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May 21, 2019

Melissa Smith

Director

Division of Regulations, Legislation, and Interpretation,  
Wage and Hour Division

U.S. Department of Labor

200 Constitution Avenue, NW, Room S-3502  
Washington, DC 20210

*Submitted via regulations.gov*

**RE: Comments on Proposed Rule Regarding Defining and Delimiting the Exemptions  
for Executive, Administrative, Professional, Outside Sales and Computer Employees  
RIN 1235-AA20**

Dear Ms. Smith:

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 express our opposition to the Department of Labor's proposed overtime rule, RIN 1235-AA20, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," published in the *Federal Register* on March 22, 2019.

The proposed overtime rule does not provide adequate protection to workers who are currently forced to perform unpaid overtime work. Far from improving upon the final rule the Department of Labor ("the Department") issued in May 2016 ("2016 final rule"), the current proposed rule would fail to ensure that millions of workers are paid a fair day's pay for a fair day's work, with particularly harsh consequences for working people in low wage industries, women, and people of color.

Current law only guarantees overtime pay to salaried workers who make less than \$455 per week (\$23,660 per year).<sup>i</sup> Recognizing that the salary level was grossly out of date, the Department, just three years ago in its 2016 final rule, raised the salary threshold for overtime pay to \$913 per week (\$47,476 per year). This change was long overdue. In 1975, more than 60 percent of full-time salaried workers were protected by overtime laws; but by 2016, less than 7 percent of salaried workers were guaranteed overtime pay.<sup>ii</sup> The regulations that governed overtime pay had not been updated in any meaningful way in four decades, leading to a hyper-erosion of protections meant to ensure that working people get paid fairly for time spent on the job beyond 40 hours per week.



If the salary threshold had kept pace with its 1975 level, the overtime threshold in 2015 would have been more than \$52,000 per year, only slightly below the U.S. median household income for that year.<sup>iii</sup> The 2016 final rule did not reach that level, but would have still strengthened protections for nearly 13.5 million workers, including 6.9 million women and 2.8 million Black, Hispanic, and Asian workers.<sup>iv</sup>

Rather than defending the 2016 final rule and these millions of workers, the Department has instead issued this current proposed rule, which sets out an even more modest salary threshold for overtime pay—\$35,308 per year—that is simply too low to protect working people and promote economic security for workers and their families. Under the current proposed salary threshold, 8.2 million workers who would have benefitted from the 2016 final rule will be left behind.<sup>v</sup> This number includes 4.2 million women and more than 2.2 million Black and Hispanic working people.<sup>vi</sup> In monetary terms, the proposed rule would cause working people to lose \$1.2 billion annually.<sup>vii</sup>

The Department claims that it proposed to adjust the salary threshold down because the threshold in the 2016 final rule was too high and therefore inappropriate.<sup>viii</sup> An analysis of the data by the Economic Policy Institute, however, shows that the threshold set in the 2016 final rule was well within reason. As noted earlier, more than 60 percent of full-time salaried workers in 1975 earned below the salary threshold. The 2016 final rule would have only partially restored protections, reaching 33 percent of full-time salaried workers.<sup>ix</sup> If, however, the 1975 rule were simply updated for inflation, the salary threshold would reach \$58,000 per year in 2020, which is more than the projected 2020 salary threshold for the 2016 final rule (\$51,000 per year).<sup>x</sup> Under the current proposal, the salary threshold of \$35,308 per year is approximately \$23,000 less than the inflation-adjusted 1975 level.<sup>xi</sup> The data, therefore, do not support the claim that the 2016 threshold was too high; instead, the data confirm the current proposed salary threshold is too low.

Additionally, the current proposal, unlike the 2016 final rule, would not automatically adjust the salary threshold going forward, which would contribute to workers being denied fair pay. The Department asserts that it “intends” to propose updates to the salary levels through future notice-and-comment rulemaking every four years.<sup>xii</sup> There, however, is no guarantee that future Departments will, in fact, update the salary levels. Given that, historically, the salary thresholds have not been updated appropriately, and that the last increase was more than a decade ago after being updated in the 1970s, the Department’s current intention provides no comfort to the millions of workers who would already lose \$1.2 billion in wages each year under this proposed rule.

The loss of overtime pay is especially burdensome for women and people of color who already suffer from discriminatory gender and race pay gaps. These pay gaps make it even more difficult for women and people of color to achieve economic security and negatively impacts families’ ability to put food on the table and pay for other basic necessities like health care, housing, and child care. Of the working people left behind by this proposed rule, approximately 1.7 million are parents whose children will directly feel the financial impact of their parents’ missing overtime wages.<sup>xiii</sup>

The proposed rule’s low salary threshold is even more concerning since it remains coupled with a “duties test” that continues to allow employers to exempt workers even if they perform a disproportionate amount



of nonexempt work. Section 13(a)(1) of the Fair Labor Standards Act (FLSA) permits an overtime pay exemption for bona fide executive, administrative, and professional employees (EAP). The “duties test” defines who is such an overtime-exempt employee and currently includes employees whose “primary duty” is managerial, administrative, or necessitating advanced knowledge.<sup>xiv</sup> However, the term “primary duty” allows employers to easily misclassify salaried workers who spend a substantial amount of time performing work that is not overtime-exempt. These workers, who should be receiving overtime pay, continue to be left vulnerable by the proposed rule.

Reforming the duties test is a critical part of preventing worker exploitation. Increasing the salary threshold would protect some workers from being misclassified and denied overtime pay, but without changes to the duties test, millions more workers who earn a salary above the threshold will continue to lose the pay they have earned and to which they are entitled. A more restrictive duties test would better align with the FLSA and the purpose of the EAP exemption and would help ensure proper compensation for hours worked. The Department should therefore adopt a test that would require the majority of a worker’s duties to be in the overtime-exempt category.

Instead of protecting workers and helping to ensure that they receive the fair compensation that the law intended to provide, the current proposed rule, as opposed to the 2016 final rule, would leave millions of workers, including a disproportionate number of workers of color, behind. The Leadership Conference calls on the Department of Labor to withdraw its NPRM and instead defend the 2016 final rule, which would boost economic security for working families across the United States. Please contact Gaylynn Burroughs, Senior Policy Counsel, at (202) 548-7163 or burroughs@civilrights.org, if you have any questions.

Sincerely,

Vanita Gupta  
President & CEO

Kristine Lucius  
Executive Vice President

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<sup>i</sup> As a result of a district court ruling, the Department is currently enforcing the overtime regulations that were in effect on November 30, 2016. *See Nevada v. U.S. Dep’t of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017). Although the Department appealed this ruling on October 30, 2017, the U.S. Court of Appeals for the Fifth Circuit granted the Government’s motion to hold the appeal in abeyance. *See generally* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10902-10903 (March 22, 2019).

<sup>ii</sup> Heidi Shierholz, Economic Policy Institute, *More than Eight Million Workers Will Be Left Behind by the Trump Overtime Proposal 2* (April 8, 2019), available at <https://www.epi.org/publication/trump-overtime-proposal-april-update/>.

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<sup>iii</sup> Center for American Progress Action Fund and Economic Policy Institute, *Fast Facts: Updating Overtime* (June 2015), <https://fixovertime.org/assets/dist/img/updatedovertime-factsheet.pdf>.

<sup>iv</sup> Shierholz, *supra* note ii at 5.

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.* at 4.

<sup>viii</sup> 84 Fed. Reg. at 10901, 10909.

<sup>ix</sup> Shierholz, *supra* note ii at 2.

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.*

<sup>xii</sup> 84 Fed. Reg. at 10914.

<sup>xiii</sup> Shierholz, *supra* note ii at 5.

<sup>xiv</sup> U.S. Department of Labor Wage and Hour Division, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (FLSA) (July 2008), [https://www.dol.gov/whd/overtime/fs17a\\_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf).