



UPDATING OVERTIME RULES IS ONE IMPORTANT STEP IN GIVING AMERICANS A RAISE

BY ROSS EISENBREY

Americans are working longer hours and are more productive—yet wages are largely flat. Indeed, the median worker saw a wage increase of just 5.0 percent between 1979 and 2012, despite overall productivity growth of 74.5 percent (Mishel and Shierholz 2013). One reason Americans' paychecks are not keeping pace with their productivity is that millions of middle-class and even lower-middle-class workers are working overtime and not getting paid for it. This is because the federal wage and hour law is out of date. Fortunately, the Obama administration can remedy this through executive action.

This policy memo argues the Secretary of Labor should exercise his authority to raise the salary threshold that helps determine which workers can receive overtime pay. The memo explains that if the threshold were raised from its current \$455 per week (\$23,660 annually) to \$970 per week (\$50,440 per year)—the latter amount being

equal to the threshold's 1975 level, adjusted for inflation—millions of salaried workers would be guaranteed the right to overtime pay if they work more than 40 hours in a week.

Background on overtime laws

Most of the U.S. workforce has the right, provided by the Fair Labor Standards Act of 1938, to be paid overtime for working more than 40 hours in a week. Each extra hour beyond 40 is supposed to be paid at 1.5 times the regular rate of pay. Employers usually want to avoid paying overtime, so they schedule their employees for 40 hours a week or less. This is why we have a standard workweek of 40 hours—five eight-hour days. Before the federal government set rules for overtime, most employees worked longer hours, and millions of Americans worked six or seven days a week, as Chinese factory workers do today.

Workers who make below a certain amount are entitled to overtime pay. However, relatively low-paid workers are being excluded from overtime pay—and even minimum-wage protection—because the Department of Labor has failed to raise the salary threshold that helps determine which workers can receive overtime pay. Salaried workers, too—not just hourly workers—have the right to be paid a premium for overtime work, unless they fall into an exempt category as a professional, an administrator, or an executive. Each of those exempt categories is defined by a set of duties showing that the exempt employee is skilled and exercises independent judgment, or is a boss with a department and employees to supervise. Each exempt category also has a salary test: The employee has to earn a salary high enough to qualify as an executive, a professional, or an administrator. But many companies have worked to get around these overtime rules; for example, cooks can be called “managers” so that their employer can deny them overtime. The too-low salary threshold, and outdated definitions of who is exempt from overtime, can and should be fixed by the Secretary of Labor.

Congress gave the U.S. Department of Labor the authority and the responsibility to redefine periodically both the salary level and the duties that define who is exempt. In the 1930s through the 1970s, the Department of Labor periodically raised the salary threshold to levels it thought more appropriate to show that the exempt employee truly was important and valued by the employer—someone who did not need the overtime law to be protected against exploitation. At lower levels of pay, the duties tests prohibited employees exempt from overtime from doing substantial amounts of routine, low-level work, but at higher pay levels employees could still be exempted from overtime pay as long as the majority of their work was important, high-level work.

In 1975, the Gerald Ford administration raised the salary threshold significantly to account for inflation, but for 29 years after, no further adjustments were made, even though inflation made the salary threshold obsolete. If

the 1975 salary level had been adjusted for inflation since then, the threshold today would be about \$970 per week, or \$50,440 a year. Unfortunately the last adjustment, made 10 years ago by the Bush administration, was stingy. It raised the salary threshold to an absurdly low level—\$455 per week, or \$23,660 a year, which today is only \$2 a week above the poverty level for a family of four. Far from being an executive salary or a professional salary, it makes a joke of the law’s provisions.

As the rules stand now, an assistant manager at a fast food restaurant who spends 95 percent of his (or her) time cooking fries, running a cash register, sweeping floors, and moving supplies into and out of the freezer can be denied any overtime pay and work 60 or 70 hours a week if his salary is at least \$23,660 a year. Because he is exempt, the hourly rate of his salary can fall below the minimum wage; “executives” are excluded from minimum-wage protection, too.

A new salary threshold

Millions of salaried workers earn more than \$455 per week but less than \$970 a week. If the level were raised to \$970 a week, all of them would be guaranteed a right to overtime pay if they work long hours, regardless of their duties. These workers include insurance clerks, secretaries, low-level managers, social workers, bookkeepers, dispatchers, sales and marketing assistants, and employees in scores of other occupations.

Fortunately, the law gives President Obama the authority to change the salary level through Department of Labor regulation. Secretary of Labor Tom Perez can propose a rule that sets the salary level at \$970 a week, or even higher. After an appropriate comment period gives the public a chance to weigh in on the issue, and time for the Department of Labor to consider the comments, a new regulation can be issued.

The result would be higher wages for millions of workers who get no overtime pay today, and probably reduced

hours of unpaid overtime for millions of others whose employers will choose to hire additional workers or just manage their employees' time better.

About the author

Ross Eisenbrey has been vice president of EPI since 2003. He is a lawyer and former commissioner of the U.S. Occupational Safety and Health Review Commission. Prior to joining EPI, Eisenbrey worked for many years as a staff attorney and legislative director in the U.S. House of Representatives, and as a committee counsel in the U.S. Senate. He served as policy director of the Occupational Safety and Health Administration from 1999

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Reference

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