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What's at stake in the states if the 2016 federal raise to the overtime pay threshold is not preserved—and what states can do about it

State action to modernize overtime rules (research report)

Report • By Celine McNicholas, Samantha Sanders, and Heidi Shierholz • November 15, 2017

Introduction

A new federal overtime rule took effect on December 1, 2016, but a Texas district court issued an injunction and the Department of Labor (DOL) was prohibited from implementing and enforcing it. This rule increased the salary level that determines when employees make enough that they can be denied pay for the overtime hours they work. By raising the threshold from \$23,660 annually to \$47,476 annually, the rule would have directly benefited 12.5 million salaried workers, affecting the lives and livelihoods of modest wage earners in all states. On August 31, 2017, a district court in Texas determined that the rule was invalid.

The Trump administration DOL has declared its intent to appeal the court's decision—defending DOL's right to set a threshold.¹ But the Labor Department is likely to issue a new rule setting the threshold at a much lower level. Even before the district court ruling, the Labor Department had announced that it was reevaluating the overtime rule in light of stakeholder concerns that the threshold in the 2016 rule was “too high”—a review taking place under a general administration-wide agenda to weaken or kill regulations.²

This report explains how the threat to the 2016 overtime rule under the banner of “deregulation” affects the states and what states can do to provide certainty to their citizens that overtime rights will be protected. The bottom line: while states should advocate for a strong federal salary threshold, the most direct way states can provide fairer pay to low-wage workers, and reduce overwork, is to adopt their own versions of the 2016 federal overtime rule.

What the 2016 federal overtime rule was designed to do

In May of 2016, the Department of Labor released a rule modernizing the federal overtime regulations to help ensure that workers are paid fairly for their work. Under the prior, outdated rule, workers paid a salary as low as

SECTIONS

1. Introduction • 1
2. What the 2016 federal overtime rule was designed to do • 1
3. What the 2016 federal overtime rule would have done for workers in every state • 3
4. What specific benefits these workers stand to lose • 5
5. What the states can do to restore overtime protections to workers • 6
6. Conclusion: Why state action is a viable strategy • 7
7. EARN and Economic Policy Institute Resources • 7

Acknowledgment • 7

Endnotes • 7

Appendix • 9

\$23,660 per year (\$455 per week) could be considered exempt managers or professionals and be denied overtime pay. The department determined that this salary threshold had been so eroded since its last full adjustment for inflation in 1975 that millions of workers with low earnings and little bargaining power could be forced to work long hours with no additional pay. Under the new rule, most salaried employees making less than \$47,476 a year would have to be paid overtime if they work more than 40 hours per week.³ This increase was conservative; had the department taken the 1975 threshold and adjusted it for inflation, it would have been well over \$50,000 per year.⁴

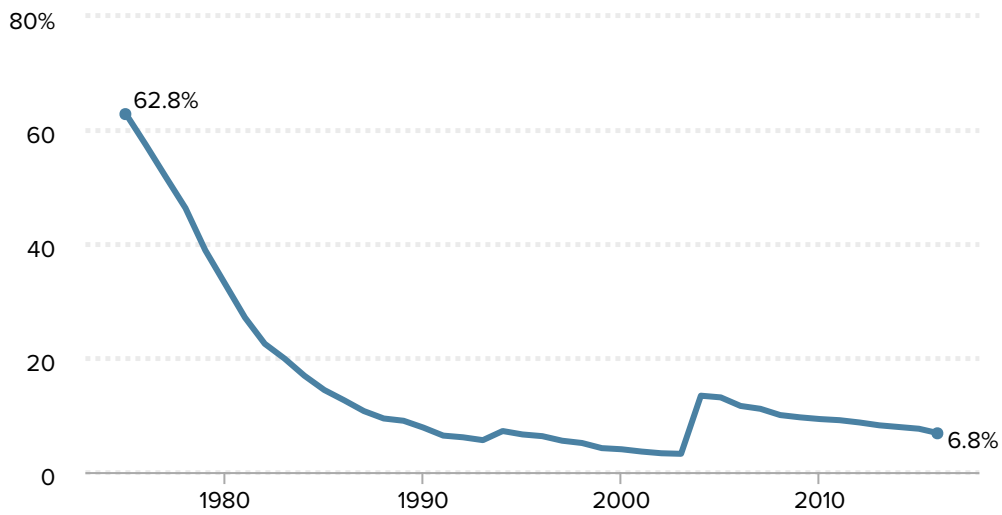
Specifically, the rule expanded the basic rights of the federal Fair Labor Standards Act (FLSA): that workers in the U.S. be paid at least a minimum wage (currently \$7.25 per hour) and that most workers, when they work more than 40 hours in a week, be paid overtime at a rate of time and a half (1.5 times their regular rate of pay).

The FLSA—and the typical state law modeled after the FLSA—has a set of tests, known as the “white collar exemption,” that exempt certain employees from coverage on the theory that they have high enough salaries, important enough responsibilities, and enough bargaining power with their employers to make the legal protections of overtime pay and the minimum wage unnecessary. To meet the requirement for this exemption under federal law, an employer must show that an employee meets three criteria or “tests.” One, the employee must be paid on a salary basis (hourly workers are automatically covered and cannot be exempt). Two, the employee must be paid above a certain weekly salary threshold (though this weekly threshold is often converted to its annual equivalent in news articles and other documents). And three, the employee must perform primary duties that are considered either “executive” (in terms of having managerial duties such as hiring, firing, and supervising), “administrative” (having authority over work directly related to general business operations), or “professional” (performing work requiring advanced knowledge in a specialized field).⁵ Employees must meet all three of these tests to be exempt under the white collar exemption, so while workers who earn above the salary threshold may be either exempt or nonexempt, almost all workers who earn below the salary threshold are guaranteed the right to overtime pay. Because it is more clear-cut than the “white collar duties” test, altering the salary threshold is a straightforward way to raise wages for modest-earning employees and ensure they are not overworked.

As **Figure A** shows, in 1975, more than 60 percent of full-time salaried workers were under the salary threshold and hence automatically eligible for overtime. By 2016, the share had dropped to less than 7 percent. The May 2016 federal overtime rule would have partially restored that share to 33 percent by setting the threshold to the 40th percentile of weekly full-time earnings in the lowest-earning census region, the South. Using data from the fourth quarter of 2015, this translated to \$913 weekly, or \$47,476 annually, for a full-time, full-year worker. The updated threshold more closely tracks a level of salary that would reasonably be paid to a managerial, administrative, or professional worker today. Another important provision of the rule was an automatic update to the threshold every three years, ensuring that the 40th percentile standard laid out in the rule would be preserved and not erode over time with inflation.

Figure A

Share of full-time salary workforce who earn less than the federal overtime salary threshold, 1975–2016



Source: Authors' analysis of Current Population Survey Outgoing Rotation Group microdata, various years

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What the 2016 federal overtime rule would have done for workers in every state

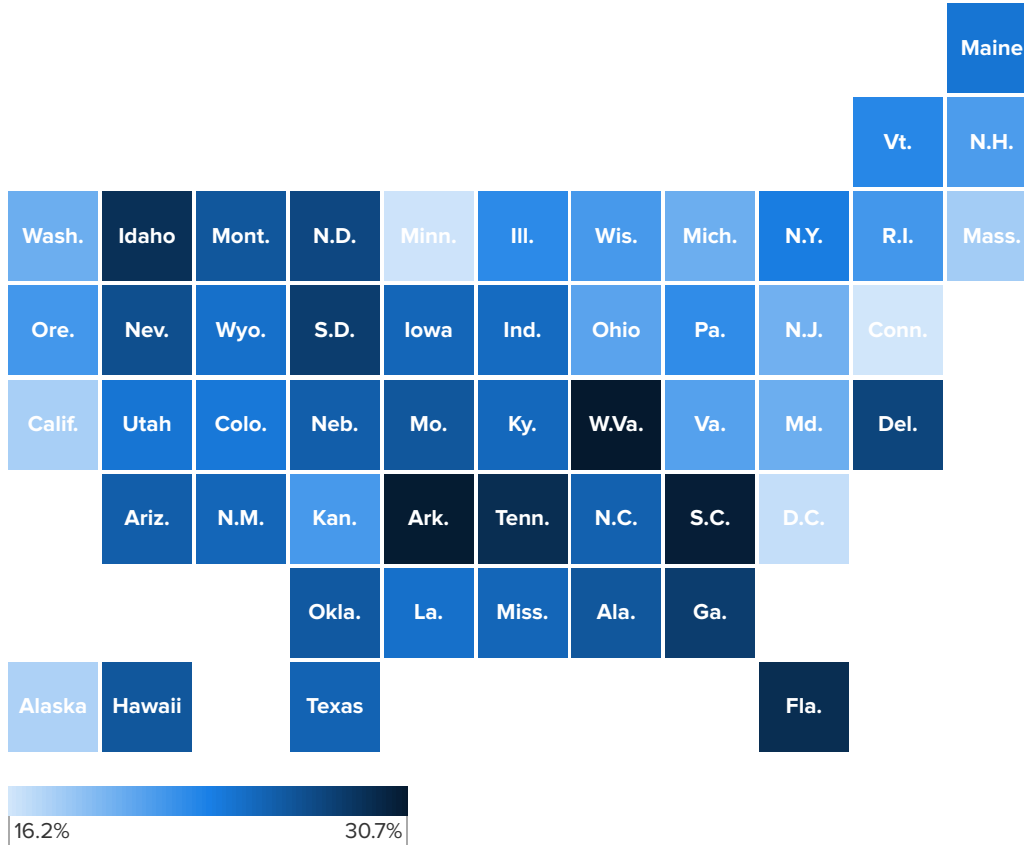
An EPI analysis of 2015 earnings data finds that the 2016 overtime rule would have benefited 12.5 million people, including 6.4 million women and 4.2 million parents. Many of the 12.5 million would be newly eligible for overtime protections; they are classified (perhaps wrongly) as having job duties that put them in the white collar exemption category, but since their pay falls between the old \$23,660 threshold and the \$47,476 threshold, they would get overtime protection by virtue of their modest salary alone. The rest would have their rights strengthened: they make more than the outdated \$23,660 threshold but were already eligible for overtime because they don't have white collar duties, and since they make less than the \$47,476 threshold they cannot be reclassified as exempt by changing or mischaracterizing their described duties.⁶

As **Figure B** shows, this new rule would have benefited working people in every state. (The interactive online map is viewable at epi.org/134853. Map data appears in **Appendix Table A1**.) In some states the threshold would have doubled, tripled, or even quadrupled the share of salaried workers automatically eligible for overtime protection by virtue of their modest salary. In South Carolina, for example, 30.3 percent of the salaried workforce—219,000 people—would have benefited from the new rule, bringing the total share of the salaried workforce covered under the new threshold from 9.6 percent to 39.9 percent. In Texas, over 1.2 million people would have directly benefited—25.4 percent of

Figure B

The 2016 federal overtime rule would have benefited working people in every state

Share of salaried workforce in each state benefiting from raising the salary threshold for overtime protection from \$23,660 to \$47,476 a year



Note: The estimates consider all the workers who would for the first time be *automatically* eligible for overtime protection because their salary falls under the salary threshold (i.e., their employers could no longer exempt them from protection by claiming their primary job duties are managerial, administrative, or professional in nature). Not included are a subset of salaried California and New York workers already covered by state thresholds higher than the old federal threshold.

Source: EPI analysis of the U.S. Department of Labor’s proposed (July 6, 2015) and final (May 18, 2016) rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

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the state’s salaried workforce (raising the share of salaried workers covered from 11.2 percent to 36.6 percent).

These benefits would have extended to a broad range of people. Although EPI’s data analysis does not provide these estimates by state, it shows that black workers, young workers, and workers with only a high school education would be disproportionately hurt by the reversion of these protections. Of the total 12.5 million workers who would be affected by a reversion to the old, outdated threshold:

- 50.9 percent are women
- 12.0 percent are black (black workers make up 8.9 percent of the salaried workforce)
- 28.7 percent are age 25 to 34 (this age group makes up 22.9 percent of the salaried workforce)
- 36.3 percent are “millennials” (workers age 16 to 34; this age group makes up 28.2 percent of the salaried workforce)
- 25.3 percent have a high school diploma but no further education (this group makes up 15.5 percent of the salaried workforce)⁷

Of the major industries most negatively affected by reversion to the old threshold—that is, those industries having the largest shares of salaried workers who would have directly benefited from the increase in the overtime threshold—are agriculture, forestry, fishing, and hunting (39.7 percent); leisure and hospitality (37.3 percent); other services (33.2 percent); construction (32.6 percent); and public administration (32.5 percent).

Occupations hardest hit (having the largest shares of salaried workers who would have directly benefited) are office and administrative support occupations (46.0 percent); transportation and material moving occupations (40.4 percent); farming, fishing, and forestry occupations (40.2 percent); construction and extraction occupations (38.9 percent); and service occupations (38.0 percent).

What specific benefits these workers stand to lose

Given the ongoing legal limbo around the 2016 threshold increase, employees in most states making as little as \$23,660 a year who are classified by their employer as professionals, administrators, or executives—for example, an assistant manager at a fast-food restaurant—can be forced to work 60–70 hours a week for no more pay than if they worked 40 hours. What do these workers, and the states they live in, stand to lose?

- **Fairer pay for low-wage workers.** Without having to pay overtime for exempt employees, extra work hours are completely free to the employer, so they can schedule 10, 20, or 30 additional hours without restraint, which lowers workers’ hourly pay rates substantially, in some cases even to below the minimum wage. Under the updated rule, affected workers who work more than 40 hours a week would get more money, either through overtime pay or through increased salaries to meet the new threshold.

- **Better work-life balance.** Under the updated rule, employers who don't want to pay affected workers for working more than 40 hours a week would need to stop scheduling them for overtime work, effectively ensuring time off from work to handle family responsibilities or engage in other pursuits.
- **More jobs.** By reducing overwork, raising the overtime threshold could expand employment. Under the rule, employers in some cases would hire new workers to cover the hours that newly overtime-eligible workers had been working without pay, or spread hours to other employees. Spreading work was a major goal for implementing overtime protections in the FLSA in the first place.

What the states can do to restore overtime protections to workers

States should not leave workers in their communities unprotected and in limbo. Any new salary threshold proposed by the Trump Department of Labor would likely be far too low to restore the overtime protection lost due to inflation. For example, using 2015 data, if the threshold were set at \$31,000, 9.1 million (nearly three-fourths) of the 12.5 million benefiting from raising the threshold to \$47,476 would be left out. Only 3.4 million eligible workers earn at least \$23,660 but less than \$31,000.⁸

By taking action to update standards on overtime pay, states can restore these protections to their residents and lay the groundwork for renewed protections at the federal level. There are several actions states can take to strengthen overtime protections.

- **Help draft and promote state legislation providing the protections that the 2016 federal overtime rule would have provided to workers.** The strongest action states could take at this moment would be to pass legislation raising the state overtime threshold, following the parameters of the 2016 federal overtime rule. Even in states where passage of such a law would be difficult, introducing it and seeking public hearings or staging press conferences would raise awareness and could help create a constituency to advocate for better protections for overworked low- and moderate-wage workers.
- **Start a ballot initiative so that voters can weigh in to provide the protections that the 2016 federal overtime rule would have provided to workers.** In states that are amenable to ballot initiative campaigns, groups could place an initiative on the ballot to raise the state's overtime threshold to provide more low- and moderate-wage workers with overtime pay.
- **Support executive action.** In some states, the overtime salary threshold may be changed through an administrative regulation. Working with the governor and/or state department of labor could be a good way to obtain an administrative change, if this is an available option and the local political climate is conducive to such a change.

Conclusion: Why state action is a viable strategy

States have a track record of filling the void when federal labor standards lapse by passing laws that restore earnings and workplace protections to working people. States are able to do this because the federal laws generally set a floor—federal law applies only in the absence of a stronger state law. In recent years many states have enacted a range of laws designed to offer working people in their states a higher minimum wage, or more paid leave, than provided by the federal government. For example, while the federal minimum wage has not been raised since 2009, twenty-nine states and the District of Columbia (D.C.) have established minimum wages that are higher than the federal minimum wage of \$7.25 per hour. Twenty-seven of those states and D.C. have increased their effective minimum wages since January 2014.⁹

California has long implemented legislation raising the salary threshold for overtime pay above the outdated federal standard, and in 2016 New York issued an administrative regulation raising its overtime salary threshold.¹⁰ Other states should follow their lead and work to return the certainty of overtime pay to working people.

Acknowledgment

This research was made possible in part by a grant from the Bauman Foundation. The statements made and views expressed are solely the responsibility of the authors.

EARN and Economic Policy Institute Resources

The EARN staff at EPI and the network of state EARN affiliates are available to support organizations and officials who are contemplating action on overtime policy. The Economic Policy Institute has a broad array of policy, data, and legal resources, as well as social media and communications assets that can support state efforts on this and other economic issues. Please contact us at earn@epi.org for further information.

Endnotes

1. U.S. Department of Labor Wage and Hour Division, “[Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#),” 29 CFR 541. In November 2016, the United States District Court for the Eastern District of Texas, Sherman Division, issued a preliminary nationwide injunction blocking the rule from taking effect. In December 2016 the Department of Justice, on behalf of the Department of Labor, filed a notice with the U.S. Circuit Court of Appeals for the Fifth Circuit to appeal the preliminary injunction. In August 2017, the United States District Court for the Eastern District of Texas issued a final ruling

concluding that the overtime rule was invalid, rendering Justice’s 2016 appeal moot. On October 30, 2017, the Department of Justice, on behalf of the Department of Labor, filed a notice to appeal the judge’s decision as part of a process under which the Trump administration DOL will undertake its own rulemaking to determine a new salary threshold (see [“Department of Labor Provides Update on Overtime,”](#) news release, United States Department of Labor, October 30, 2017).

2. For the Trump administration’s stance on the overtime rule, see Ronald Klain, [“An Issue Democrats Can Love: Overtime,”](#) *Washington Post*, September 3, 2017, and Heidi Shierholz, [“The Trump Administration Is Trying to Take Away the Rights of Millions of Americans to Get Paid for Their Overtime,”](#) Economic Policy Institute, July 25, 2017. For the likelihood that the DOL will propose a much lower threshold, in the low \$30,000s, see [“Labor Secretary Nominee Acosta on Overtime: \\$33K Minimum Salary?”](#) (user-created clip by Tammy McCutchen on C-SPAN, March 23, 2017). For the Trump administration’s deregulatory agenda, see Heidi Shierholz and Celine McNicholas, [“Understanding the Anti-Regulation Agenda,”](#) Economic Policy Institute fact sheet, April 11, 2017, and EPI’s [Perkins Project on Worker Rights and Wages Policy Watch](#) web portal.
3. The salary threshold does not apply to some occupations, for example, teachers. Teachers are exempt from overtime pay, no matter how little they earn, “if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.” See [“Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act \(FLSA\),”](#) U.S. Department of Labor, Wage and Hour Division, revised July 2008.
4. 81 Fed. Reg. at 32467.
5. The exemption is in the statute; FLSA section 13(a)(1) says that bona fide Executive, Administrative, or Professional (EAP) employees will be exempt from overtime. The statute delegates authority to the Secretary of Labor to define the terms and scope of the exemption, which is done in the regulations issued by the Department of Labor. For more details on the white collar exemption, see [“Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\),”](#) U.S. Department of Labor, Wage and Hour Division, revised July 2008.
6. Data in this section come from Ross Eisenbrey and Will Kimball, [The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live](#), Economic Policy Institute, May 17, 2016.
7. Data on number and shares of state workers affected come from Ross Eisenbrey and Will Kimball, [“The New Overtime Rule Will Benefit Working People in Every State,”](#) Economic Snapshot, Economic Policy Institute, May 18, 2016. Data on demographic characteristics of affected workers come from Ross Eisenbrey and Will Kimball, [The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live](#), Economic Policy Institute, May 17, 2016.
8. EPI analysis of 2015 Current Population Survey Outgoing Rotation Group data. The \$31,000 figure is the 2004 threshold adjusted for inflation, which Labor Secretary Alexander Acosta has suggested may be an appropriate threshold (see [“Labor Secretary Nominee Acosta on Overtime: \\$33K Minimum Salary?”](#), user-created clip by Tammy McCutchen on C-SPAN, March 23, 2017). The overtime threshold was last increased in 2004; however, the 2004 increase did not come close to adjusting fully for inflation since the prior increase almost 30 years earlier. If the 1975 threshold had been adjusted for inflation, it would be well over \$50,000 today.
9. See the [“Minimum Wage Tracker”](#) on the Economic Policy Institute website for a summary of state

actions on the minimum wage.

10. Cal. Lab. Code § 515; New York, notice of [final rulemaking](#).

Appendix

Appendix Table A1 provides data showing how the overtime rule would affect workers in each state. This data is also viewable in an online interactive map at epi.org/134853 (Figure B).

The 2016 federal overtime rule would have benefited working people in every state

Share of salaried workforce in each state benefiting from raising the salary threshold for overtime protection from \$23,660 to \$47,476 a year

State	Share of salaried workforce directly benefiting	Number of people directly benefiting	Share of total salaried workforce covered under new threshold
<i>Alabama</i>	26.4%	167,000	39.1%
<i>Alaska</i>	17.6%	16,000	25.9%
<i>Arizona</i>	25.8%	258,000	36.0%
<i>Arkansas</i>	30.6%	130,000	44.0%
<i>California</i>	17.9%	1,076,000	27.4%
<i>Colorado</i>	24.0%	248,000	31.7%
<i>Connecticut</i>	16.2%	113,000	23.7%
<i>Delaware</i>	27.7%	49,000	35.6%
<i>Washington D.C.</i>	16.8%	29,000	23.6%
<i>Florida</i>	29.3%	1,068,000	41.9%
<i>Georgia</i>	28.2%	493,000	39.3%
<i>Hawaii</i>	26.4%	57,000	36.9%
<i>Idaho</i>	29.1%	64,000	35.6%
<i>Illinois</i>	22.8%	539,000	31.2%
<i>Indiana</i>	24.9%	248,000	34.8%
<i>Iowa</i>	25.2%	124,000	33.3%
<i>Kansas</i>	21.7%	98,000	29.3%
<i>Kentucky</i>	25.1%	149,000	34.1%
<i>Louisiana</i>	24.5%	174,000	40.8%
<i>Maine</i>	24.2%	46,000	32.6%
<i>Maryland</i>	20.2%	233,000	28.4%
<i>Massachusetts</i>	18.0%	262,000	25.0%
<i>Michigan</i>	20.1%	275,000	28.0%
<i>Minnesota</i>	16.4%	158,000	21.5%
<i>Mississippi</i>	25.3%	88,000	37.8%
<i>Missouri</i>	26.3%	257,000	35.0%
<i>Montana</i>	26.4%	33,000	37.8%
<i>Nebraska</i>	25.8%	81,000	34.7%

Appendix
Table A1
(cont.)

State	Share of salaried workforce directly benefiting	Number of people directly benefiting	Share of total salaried workforce covered under new threshold
<i>Nevada</i>	26.9%	115,000	35.9%
<i>New Hampshire</i>	21.5%	54,000	28.6%
<i>New Jersey</i>	20.0%	410,000	28.3%
<i>New Mexico</i>	25.3%	61,000	37.0%
<i>New York</i>	23.6%	982,000	33.2%
<i>North Carolina</i>	25.7%	425,000	36.6%
<i>North Dakota</i>	27.5%	34,000	35.0%
<i>Ohio</i>	20.9%	351,000	28.7%
<i>Oklahoma</i>	26.2%	154,000	37.5%
<i>Oregon</i>	21.9%	124,000	29.1%
<i>Pennsylvania</i>	22.6%	459,000	30.8%
<i>Rhode Island</i>	21.8%	37,000	29.2%
<i>South Carolina</i>	30.3%	219,000	39.9%
<i>South Dakota</i>	28.2%	32,000	36.1%
<i>Tennessee</i>	29.2%	290,000	40.2%
<i>Texas</i>	25.4%	1,244,000	36.6%
<i>Utah</i>	24.1%	119,000	36.2%
<i>Vermont</i>	22.9%	25,000	31.5%
<i>Virginia</i>	21.1%	333,000	28.9%
<i>Washington</i>	20.2%	232,000	26.6%
<i>West Virginia</i>	30.7%	66,000	40.7%
<i>Wisconsin</i>	21.6%	187,000	27.1%
<i>Wyoming</i>	24.6%	20,000	32.4%

Note: The estimates consider all the workers who would for the first time be *automatically* eligible for overtime protection because their salary falls under the salary threshold (i.e., their employers could no longer exempt them from protection by claiming their primary job duties are managerial, administrative, or professional in nature). Not included are a subset of salaried California and New York workers already covered by state thresholds higher than the old federal threshold.

Source: EPI analysis of the U.S. Department of Labor’s proposed (July 6, 2015) and final (May 18, 2016) rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541; and Current Population Survey Outgoing Rotation Group microdata, 2015

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