



THE NEW OVERTIME SALARY THRESHOLD WOULD DIRECTLY BENEFIT 13.5 MILLION WORKERS

How EPI's Estimates Differ from the Department of Labor's

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An estimated 13.5 million workers would directly benefit from the Department of Labor's proposal to raise the salary threshold under which salaried workers are eligible for overtime pay regardless of their duties. This figure, the methodology for which is detailed in an EPI technical paper (*Estimating the Number of Workers Directly Benefiting from the Proposed Increase in the Overtime Salary Threshold*), is based on the economy of 2014 and would be somewhat greater in 2016. According to our analysis, most of these 13.5 million workers would newly gain overtime (OT) pay eligibility while the others would have their rights strengthened.

Americans' paychecks have not kept pace with their productivity in part because millions of lower-middle-class and even middle-class workers are working overtime but not getting paid for it. President Obama directed the Labor Department to modernize the rules that require employers to pay workers time-and-a-half if they work overtime. On June 30, 2015, the department issued a proposed rule to raise the overtime threshold from \$455 per week, or \$23,660 per year, to a "standard salary level equal to the 40th percentile of earnings for full-time salaried workers," which is \$921 per week in 2013 dollars, or \$933 per week adjusted to 2014 dollars. The Notice of Proposed Rulemaking (NPRM), published July 6, 2015, in the *Federal Register*, invited interested

parties to submit written comments on the proposed rule at www.regulations.gov on or before September 4, 2015. If the rule is implemented, the new salary threshold would be an estimated \$50,440 in 2016.

At first blush our evaluation of this proposed OT rule change differs from the widely circulated DOL assessment in the NPRM that 5 million workers would benefit from the new OT salary threshold. The DOL also notes in the NPRM that 10.0 million workers would have their rights strengthened by the higher salary threshold, for a total of nearly 15 million directly affected by the new OT rule (1.5 million greater than our estimate). Additionally, in the NPRM, the department notes that, of the 10 million salaried workers whose rights to OT would be strengthened, there are over 2 million who are currently incorrectly misclassified as not eligible for OT and would therefore receive new OT eligibility. That means that DOL actually estimates that 7 million workers would newly become eligible for OT pay.

Our assessment is that even more than these 7 million workers would become newly eligible for OT pay. Our assessment differs from DOL's because the department assumes, incorrectly in our view, that OT eligibility was not eroded by changes to the OT rules introduced in 2004 by the George W. Bush administration. We provide detailed evidence below showing that OT eligibility has been severely eroded since the late 1990s, when DOL computed the exemption probability estimates that it still relies on today. (Tables describing the demographic, geographic, industry, and occupational composition of the 13.5 million workers who would directly benefit from raising the overtime threshold can be found in the EPI publication, *Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers: Here is a Breakdown of Who They Are*).

Background on the OT threshold

The Fair Labor Standards Act (FLSA) overtime provisions stipulate that workers must be paid at least “time-

and-a-half,” or 1.5 times their regular pay rate, for each hour of work per week beyond 40 hours.

Hourly workers in most service and blue-collar occupations are guaranteed the right to overtime pay, while salaried workers' eligibility is determined by their pay and the nature of their duties.

Salaried workers who earn below \$455 per week, or \$23,660 per year, are automatically eligible for overtime pay—regardless of the nature of their job or the duties they perform. Salaried workers whose earnings are \$455 per week or more can be exempted from the right to receive overtime if they fall into one of three categories: professionals, administrators, and executives. Each of these 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. Thus, the regulations aim to exclude from overtime protections those relatively few workers who have enough individual bargaining power that they do not need the protections—namely, professional and managerial employees who do relatively high-level work, have a relatively high degree of control over their time and tasks, and who earn a salary that reflects this. This exemption is known as the “white collar” or “EAP” (executive, administrative, and professional) exemption. (EPI 2015)

The Department of Labor (DOL) estimates

In the NPRM, the DOL states:

In addition to the 4.7 million affected EAP workers who will be newly eligible for overtime protection (absent employer response to increase the salary level to retain the exemption), overtime protection will be strengthened for an additional 10.0 million salaried workers who earn between the current salary level of \$455 per week and the proposed salary level of \$921 per week. These

workers, who were previously vulnerable to misclassification through misapplication of the duties test, will now be automatically overtime protected because their salary falls below the new salary level and therefore they will not be subject to the duties test.

These 10.0 million workers include:

- 6.3 million salaried white collar workers who are at particular risk of being misclassified because they currently pass the salary level test but do not satisfy the duties test; and
- 3.7 million salaried workers in blue collar occupations whose overtime protection will be strengthened because their salary will fall below the proposed salary threshold.(U.S. DOL 2015, 199–200).

So DOL’s count of the total affected comes to roughly 15 million workers, just 1.5 million more than EPI’s assessment of 13.5 million workers. The greater difference between DOL and EPI estimates is in the assessment of how these workers would be affected; how many would gain new overtime pay eligibility versus how many are currently eligible (because their duties are not professional or managerial) but are vulnerable to having their employers misclassify them as having professional or managerial duties as their primary duty, and thus being ineligible for OT. Workers in this latter category would have their rights strengthened under the proposed new rule because they would be eligible for overtime by virtue of their salary alone, rather than subject to the more malleable duties test.

The bottom line is that DOL’s assessment is based heavily on judgments reached in the late 1990s about the share of employees in particular occupations considered eligible or not for overtime protection. In response to a request from the General Accounting Office (now the Government Accountability Office), a panel of wage and

hour experts convened in 1998 examined 499 occupational codes and assigned a probability of exemption¹ to each of the 251 occupations that likely included employees whose primary duties were executive, administrative, or professional and would therefore not be entitled to overtime pay (GAO 1999). In our view, reliance on judgments made in 1998 provides an unreasonably sunny view of today’s workplaces that ignores changes in the law implemented in 2004, various court decisions, and the corresponding behavior of employers to limit the ability of workers to obtain overtime pay.

The erosion of overtime eligibility since late 1990s

In a recent public forum, Secretary of Labor Thomas E. Perez acknowledged that employee rights have been eroded when he said, “The deck is stacked against them in large measure because in 2004, the rules governing overtime were changed to help employers and hurt workers by enabling employers to prevent too many workers from receiving the overtime protections the law intended” (The White House 2015). Nevertheless, in the NPRM, DOL addresses these legal changes only as having affected *perceptions* of the law, rather than the law itself, and it does not account for most of the changes in its estimates of the effects of the proposed rule on overtime rights:

The Department is concerned that the removal of the more protective long duties test in 2004 has exacerbated these concerns and led to the inappropriate classification as EAP exempt of employees who pass the standard duties test but would have failed the long duties test. (U.S. DOL 2015, 94)

The Department’s outreach has made clear that there are also some widespread misconceptions about overtime eligibility under the FLSA. For example, many employers and employees mistakenly believe that payment of a salary auto-

matically disqualifies an employee from entitlement to overtime compensation irrespective of the duties performed. Many employees are also unaware of the duties required to be performed in order for the exemption to apply. (U.S. DOL 2015, 24)

It is lamentably true that many workers and their employers assume that salaried workers are by definition ineligible for overtime pay. The news media are among the misinformed, and they spread their misunderstanding. The editors of *BloombergView*, for example, recently opposed the proposed rule to raise the salary threshold, writing, “At the moment, salaried workers making more than \$455 a week don’t qualify for mandatory overtime pay” (BloombergView 2015). On the same day, the *Washington Post* (DePillis 2015) ran a story that claimed bookkeepers are exempt, i.e., ineligible for overtime protections, if they earn a salary greater than \$455 a week, even though 95 percent of bookkeepers are not exempt, based on their duties, according to DOL’s 1998 estimates (U.S. DOL 2015, 255).

A combination of this misunderstanding and employer willingness to push the limits of the law have resulted in widespread noncompliance and misclassification. In fact, quoting from the NPRM, “The Department estimates that almost 20 percent of the 11.6 million salaried white collar workers who fail the duties test are misclassified as exempt” (U.S. DOL 2015, 146). Twenty percent of 11.6 million is 2.3 million. Thus, DOL estimates that nearly 2.3 million employees who are legally entitled to OT are being treated as exempt by their employers, but they are not counted among those who would benefit from a higher salary threshold: adding this group would raise DOL’s key estimate of those gaining eligibility for OT from 4.7 million to 7 million.

The regulatory changes made by the Bush administration in 2004 were supposed to clarify the right to overtime but instead created a great deal of confusion and generated a huge increase in litigation. EPI estimated that

those changes eliminated overtime rights for about 6 million employees who formerly had had the right to overtime pay (Eisenbrey 2004). In the past, for example, if an employee did a significant amount of nonmanagerial, nonexempt work such as routine clerical tasks, working a cash register, washing floors, stocking shelves, or unloading trucks, she would be considered entitled to overtime pay. The “rule of thumb” was that doing such tasks for more than half of one’s workday meant the employee’s primary duty was not managerial or professional. But the 2004 rules changes eliminated the rule of thumb and established the notion of “concurrent duties,” that an employee could simultaneously spend all day working a cash register and simultaneously perform managerial and supervisory duties that would make her an exempt executive, with no right to overtime pay. The 2004 rules also weakened another key part of the test for being an executive: employees who can only recommend—but not carry out—the “change of status” of the two employees that they “supervise” are denied overtime rights as “executives” even if they manage nothing more substantial than a team or grouping of employees. Eisenbrey (2004) estimated that 1.4 million low-level, salaried supervisors lost their overtime rights, along with 548,000 hourly supervisors, who could be switched to being paid on a salary basis and thus denied overtime protection. A perfect example is *Garrison v. ConAgra Foods Packaged Foods LLC*, in the U.S. District Court for the Eastern District of Arkansas, where front-line production supervisors were denied the right to overtime pay, as a matter of law.

Despite these changes, DOL estimates that most first-line supervisors are eligible for overtime—with the share being either 95 percent or 70 percent depending on particular occupation (U.S. DOL 2015, 236; 249–263).

Other changes in 2004 created whole new but ill-defined categories of exempt employees, such as “team leaders,” who have no right to overtime pay if their employer considers them to be performing important administra-

tive tasks. Employees in occupations which formerly had overtime eligibility, such as funeral directors and licensed embalmers, had their right to overtime pay eliminated, as did hundreds of thousands of employees without a graduate degree or even a college degree, who can now be designated “professional employees” with no right to overtime pay. We estimated these category changes removed overtime protections from more than three million employees (Eisenbrey 2004). These changes are not reflected in the NPRM, which, for example, assumes all funeral service employees remain eligible for overtime despite the 2004 rule change.

Many chefs and sous chefs who are not executive chefs were exempted in 2004 as “learned professionals” and “creative professionals.” The most aggressive employers have taken advantage of the change in the law to try to exempt even standard chefs and cooks. (See, for example, *Alvarez v. 9021Pho Fashion Square LLC et al.*) Yet the DOL assumes all chefs and head cooks are already eligible for overtime, and thus not counted in those newly eligible.

Likewise, prekindergarten and nursery school teachers (as opposed to child care workers), no matter how low their pay, were denied overtime pay under the 2004 rule, even if their work does not require the exercise of discretion and judgment. Eisenbrey 2004 estimated that 30,000 nursery school teachers lost the right to overtime pay.

The courts have read DOL’s changes to permit easier exemption: Mortgage loan officers have been exempted as outside sales workers even when they spend no more than an hour a day, one or two days a week, outside the office (see *Hantz v. Prospect Mortgage*). And the Supreme Court, in *Christopher et al. v. SmithKline Beecham Corp., dba GlaxoSmithKline*, disagreed with the Department of Labor and held that pharmaceutical representatives, who are legally forbidden from making sales, are outside salesmen with no right to overtime pay.

The estimated 6 million workers who *lost* OT eligibility as a result of the 2004 rule changes, and employees affected by the associated changed practices of employers, are all part of the 10 million salaried workers who, DOL assesses, currently *have* OT eligibility but whose rights would be strengthened by raising the salary threshold. That is, the DOL estimate of the number of workers who currently have overtime eligibility but whose “rights would be strengthened” are based on *late 1990s analyses* of the share of workers in particular occupations who are provided overtime: DOL is assuming that no workers lost their overtime eligibility rights because of changes in employer practices or legal rulings in response to the 2004 rule revisions. In contrast, EPI assumes that among those 10 million are workers who lost eligibility because of changes made in 2004 and workers who are currently legally entitled to overtime pay but misclassified (and thus incorrectly treated as ineligible for overtime pay) by their employers. These workers will clearly and transparently gain overtime eligibility when the salary threshold is raised.

A recent analysis of the proposed salary threshold increase by the National Retail Federation provides strong evidence for our conclusion that the status of OT eligibility among salaried workers in today’s workplaces has been significantly diminished since 1998, meaning that millions more employees will gain the right to overtime than the DOL suggests in the NPRM. In its report, *Rethinking Overtime Pay*, the NRF asserts that hundreds of thousands of employees (whom DOL would have determined to be eligible for overtime in 1998) are “currently exempt” but would gain eligibility if the salary threshold is raised.² The details are provided in Appendix C of the report. NRF estimates, for example, that 89,000 shipping, receiving, and traffic clerks are exempt but would gain eligibility, whereas DOL’s estimated probability of exemption, based on the 1998 GAO analysis, would yield only about 4,500 exempt clerks. Similarly, 146,000 bookkeeping, accounting, and auditing clerks are found to be exempt, whereas DOL’s probability esti-

mate is a little more than 7,000. Relative to DOL's estimates, NRF estimates that 114,000 more general office clerks, 281,000 more first-line supervisors of food preparation workers, and 52,000 more secretaries are ineligible for overtime. In all, there is a 1.14 million difference between the number of workers that NRF estimates are ineligible now but newly eligible under a proposed raise in the threshold, and DOL's estimates. Put another way, NRF's analysis confirms erosion in OT eligibility by finding that 1.14 million fewer employees in the top 15 salaried occupations in the retail and restaurant sector have overtime eligibility compared with the number who would have had eligibility under the pre-2004 rules.

Conclusion

If DOL's occupation-based estimates of overtime eligibility are obsolete—as they surely appear to be—and fail to account for the millions of employees who have lost overtime eligibility, then a much greater share of DOL's 10 million “affected employees” would gain overtime eligibility. Our analysis, supported by NRF's, suggests that this is the case, meaning that the impact of raising the overtime salary threshold is much greater than what DOL suggests. The estimate of 4.7 million workers gaining overtime eligibility is thus a severe underestimate.

Unfortunately, there are not definitive data that allow a precise determination of how many salaried workers are currently legally entitled to and receiving overtime pay or how that has changed since the late 1990s. Assuming that salaried workers have essentially the same OT rights they had in the late 1990s, as DOL does in the NPRM, ignores the known changes in the law since then and the behavior of employers.

It would be better in our view to operate with the default understanding that nearly all salaried workers earning above the salary threshold (\$23,660) today have either lost their right to OT pay or are being treated as exempt by their employer, so that raising the threshold will provide them new access to OT eligibility. The number of

workers made OT eligible as a result of the higher salary threshold is therefore much greater than the 4.7 million workers that DOL estimates. Rather, almost the entire group would have OT eligibility once the new \$50,440 salary threshold is implemented in 2016. At a minimum, EPI and DOL agree that 7 million employees who are currently classified as exempt and who have no right to overtime pay will be reclassified as a result of the new DOL rules and will now be eligible for overtime pay. Our assessment is that would be true of most of the 15 million workers whom DOL says will be directly affected by the higher salary threshold.

EPI's own estimates of the rule's impact are actually somewhat smaller than DOL's estimate of 15 million workers. In an upcoming report, we will provide a detailed methodological accounting of our estimates, how we benchmarked our results with those of DOL and the Bureau of Labor Statistics, and how we derived our estimate that 13.5 million workers would be directly affected. Our assessment, following the arguments made above, is that most of these 13.5 million workers will be gaining overtime pay eligibility. In terms that use DOL's concepts, EPI estimates that in 2014 the new higher salary threshold would have made 5.3 million workers newly eligible, would have brought eligibility to another 2 million workers that employers had improperly classified as exempt, and would have strengthened the rights of 6.1 million workers because their salaries, not complicated and malleable duties tests, qualify them for overtime protection, for a total of 13.5 million (when rounded) directly affected by the higher salary threshold.

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Endnotes

1. "Each occupation is assigned a probability representing the odds that a worker in that occupation would pass the duties test. For the EAP duties test, the five probability intervals are:
 - Category 0: Occupations not likely to include any workers eligible for the EAP exemptions.
 - Category 1: Occupations with probabilities between 90 and 100 percent.
 - Category 2: Occupations with probabilities between 50 and 90 percent.
 - Category 3: Occupations with probabilities between 10 and 50 percent.
 - Category 4: Occupations with probabilities between 0 and 10 percent."
2. Appendix C is in the original study, prepared before the Labor Department proposal was released. NRF posted an updated version on July 17, 2015, based on the actual proposal.

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