* and SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, AN UNEQUAL DIVISION OF LABOR (May 2018), https://www.americanprogress.org/issues/women/reports/2018/05/18/450972/unequal-division-labor/. *See also* Family Caregiver Alliance National Ctr. on Caregiving, CAREGIVER STATISTICS: DEMOGRAPHICS, https://www.caregiver.org/caregiver-statistics-demographics (last visited May 17, 2019) (citing data showing upwards of 75 percent of all unpaid caregivers for adults are women, and may spend as much as 50 percent more time providing care than men).

[8] GLYNN, *supra* note 6.

[9] *See id.* and, *e.g.,* NWLC, THE WAGE GAP FOR MOTHERS BY RACE, STATE BY STATE, https://nwlc.org/resources/the-wage-gap-for-mothers-state-by-state-2017/ (last visited May 17, 2019).

[10] *See* 29 U.S.C. §§ 207(r), 213, and Heidi Shierholz, *Millions of Working Women of Childbearing Age Are Not Included in Protections for Nursing Mothers*, Working Econ. Blog (Dec. 10, 2018), https://www.epi.org/blog/break-time-for-nursing-mothers/ (last visited May 20, 2019). Employers are required to provide any non-exempt 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 if they become non-exempt under overtime rules. A new mother earning a $40,000 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; under the 2016 Final Rule, she would benefit not only from guaranteed overtime protection, but also from guaranteed space and protected time to maintain her breastfeeding relationship upon her return to work—but she would not be assured of either protection under the current proposal.

[11] HARTMANN ET AL., *supra* note 5, at 15.

today, we write to again urge the Department to adopt an updated overtime policy that will effectively meet the needs of working women and men across the country.

For the reasons set forth below, we disagree with the Department's conclusion that the overtime salary threshold adopted in 2004 is an appropriate baseline for updating the standard salary level, and that the duties test requires no adjustments so long as the 2004 methodology is maintained. The current proposal does not fix the key problem with the current regulatory scheme: the proposed salary level is still far too low given that the duties test allows employers to exempt workers from overtime protections even when they perform a disproportionate amount of nonexempt work. This combination means that the proposed rule fails to adequately protect workers who are not executive, administrative, or professional employees in any meaningful sense. In the final rule, the Department must either substantially raise the proposed salary level or strengthen the duties test to truly capture only those who should be exempt—and in either case, establish an indexing mechanism to regularly update the salary level—in order to fully realize the purpose and promise of the FLSA.

* * *

I. The salary threshold adopted in 2004 is not an appropriate baseline for updating the standard salary level, as it produces a threshold that is too low to fulfill its purpose under the FLSA.

The Department "believes that adherence to the 2004 final rule's methodology is reasonable and appropriate" in its proposed update to the overtime salary threshold.[12] The Center respectfully disagrees.

Under the FLSA, the Department has the power to "define and delimit" the exemption from federal overtime coverage for executive, administrative, and professional employees.[13] 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,[14] recognizing 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."[15] 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. When established at an appropriate level, the salary component of the EAP exemption 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.

In recent decades, however, this threshold has eroded so much that it has broken down as a meaningful measure to distinguish between exempt and nonexempt employees. 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. 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 exempt (i.e., no more than 20 percent in a workweek, or 40 percent for retail employees), while the short test combined a higher salary level with an easier duties test that did not restrict the amount of nonexempt work. The logic behind this structure is clear: the higher an employee's

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[12] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 84 Fed. Reg. 10900, 10909 (March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

[13] 29 U.S.C. § 213(a)(1).

[14] *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).

[15] *Id.* at 19.

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.

With the exception of 1975,[16] from 1949 until 2004, the Department set the two salary levels using a consistent methodology (with some variations in data);[17] during this period, the short test salary level was set ranging from 130 to 180 percent of the long test salary levels,[18] and averaging 149 percent of the salary for the long test. In 2004, however, the Department established a single, low salary threshold ($455 per week or $23,660 per year, akin to the long test salary level)[19] to be paired with a weak "standard" duties test that was the functional equivalent of the short test.[20] 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. At $23,660, the salary 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.[21] 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." For low-level supervisory employees, a "promotion" may mean not only the loss of overtime pay but a dramatic increase in hours,[22] 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.[23] The mismatch between the 2004 Rule's low salary

[16] In 1975, the Department adjusted the salary levels based on the Consumer Price Index. These were interim levels and the Department intended to issue new regulations based on a salary study to be completed six months later. The Department also stated that the 1975 rulemaking should not be considered a precedent. *See* 40 Fed. Reg. 7081, 7091 (Feb. 19, 1975).

[17] For employees who would be subject to the long test, the Department set the salary level so that ''no more than about 10 percent'' of exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." HARRY S. KANTOR, U.S. DEP'T OF LABOR, REPORT & RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541, UNDER THE FAIR LABOR STANDARDS ACT 5-7 (Mar. 3, 1958).

[18] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 81 Fed. Reg. 32391, 32400 (May 23, 2016).

[19] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg 22122, 22168 (Apr. 23, 2004) (comparing the new $455 weekly standard salary level to the long test metrics and showing that "the lowest 10 percent of all likely exempt salaried employees earn approximately $500 per week," "[t]he lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week," and "[t]he lowest 10 percent of likely exempt salaried employees in the retail industry earn approximately $450 per week").

[20] In 2004, the Department described the difference as merely ''de minimis'' and explained that the new standard duties test would be ''substantially similar'' to the old short duties test. 69 Fed. Reg. at 22192–93, 22214. Although the duties test for executives included an additional requirement from the old long test, the Department stated that the number of workers these differences would impact "is too small to estimate quantitatively." 69 Fed. Reg. at 22193.

[21] Ross Eisenbrey & Will Kimball, *An Updated Analysis of Who Would Benefit from an Increased Overtime Salary Threshold*, Working Econ. Blog (June 26, 2015), http://www.epi.org/blog/an-updated-analysis-of-who-would-benefit-from-an-increased-overtime-salary-threshold/ (last visited May 20, 2019).

[22] *See, e.g.,* Judy Conti, NELP, THE CASE FOR REFORMING FEDERAL OVERTIME RULES: STORIES FROM AMERICA'S MIDDLE CLASS (Dec. 2014), http://nelp.org/content/uploads/2015/03/Reforming-Federal-OvertimeStories.pdf.

[23] Annette Bernhardt et al., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf.

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.[24]

The Department corrected this mismatch by promulgating the 2016 Final Rule, which retained the standard (short) duties test while essentially reinstating the higher short-test salary threshold. In so doing, 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 identifying 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."[25]

Restoring the value of the salary threshold, however, in no way eclipses the role of the duties test in the determination of exempt status. We disagree with the Department's assertion to the contrary in the current NPRM—which in turn relies heavily on a deeply flawed opinion by a single district court judge.[26] Both the Department and the judge who enjoined the 2016 Final Rule erroneously characterize the number of newly overtime-nonexempt workers under the 2016 threshold as evidence of that threshold's displacement of the duties test in the exemption determination, when this expansion is simply the logical result of adjusting the salary level after a long lapse and realigning it to match the duties test.[27] 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 nearly half (47 percent) of all salaried white collar workers who did not satisfy the duties test for EAP exemption earned above the $47,476 salary threshold established by the 2016 Final Rule, and for these 6.5 million workers, the duties test—rather than the salary-level test—would determine their nonexempt status.[28] 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.[29]

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, administrative, and professional employees whom Congress intended to exempt from overtime coverage under the FLSA. The Department explicitly determined that, "[b]ased on the historical relationship of the short test salary level to the long test salary level ... a salary between approximately the 35th and 55th percentiles of weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test."[30] In its current NPRM, the Department proposes to rescind this carefully considered rule—designed to correct methodological errors introduced in 2004—and simply revert to the flawed 2004 methodology, without considering any meaningful alternatives that could better assure lower-paid workers, especially those who perform a great deal of non-exempt duties, are appropriately classified as overtime-eligible.

If the Department will not reconsider its decision to lower the standard salary level from the measure established in the 2016 Final Rule (i.e., the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census region), it should advance a salary level that is still within the range that its own

[24] 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.

[25] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 80 Fed. Reg. 38516, 38519 (July 6, 2015).

[26] *See* 84 Fed. Reg. at 10908-09.

[27] The Economic Policy Institute estimates that, of the 4.1 million workers newly covered by the threshold in the 2016 Final Rule, roughly 70 percent (2.9 million) were affected as a result of the erosion of the effective level of the threshold since the prior update, not the change in methodology—while the remaining 1.2 million workers affected were the result of the shift from the flawed 2004 methodology to the appropriate methodology of the 2016 Final Rule.

[28] 81 Fed. Reg. at 32413.

[29] *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))

[30] 82 Fed. Reg. at 32404.

analysis identified as appropriate when paired with the standard duties test—e.g., a threshold at the 35th percentile of weekly wages of full-time salaried workers in the lowest-wage Census region. The Department should also return to using a threshold from a series published by the Bureau of Labor Statistics (as the 2016 Final Rule did), providing crucial transparency. And while there is not evidence to suggest that a phase-in period for a substantially higher salary threshold is necessary, it would be far better for the Department to phase in an appropriate salary level over time than to persist in reducing it to an inappropriate level. But simply looking to the 2004 salary threshold and the methodology used to establish it to revise the 2016 threshold downward necessarily perpetuates the problematic mismatch created in 2004—unless the Department also overhauls the duties test to make it far more vigorous and demanding than it currently is.

II. Without a substantial increase to the standard salary level, the Department must strengthen the standard duties test in the final rule.

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 delimi[t]' the scope of the [EAP] exemption" as Congress intended.[31] 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. The far lower salary threshold that the Department now proposes disrupts that carefully calibrated balance and requires a longer, more rigorous duties test to restore it.

Thus, if the Department is not willing to raise the salary threshold high enough to adequately account for workers who should receive overtime, the Department should instead pursue a more restrictive "duties test" to bring this proposal in line with the FLSA and the purposes of the EAP exemption. The same problem exists under the rules established in 2004 and under the rules currently proposed by the Department: too many employers can abuse the overtime exemption, giving employees a small amount of additional pay and 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." Without a standard salary level that is far closer to the level established in the 2016 Final Rule, strengthening the duties test is necessary and appropriate to assure the proper classification of workers who have limited professional or managerial duties and who are not "bona fide" executives, administrators or professionals.

Given that using the Department's 2004 methodology to set the overtime salary threshold results in a standard salary level that is the equivalent of the level formerly associated with the long duties test,[32] the Department could reinstate the long duties test to ensure that workers will not be classified as "bona fide" exempt EAP employees unless a strong majority of their duties are in fact exempt in nature. The state of California has adopted a similar model, under which EAP employees may not be considered exempt unless they spend more than 50 percent of their time performing exempt work. The Department should recognize, however, that objection from the business community to overhauling the duties test 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.[33]

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[31] *See Auer v. Robbins*, 519 U.S. 452, 456 (1997).

[32] *See supra* note 19 and accompanying text.

[26] *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* 69 Fed. Reg. at 22126-27 (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).

III. 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.

The Center is concerned that the Department does not propose an automatic method for updating the salary level regularly—a method that it clearly could create through notice-and-comment rulemaking within its authority under 29 U.S.C. 213(a)(1) to establish the salary level test. The Department proposes vaguely that it intends to update the salary level once every four years through an NPRM published in the Federal Register, but this still requires months or even years of work with no assurance that future Departments will undertake this task on this schedule. As the Department recognizes in this NPRM, "the earnings thresholds . . . become a less useful measure of employees' relative earnings [over time], and a less useful method for identifying exempt employees."[34] Inaction leads to stagnant wages and contributes to wage inequality for workers: indeed, the wages that working people stand to lose annually under the salary threshold in the proposed rule relative to the 2016 Final Rule will be exacerbated by the lack of indexing, rising from $1.2 billion in 2020 to $1.6 billion in 2029.[35] By contrast, automatic updating benefits workers as well as their employers—providing the stability and predictability they need to plan for the future.

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; in fact, the Center supported annual updates in our comments on the 2015 NPRM. 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. Given the time and cost associated with the regular rulemaking required to ensure that the salary test remains effective, 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. 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,"[36] updating the threshold any less frequently would allow the salary level to erode too significantly and undermine its effectiveness in the years between updates.

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For the foregoing reasons, the Department's proposed rule departs from decades of historical precedent and undercuts the purposes of the Fair Labor Standards Act's overtime provisions. The salary threshold proposed is too low to effectively incentivize employers to balance the additional hours they ask of the women and men they employ with the costs of either providing overtime pay or of raising salaries to the new threshold.

Without considerable revision, the Department's proposal will lead to continued misclassification of overtime-eligible employees, denying critical pay and protections to many working people who are not bona fide EAP workers. We therefore urge the Department to substantially raise the standard salary level to restore its effectiveness in providing a reasonable and consistent guide to distinguish between overtime-eligible and potentially exempt employees. If the Department is unwilling to do so, it must establish a strengthened and updated duties test that more closely examines whether an individual's primary duties are properly considered executive, administrative, or professional. And in either case, the Department should adopt an indexing mechanism to ensure that the value of the standard salary level does not decrease over time.

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[34] 84 Fed. Reg. at 10914.

[35] SHIERHOLZ, *supra* note 1, at 8.

[36] 81 Fed. Reg. at 32438.

Thank you for the opportunity to submit comments on this NPRM. Please do not hesitate to contact Julie Vogtman, Director of Job Quality and Senior Counsel (jvogtman@nwlc.org/202.588.5180), if you have questions or require additional information regarding these comments.

Sincerely,

Emily Martin
Vice President for Education & Workplace Justice

Julie Vogtman
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