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Submitted via www.regulations.gov

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

RE: NWLC comments in support of Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (RIN 1235-AA39)

Dear Ms. DeBisschop:

The National Women's Law Center (NWLC) 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.¹ This rule will help millions of low and moderately paid workers—especially women—achieve economic security, and we urge you to finalize and implement it without delay,

Since 1972, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of LGBTQI+ people, women of color, and women with low incomes and their families. Ensuring that working people receive the full pay and protections to which they are entitled under the FLSA is a critical way to advance higher wages and better working conditions, benefiting the communities we serve.

By raising the salary threshold under which workers are guaranteed eligibility for overtime premium pay to the 35th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region, 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 proposed rule will benefit an estimated 3.6 million salaried workers²—most of whom are women, who are disproportionately concentrated in lower-paying jobs with salaries below the proposed threshold.³ In the final rule, we recommend that the Department establish a salary threshold no lower than the level proposed in the NPRM, and maintain the fixed percentile approach to adjust the salary threshold every three years so that it automatically rises along with wages.

In addition, NWLC 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.

¹ 88 Fed. Reg. 62152 (Sept. 8, 2023).

² *Id.* at 62220.

³ *Id.* at 62198. See also, e.g., Brooke LePage & Jasmine Tucker, *A Window Into the Wage Gap: What's Behind It and How to Close It*, NAT'L WOMEN'S LAW CTR. (NWLC) (Jan. 2023), <https://nwlc.org/wp-content/uploads/2023/01/2022-Wage-Gap-Factsheet-1.10.23v2.pdf>.

This change is especially important for preschool teachers, who are overwhelmingly women and overwhelmingly low-paid. 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. We provide additional context for this recommendation and detail our support for the proposed rule in the comments that follow.

I. The proposed increase to the overtime salary is critically needed and falls squarely within historical precedent.

NWLC supports the Department’s proposed salary threshold. Under the rules issued by the Trump administration in 2019, salaried executive, administrative, and professional employees are only automatically eligible for overtime pay if they are paid less than \$35,568 annually. By raising the threshold to \$55,068, the proposed regulation would give millions of workers paid modest salaries—disproportionately women—the overtime protections they deserve.

We objected to the current threshold when it was proposed because it was wholly inadequate as a guide to distinguish bona fide EAP employees from nonexempt workers entitled to overtime pay.⁴ The Department has long maintained that an employee cannot be deprived of overtime protections on the basis of the EAP exemption if their employer does not pay a salary that is indicative of “bona fide” EAP status,⁵ 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.”⁶

Accordingly, for more than 75 years, the Department’s regulations have paired an examination of an employee’s duties with 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. The higher an employee’s salary, the greater the likelihood that they hold an EAP position—and the less extensive the inquiry into their duties needs be to verify that this is the case.

The 2019 rule, however, did not achieve that appropriate salary level. Instead, it perpetuated the flawed approach established in 2004, pairing a light duties test that does not restrict the amount of nonexempt work that an EAP employee may perform with a low salary threshold—and ensured that the exempt status of the majority of full-time salaried employees would turn solely on a weak duties test.⁷ Like previous iterations, the 2019 Rule also failed to provide any

⁴ See NWLC comments (May 21, 2019), <https://www.regulations.gov/comment/WHD-2019-0001-59308>.

⁵ 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).

⁶ *Id.* at 19.

⁷ 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% in a workweek, or 40% 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. 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) to be paired with a weak “standard” duties test that was the functional equivalent of the short test. By combining a low salary level test with a light duties test, the Department

mechanism to automatically increase the salary threshold, so that it covered fewer workers every year.

At \$35,568, the salary threshold established in 2019 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 \$36,000 a year might cost a worker their overtime pay even if they are required to work 50 hours a week and perform many of the same tasks as the employees they “supervise.”⁸ For low-level supervisory employees, a “promotion” may mean not only the loss of overtime pay but a dramatic increase in hours, even as their hourly co-workers cannot get all the scheduled hours they would like.⁹

The proposed rule restores a reasonable balance between the strength of the duties test and the height of the salary threshold—and thereby restores the effectiveness of the threshold in identifying those EAP employees whose higher salaries, increased bargaining power and job autonomy, and other compensatory benefits and privileges distinguish them from nonexempt workers entitled to overtime pay.

Restoring the value of the salary threshold, however, does not eclipse the role of the duties test in the determination of exempt status. In the 2019 rulemaking, the Department erroneously asserted that the number of newly overtime-nonexempt workers under the threshold finalized in 2016 threshold—which was enjoined in a deeply flawed decision by a single district court judge—was evidence of that threshold’s displacement of the duties test in the exemption determination.¹⁰ To the contrary, the expansion in coverage that would have occurred under the 2016 threshold was simply the logical result of adjusting the salary level after a long lapse and realigning it to match the duties test.¹¹ It is also critically important to recognize that the salary

in 2004 abandoned the traditional methodology’s inverse relationship between the height of the salary threshold and the strength of the duties test. See generally, e.g., Ross Eisenbrey, *Updated Overtime Rules Will Help Millions of Middle-Class Workers*, Testimony Before the U.S. House of Representatives Subcommittee on Workforce Protections’ Hearing on “Examining the Costs and Consequences of the Administration’s Overtime Proposal,” ECON. POLICY INST. (July 23, 2015), <https://files.epi.org/2015/ross-eisenbrey-testimony-07-23-15-final.pdf>.

⁸ See Lauren Cohen, Umit Gurun & N. Bugra Ozel, *Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments* (NBER Working Paper No. 30826, Jan. 2023), <https://www.nber.org/papers/w30826#:~:text=Too%20Many%20Managers%3A%20The%20Strategic%20Use%20of%20Titles%20to%20Avoid%20Overtime%20Payments,-Lauren%20Cohen%2C%20Umit&text=We%20find%20widespread%20evidence%20of,a%20pre%2Ddefined%20dollar%20threshold> (finding “widespread evidence of firms appearing to avoid paying overtime wages by exploiting a federal law that allows them to do so for employees termed as ‘managers’ and paid a salary above a pre-defined dollar threshold,” and estimating that in 2019 alone, employers used job titles to avoid paying overtime on 151 million employee hours, worth about \$4 billion in money stolen from workers—with the average worker losing about 13.5% of their salary based on this misclassification).

⁹ See, e.g., Noam Scheiber, *You’re Now a ‘Manager.’ Forget About Overtime Pay*, N.Y. TIMES, March 6, 2023, <https://www.nytimes.com/2023/03/06/business/economy/managers-overtime-pay.html>; Judy Conti, *The Case for Reforming Federal Overtime Rules: Stories from America’s Middle Class*, NELP (Dec. 2014), <http://nelp.org/content/uploads/2015/03/Reforming-Federal-OvertimeStories.pdf>.

¹⁰ See 84 Fed. Reg. at 10908-09.

¹¹ The Economic Policy Institute estimates that, of the 4.1 million workers newly covered by the threshold in the 2016 Final Rule, roughly 70%(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. 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%) 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. See 81 Fed. Reg. at 32413.

test and the duties tests are not alternative, but rather complementary, tests; both an employee's salary *and* their duties must be indicative of "bona fide" EAP status for them to be denied the protections of the FLSA.¹²

We supported the Department's proposal in 2015 to raise the salary threshold for the EAP exemption to the 40th percentile of weekly earnings for full-time salaried workers and maintain that it was a well-reasoned, legally sound rule that could have—and should have—benefited millions of workers in the intervening years.¹³ The rule now proposed is even more modest and indisputably within the Department's legal authority to promulgate. Neither the major questions doctrine nor the non-delegation doctrine prevents the Department from taking any of the actions in the proposed rule, which is neither unheralded nor transformative; rather, the Department is regulating well within the area of its expertise and adjusting a long-established test that it has adjusted many times before, always pursuant to principles that Congress set down in the FLSA to guide the Department's exercise of its authority.

In 1975, the salary threshold was set at a level that meant that 63.0% of full-time salaried workers were covered by overtime protections. By 2023, that share has dropped to just 9.0%. Under the new rule proposed by the Department, that share would increase to 28.2%. The threshold proposed by DOL is well within historical precedent, and could have reasonably been significantly higher and still fully consistent with historical precedent. Raising the minimum salary level required to qualify for the EAP exemptions from \$684 per week to the 35th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region (\$1,059 per week) 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.

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

As a result of longstanding sexism, racism, and structural barriers in our economy, women, especially women of color, typically are paid less than men—not only in hourly jobs, but in salaried positions as well.¹⁴ And 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 \$55,068 annually. Of the approximately 3.6 million workers would benefit from this rule, the Economic Policy Institute estimates that close to 57% are women, including 700,000 women of color.¹⁵ These workers include people who make between \$35,568 and \$55,068 and will now have stronger overtime protections, as well as those who will have their salaries increased to meet the new threshold.¹⁶

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 or attend to other obligations. Each of these benefits is critically important for women, especially those with caregiving

¹² 81 Fed. Reg. at 32413 ("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)).

¹³ See NWLC comments (Sept. 3, 2015), <https://www.regulations.gov/comment/WHD-2015-0001-4368>. The final rule issued in 2016 adjusted the standard salary level for exempt EAP employees to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region. See 81 Fed. Reg. 32391 (May 23, 2016).

¹⁴ See generally, e.g., LePage & Tucker, *A Window Into the Wage Gap*, *supra* note 3.

¹⁵ Economic Policy Institute analysis of Current Population Survey microdata, 1975-2023.

¹⁶ See 88 Fed. Reg. at 62198, 62220.

responsibilities: two-thirds of mothers are breadwinners or co-breadwinners for their families,¹⁷ 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.¹⁸ The majority of Black and Latina breadwinning mothers are single parents working to provide for their families¹⁹—and typically are doing so for lower pay than white men, men of color, and white women.²⁰ Under the proposed rule, many of these women and their families will benefit from the increased economic security that comes from higher pay when they work longer hours.

Many breadwinning mothers and caregivers, too, will benefit from gaining more time, as the proposed rule reinforces the value of the 40-hour workweek by making it harder for employers to require people to work more than 40 hours without overtime pay. Research indicates that working excessive hours contributes to occupational segregation: because women have more demands on their time than men due to family responsibilities, they are more likely to have to leave jobs in male-dominated fields—and even exit the workforce entirely—when they have to work 50 hours or more per week.²¹ The proposed rule incentivizes a more equitable distribution of hours.

In fact, as some employers shift schedules to minimize overtime costs, employees who had been involuntarily working part-time—or working fewer part-time hours than they would like—may gain the additional hours they want and need. Women are far more likely than men to work part time, but research shows that many of these part-time employees would prefer to work more hours, especially in low-paying service sector positions.²² The current overtime salary threshold enables employers to assign additional work to their overtime-exempt employees at no additional cost; by shrinking the pool of exempt employees, the proposed rule can encourage employers to offer more hours to part-time staff rather than requiring their full-time employees to work overtime.

III. To ensure its continued effectiveness, the Department should update the salary threshold at least every three years so that it is maintained at the 35th percentile of weekly earnings for full-time salaried employees in the lowest-wage Census Region.

The current salary threshold was inadequate when it was issued in 2019 and is even more so today, given the substantial wage growth and inflation that have occurred in the intervening years. The eroded value of today's threshold validates the Department's assertion that, "if left unchanged, such thresholds become substantially less effective in identifying exempt EAP employees as wages for workers increase over time."²³ The Department's authority to avert this outcome by establishing, through notice-and-comment rulemaking, a mechanism to automatically update the salary level test

¹⁷ See, e.g., Sarah Jane Glynn, *Breadwinning Mothers Are Critical to Families' Economic Security*, CTR. FOR AM. PROGRESS (March 2021), <https://www.americanprogress.org/article/breadwinning-mothers-critical-families-economic-security/>. In 2019, 41% of mothers were sole or primary breadwinners for their families, earning at least half of their total household income; an additional 25% were co-breadwinners, i.e., married mothers earning at least one-quarter of total household income.

¹⁸ See, e.g., Sarah Jane Glyn, *An Unequal Division of Labor*, CTR. FOR AM. PROGRESS (May 2018), <https://www.americanprogress.org/article/unequal-division-labor/>; Katherine Gallagher Robbins & Jessica Mason, *Women's Unpaid Caregiving Is Worth More Than \$625 Billion—and It Could Cost More*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Aug. 2023), <https://nationalpartnership.org/womens-unpaid-caregiving-worth-more-than-625-billion/>.

¹⁹ Glynn, *Breadwinning Mothers Are Critical to Families' Economic Security*, *supra* note 17.

²⁰ See, e.g., *The Wage Gap for Mothers by Race, State by State*, NWLC (Aug. 2023), <https://nwlc.org/resource/wage-gap-for-mothers-by-race-state-by-state/>.

²¹ Youngjoo Cha, *Overwork and the Persistence of Gender Segregation in Occupations*, 27 GENDER & SOC. 158-84 (2013), <https://doi.org/10.1177/0891243212470510>.

²² See, e.g., Brooke LePage, *Part-Time Workers Are Facing Heightened Uncertainty During COVID—and Most Are Women*, NWLC (Feb. 2022), <https://nwlc.org/wp-content/uploads/2020/02/Part-time-workers-factsheet-v2-2.1.22.pdf>.

²³ 88 Fed. Reg. at 62178.

is clearly encompassed within its authority under 29 U.S.C. 213(a)(1) to establish the salary level test, and NWLC agrees that updates at regular intervals are appropriate to produce predictable and incremental adjustments.

The Department has amply demonstrated that its reasons for selecting the 35th percentile of weekly earnings for full-time salaried employees in the lowest-wage Census Region as the revised salary threshold are methodologically sound and firmly rooted in historical precedent. NWLC agrees with the Department's conclusion that maintaining this "fixed percentile" approach, so that increases in the threshold are based on earnings growth (consistent with the underlying methodology established through rulemaking) rather than the less relevant measure of price increases, is the best mechanism to employ for periodic adjustments.

We supported using this approach to update the threshold on an annual basis when the Department initially proposed it in 2016, and we continue to believe that modest annual adjustments would provide the greatest predictability for both employers and employees. The Department's proposal to update the salary threshold at three-year intervals will still represent a vast improvement over the lengthy gaps between increases that have occurred in recent decades, but we encourage the Department not to consider any interval longer than three years.

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,²⁴ §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."²⁵

This NPRM neither proposes any changes to nor invites comments on §541.303, so NWLC is not proposing that the Department amend this section when it finalizes these proposed regulations. However, we recommend that the Department move quickly to propose changes to this provision. Women are far more likely than men to work as teachers, and they typically are paid far less than other professionals, such as doctors and lawyers, who are categorically excluded from overtime pay. Applying the salary test to teachers will help improve compensation in this essential but underpaid profession, especially for the thousands of preschool teachers who have increased their professional qualifications but still do not receive a livable wage.

The Bureau of Labor Statistics reports that the average annual wage for "preschool teachers, except special education" in 2022 was \$38,640²⁶—well below the proposed \$55,068 threshold for exempt professional employees. The average salary for "kindergarten teachers, except special education," was modestly above the proposed threshold, at \$65,120,²⁷ but since this is the *average* salary, many kindergarten teachers necessarily receive salaries below it. Women make up 97% of preschool and kindergarten teachers.²⁸

²⁴ See 29 U.S.C. §213(a)(1).

²⁵ See §541.303(b).

²⁶ Bureau of Labor Statistics (BLS), *May 2022 National Occupational Employment & Wage Estimates*, U.S. DEP'T OF LABOR, https://www.bls.gov/oes/current/oes_nat.htm#25-0000 (last updated Apr. 25, 2023).

²⁷ *Id.*

²⁸ BLS, *Labor Force Statistics from the Current Population Survey, Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity, 2022*, U.S. DEP'T OF LABOR, <https://www.bls.gov/cps/cpsaat11.htm> (last updated Jan. 25, 2023).

The average salaries of elementary, middle, and secondary school teachers are all below \$70,000 annually,²⁹ and many teachers earn far less. The average starting salary of teachers nationwide in 2021-2022 was \$42,845, according to a survey by the National Education Association.³⁰ Women make up 80% of elementary/middle school teachers and 59% of secondary school teachers.³¹

Given their disproportionate representation in lower-paid teaching positions, women would disproportionately benefit from ending the teacher exclusion from overtime pay—as would teachers of color, who typically are paid lower salaries than their white peers.³² The Department should move quickly to propose that teachers' salaries must meet the salary test for them to be exempt from FLSA overtime rules, which will combat gender and racial pay disparities and help attract and retain more people to this vital profession.

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,³³ but the Department's current Fact Sheet #46, "Daycare Centers and Preschools Under the Fair Labor Standards Act (FLSA)"³⁴ 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. Misclassifying child care workers means denying overtime pay to some of the lowest-paid workers in the U.S.: in 2022, the average annual pay for child care workers—who are 94% women, disproportionately women of color—was just \$29,570.³⁵

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 they 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....

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.³⁶ In contrast, Fact Sheet #46, the

²⁹ BLS, *May 2022 National Occupational Employment & Wage Estimates*, *supra* note 26.

³⁰ *NEA 2021-2022 Teacher Salary Benchmark Report*, NAT'L EDUCATION ASSOC. (Apr. 2023), https://www.nea.org/sites/default/files/2023-04/2021-2022-teacher-salary-benchmark-report_0.pdf.

³¹ BLS, *Labor Force Statistics from the Current Population Survey, Table 11*, *supra* note 28.

³² See John Schmitt, Heidi Shierholz & Jori Kandra, *Expanding Overtime Protection for Teachers Under the Fair Labor Standards Act*, ECON. POLICY INST. (Nov. 2021), <https://www.epi.org/publication/expanding-overtime-protection-for-teachers-under-the-fair-labor-standards-act/>.

³³ 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).

³⁴ Wage & Hour Div., *Fact Sheet #46: Daycare Centers and Preschools Under the Fair Labor Standards Act (FLSA)*, U.S. Dep't of Labor, <http://www.dol.gov/whd/regs/compliance/whdfs46.htm> (last updated July 2009).

³⁵ BLS, *May 2022 National Occupational Employment & Wage Estimates*, *supra* note 26, and BLS, *Labor Force Statistics from the Current Population Survey, Table 11*, *supra* note 28. See also, e.g., Brooke LePage, *The Child Care and Early Learning Workforce Is Underpaid and Women Are Paying the Price*, NWLC (May 2023), <https://nwlc.org/wp-content/uploads/2023/05/child-care-workers-5.25.23v3.pdf>.

³⁶ 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. See Allison H. Friedman-Krauss, et al., *The State of Preschool 2022: State Preschool Yearbook*,

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 preschool 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 [an] 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.³⁷ The Department should review its regulations, guidance, and enforcement activities to ensure that the early childhood workforce receives the pay it deserves.

* * *

NAT’L INST. EARLY ED. RESEARCH 228-29 (2015), https://nieer.org/wp-content/uploads/2023/09/YB2022_FullReport.pdf (Appendix Table 30). 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 23.

³⁷ See, e.g., *Early Educators’ Wage Growth Lagged Behind Other Low-Paid Occupations, Jeopardizing the Supply of Child Care as Relief Dollars Expire*, NWLC (July 2023), <https://nwlc.org/wp-content/uploads/2023/07/ChildCareDollarsFS.pdf>.

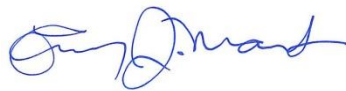
NWLC commends the Department for proposing this critical expansion of overtime protections under the FLSA, which will benefit millions of workers and families throughout the country. We urge the Department to issue and implement a final rule as swiftly as possible. We also urge the Department to continue 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 to which it is entitled.

We appreciate your consideration and the opportunity to comment on this NPRM. Please do not hesitate to contact Julie Vogtman at jvogtman@nwlc.org if you have any questions or would like further information regarding the issues raised in these comments.

Sincerely,

A handwritten signature in blue ink that reads "Julie Vogtman". The signature is written in a cursive, flowing style.

Julie Vogtman
Director of Job Quality & Senior Counsel

A handwritten signature in blue ink that reads "Emily Martin". The signature is written in a cursive, flowing style.

Emily Martin
Vice President, Education & Workplace Justice