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September 4, 2015

Mary Zeigler, Director

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: Proposed Rule Regarding Defining and Delimiting the Exemptions for
Executive, Administrative, Professional, Outside Sales, and Computer
Employees, 80 Fed. Reg. 38515 (July 6, 2015), RIN: 1235-AA11**

Dear Ms. Ziegler:

On behalf of the Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 organizations to promote and protect the rights of all persons in the United States, we write to offer our full support for the Department of Labor's proposed rule on *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*. Under current law, salaried workers making less than the poverty threshold may be forced to work far in excess of 40 hours a week without receiving any overtime pay. This has a particularly harsh impact on female-headed households and communities of color. The rule would provide or strengthen overtime protections under the Fair Labor Standards Act (FLSA) for as many as 13.5 million salaried workers, 6.9 million of whom are women,¹ boosting economic security for working families across the country.

The March 13, 2014 Presidential Memorandum that directed the Department of Labor (DOL) to update and modernize overtime regulations to ensure that workers are paid a fair day's pay for a fair day's work was issued in response to grossly out of date standards in overtime pay for salaried workers. While the current poverty line for a family of four living in the United States in 2015 is \$24,250 according to the U.S. Department of Health and Human Services,² the current salary threshold for overtime pay is below this line. Current law only guarantees overtime pay to salaried workers who make less than \$455 per week (\$23,660 per year).³ A working family member making less than the current poverty level should not be exempt from receiving overtime compensation for long hours worked.

In response to the Presidential Memorandum, the DOL issued a Notice of Proposed Rulemaking (NPRM) on July 6, 2015. The new rule would update the salary threshold to \$970 per week (\$50,440 per year), expanding the number of workers covered and updating the salary level to a fairer standard.⁴ We support the DOL's goal of setting a new standard salary level. Updating overtime regulations is one of the most important steps the DOL can take to protect working families.

In 1975, 62 percent of salaried workers were protected by overtime laws; today that number is a mere 8 percent.⁵ The regulations that govern overtime pay have not been updated in a meaningful way in four decades. If the salary threshold had kept pace with its 1975 level, the overtime threshold would be more than \$52,000 today adjusted for inflation.⁶ Increasing the threshold to the proposed level will give middle-class workers and families a big boost. Working families cannot wait any longer for this vital change.

Currently, 21.7 million salaried managerial and professional workers fall above the salary threshold and therefore are not covered by overtime protections.⁷ Those that would benefit the most from this increase include women, African Americans, and Hispanics.

For example, salaried managerial and professional women - 39 percent of whom earn below \$50,000, compared to only 23 percent of salaried managerial and professional men – would benefit.⁸ Outdated overtime rules contribute to unfair pay, which can have harmful consequences for all workers—including for the two-thirds of mothers who are breadwinners or co-breadwinners for their families.⁹ Under the proposed salary threshold, 44 percent of single mothers and 32 percent of married mothers who are currently exempt from overtime protections would be newly covered in 2016.¹⁰ More than a third of all currently exempt women workers, and nearly half of currently exempt Black and Hispanic women workers, would be covered.¹¹

African American and Hispanic salaried workers, who fall at the low end of the earnings scale relative to comparable white workers, would also benefit significantly from the increase in the salary threshold. Among these workers, 42 percent of African Americans and 44 percent of Hispanics earn below \$50,000, compared to 28 percent of whites.¹² While African Americans and Hispanics each make up 7 percent of currently exempt workers,¹³ under the proposed threshold change, African Americans would comprise 9 percent and Hispanics 11 percent of those newly covered.¹⁴

Employers have long benefited from increased worker productivity without sharing the benefits with their workers. Worker productivity has steadily risen in recent years, yet inflation-adjusted wages for most workers have barely increased.¹⁵ This trend indicates that although workers are more efficient, they are not receiving benefits for their increased productivity. CEOs, on the other hand, have seen a massive increase in their compensation. From 1978 to 2013, CEO compensation, adjusted for inflation, increased 937 percent, far greater than the painfully slow 10.2 percent growth in a typical worker's compensation over the same period. Increasing the overtime threshold will ensure that middle-class workers are being compensated fairly by their employers.

A majority of Americans strongly support increasing the overtime threshold. According to Public Policy Polling, 79 percent of Americans support raising the threshold above \$23,000 per year, while 65 percent support raising it to \$75,000.¹⁶ In addition, increasing the salary threshold would benefit businesses that already compensate workers fairly for hours worked, leveling the playing field with businesses that seek to gain an economic advantage by shortchanging their workers.

We also applaud DOL's proposal to automatically update the standard salary and compensation levels annually, either by maintaining the levels at a fixed percentile of earnings or by updating the amounts based on changes in the Consumer Price Index for all Urban Consumers (CPI-U). The salary threshold has only been increased once in the last 40 years. In order to avoid a recurrence of this problem, it is essential that the new rule keep up with the changing economy. This will ensure that the salary threshold continues to provide an effective means of distinguishing between overtime eligible employees and those meant to be exempt under the original intent of the rule. We propose setting the standard salary level

equal to the 40th percentile of earnings for full-time salaried workers, as has been used to set the NPRM's current proposed salary threshold. This threshold is a reasonable standard in line with historical precedent that will more effectively ensure that employees entitled to overtime protection receive it, while simplifying the determination of exempt status.

In addition to changes in the salary threshold, the DOL has solicited comment regarding modification of the "duties test" and whether it currently works as intended to screen out employees who are not bona fide executive, administrative, and professional (EAP) employees. Section 13(a)(1) of the Fair Labor Standards Act (FLSA) originally permitted an overtime pay exemption for *bona fide* executive, administrative, and professional employees that made over \$30 a week.¹⁷ This exemption was premised on the belief that the exempted workers earned salaries well above the minimum wage and enjoyed other privileges. Congress directed the Secretary of Labor to define what constitutes a "bona fide executive, administrative or professional employee." In order to define such exempt employees, the "duties test" has emerged. The duties test currently covers employees whose "primary duty" is managerial, administrative, or necessitating advanced knowledge.¹⁸

We believe that the term "primary duty" has been interpreted too broadly. It allows employers to exempt from overtime pay employees that have the responsibility to hire or fire others, but spend a majority of time performing the same tasks as hourly employees who do receive overtime pay. The current duties test provides a platform for employers to abuse employees they appoint to administrative or managerial positions. Employers can require a manager to work upwards of 40 hours a week without paying any overtime compensation for time spent completing non-managerial tasks, such as cleaning, stocking shelves, and serving customers. These are tasks that employers would be required to pay overtime compensation for hourly employees if the employee worked more than 40 hours. However, under the current duties test approach, if the employee is appointed to a salaried position, he or she can be required to complete the same tasks, working more than 40 hours a week with no overtime compensation.

Reforming the duties test is a necessary part of combatting such worker exploitation. While increasing the salary threshold provides much needed protection for many workers who make less than the proposed threshold, it does not address the needs of those workers who earn above the threshold. These workers need a clarified duties test to ensure proper compensation for hours worked. For this reason, we recommend that the DOL adopt a rule that resembles California State law, which requires that at least 50 percent of a worker's duties be in the exempt category. This would change the subjective nature of the current "primary duty" standard. Employers would no longer be permitted to assign a managerial task to an employee, merely to avoid paying that person overtime, while continuing to require that worker to perform the same tasks as hourly employees.

The Leadership Conference strongly supports the new rule, which would provide a significant benefit to low wage hourly workers – particularly female workers and workers of color – by updating the salary threshold now and in the future, and revising the duties test to ensure that workers are treated fairly.

Thank you for the opportunity to comment on this proposed rule. The Leadership Conference applauds your leadership in this area. We urge the administration to act swiftly to implement final regulations in order to help ensure that the federal government upholds its commitment to insure a fair day's pay for a fair day's work and help millions of hard working Americans receive the protection they deserve. Please contact Lisa Bornstein, Legal Director and Senior Legal Advisor at (202) 466-3311 or bornstein@civilrights.org or June Zeitlin, Director of Human Rights Policy at (202) 263-2852 or zeitlin@civilrights.org if you have any questions.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

¹ Mishel, L., & Eisenbrey, R. (2015, August). *Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers*. Economic Policy Institute Publication. Retrieved 5 August 2015, from <http://s4.epi.org/files/pdf/90214.pdf>.

² United States Department of Health and Human Services. *2015 Poverty Guidelines*. <http://aspe.hhs.gov/poverty/15poverty.cfm>.

³ United States Department of Labor Wage and Hour Division. *Fact Sheet: Proposed Rulemaking to Update the Regulations Defining and Delimiting the Exemptions for "White Collar" Employees*. <http://www.dol.gov/whd/overtime/NPRM2015/factsheet.htm>.

⁴ 80 FR 38515

⁵ Center for American Progress Action Fund. *Fast Facts: Updating Overtime*. June, 2015. <http://fixovertime.org/assets/dist/img/updatingovertime-factsheet.pdf>.

⁶ Economic Policy Institute. "Why It's Time to Update Overtime Pay Rules." 2015. Available at <http://www.epi.org/publication/time-update-overtime-pay-rules-answers-frequently/>.

⁷ Heidi Shierholz. "Increasing the Overtime Salary Threshold Is Family-Friendly Policy." (Washington: Economic Policy Institute, 2014). available at <http://www.epi.org/publication/increasing-overtime-salary-threshold-family/>.

⁸ *Id.*

⁹ Glynn, S. (2014, June). *Breadwinner Mothers, Then and Now*. Center for American Progress publication. Retrieved 5 August 2015. <https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

¹⁰ Hartmann, H. et al. (2015, August). *How the New Overtime Rule Will Help Women & Families*. Institute for Women's Policy Research & MomsRising Publication. Retrieved 11 August 2015, from <http://www.iwpr.org/publications/pubs/how-the-new-overtime-rule-will-help-women-families>.

¹¹ *Id.*

¹² Heidi Shierholz. "Increasing the Overtime Salary Threshold Is Family-Friendly Policy" (Washington: Economic Policy Institute, 2014). Available at <http://www.epi.org/publication/increasing-overtime-salary-threshold-family/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Mishel, Lawrence. "The wedges between productivity and median compensation growth." (Washington: Economic Policy Institute, 2012). Available at <http://www.epi.org/publication/ib330-productivity-vs-compensation/>.

¹⁶ Public Policy Polling. *National Survey Results*. (May, 2015). <http://www.americansunitedforchange.org/page/-/PPP-Overtime%20Pay-%205-12-2015.pdf>.

¹⁷ Whittaker, William. *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*. Cornell University ILR School. (May, 2005). http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1240&context=key_workplace.

¹⁸ U.S. Department of Labor Wage and Hour Division. *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the FLSA*. http://www.dol.gov/whd/overtime/fs17a_overview.pdf.