

The court decision invalidating the 2016 overtime rule was based on fundamentally flawed economic logic

Report • By Heidi Shierholz and John Schmitt • April 22, 2022

Overtime pay rules are designed to ensure that most workers who put in more than 40 hours a week get paid 1.5 times their regular pay for the extra hours they work. Almost all hourly workers are automatically eligible for overtime pay, but workers who are paid on a salary basis are only *automatically* eligible for overtime pay if they earn below a certain salary threshold. Above that threshold, employers can claim that workers are “exempt” from overtime pay protection if their job duties are considered “executive,” “administrative,” or “professional.” An exempt worker can be required to work more than 40 hours a week with no extra pay. For example, an assistant manager at a fast-food restaurant might be forced to work 60–70 hours a week for no more pay than if they worked 40 hours.

The overtime threshold is intended to prevent employers from exploiting lower-paid white-collar salaried workers, but at \$455 per week in 2016 (or \$23,660 for a full-year worker), it wasn’t doing this very effectively. A 2016 federal overtime rule that would have raised the salary threshold below which most salaried workers are automatically eligible for overtime regardless of their duties was supposed to take effect on December 1, 2016. However, nine days before that date, a Texas district court judge issued an injunction and the Department of Labor (DOL) was prohibited from implementing and enforcing the rule. The following August, the same district court in Texas declared that the rule was invalid, and the Trump Labor Department subsequently issued a new rule setting the threshold at a much lower level, leaving millions of workers without the crucial protections they would have had under the 2016 rule.¹

The salary threshold in the 2016 rule, which was set to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region—at the time, \$913 per week or \$47,476 for a full-year worker—would have been a substantial increase over the threshold then in place. However, it was still at the low end of historical norms. For example, if the relevant 1975 salary threshold had simply been updated for inflation, it would have been roughly \$54,000 for a full-year worker in 2017, 14% above the 2016 salary threshold.

Further, in 1975, the relevant salary threshold was set at a level that covered 63% of full-time salaried workers. By 2016, the share had dropped to less than 7%, and the 2016 federal overtime rule would have only partially restored that share, to 33%.² Perhaps most importantly, DOL’s analysis shows that using the methodology used since the 1950s to set the salary thresholds, it could have appropriately been set anywhere in the range from \$854 to \$1,183—\$44,408 to \$61,516 for a full-year worker—which were approximately the 35th and 55th percentiles of weekly earnings for all full-time salaried workers nationwide at the time. DOL chose to go very close to the low end of that range.³

In other words, by virtually any reasonable measure, DOL could have set the 2016 threshold substantially higher than it did and still have been well within historical norms. The Texas district court judge who enjoined the rule and who declared the rule invalid—Judge Amos Mazzant—based his decisions on fundamentally flawed economic logic. Below we list the flawed economic claims underlying Judge Mazzant’s decisions, and we show why those claims have no basis in reality.



Claim: The threshold was set so high it rendered the duties test moot.

In particular, Judge Mazzant claimed that “with the Final Rule, the Department exceeds its delegated authority...by raising the minimum salary level such that it supplants the duties test...This significant increase to the salary level creates essentially a de facto salary-only test.”⁴

The reality: The idea that 2016 salary threshold was so high that it displaced the role of the duties test is flatly refuted by the analysis in the rule itself.

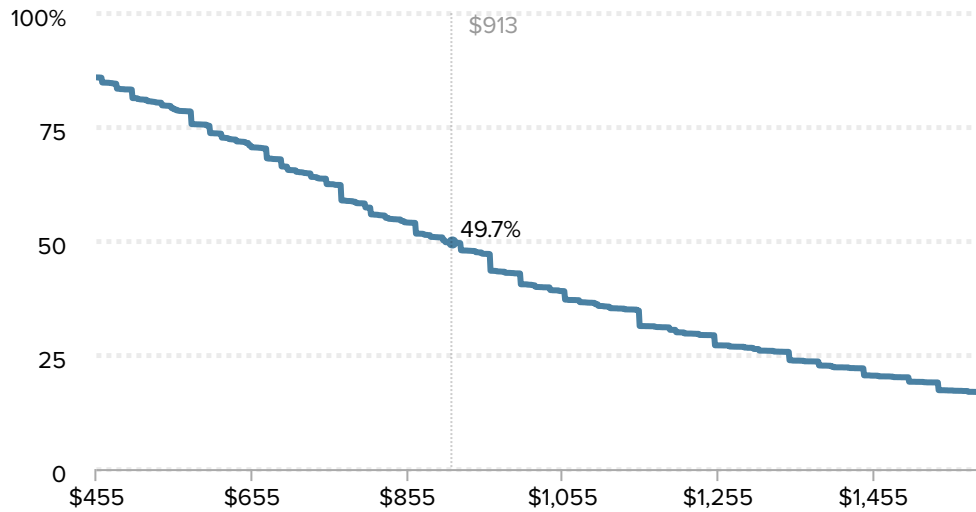
The 2016 final rule showed that among white-collar workers who failed the duties test—and were thus eligible for overtime—nearly half earned *above* the 2016 salary level. This means that among white-collar salaried workers who were eligible for overtime as a result of their duties, nearly half had their overtime-eligible status determined by the duties test alone, demonstrating that the duties test was not remotely “displaced” by the 2016 salary threshold but was, in fact, essential.⁵

Figure A recreates part of a figure from the 2016 final rule,⁶ which models how the determination of overtime-eligibility plays out across a range of hypothetical salary thresholds from \$455 to \$1,600. At the 2016 salary threshold—\$913 on a weekly basis, \$47,476 for a full-year worker—nearly half (49.7%) of white-collar salaried workers who failed the duties test had earnings at or above the threshold and thus had their overtime-eligible status determined by the duties test alone. The figure also shows that, as would be expected, the share that would have their overtime-eligibility determined by the duties test alone declines as the wage threshold increases.

Figure A

What share of white-collar salaried workers whose duties make them overtime-eligible have their overtime-eligibility determined by the duties test alone?

Among white-collar salaried workers who fail the duties test, share that earn above the salary threshold, pooled 2015–2017 data



Source: Economic Policy Institute (EPI) analysis of Current Population Survey Outgoing Rotation Group microdata, pooled 2015–2017, EPI Current Population Survey Extracts, Version 1.0.28 (2022), <https://microdata.epi.org>, following the methodology used to generate Figure 3 in the U.S. Department of Labor’s 2016 *final rule*, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541 (published May 23, 2016).

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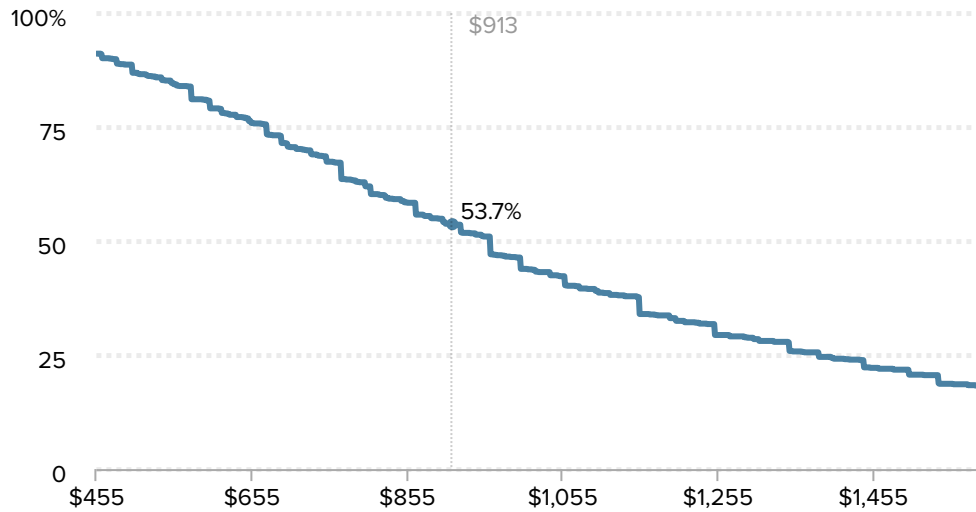
A similar pattern holds when we restrict the analysis to only those white-collar salaried workers who work full time, which is the group most impacted by the rule. **Figure B** is similar to Figure A but includes only full-time workers. Figure B demonstrates that at the 2016 salary threshold more than half (53.7%) of full-time white-collar salaried workers who failed the duties test earned at or above the threshold, which means their overtime-eligible status would have been determined by the duties test alone. This establishes the factual incorrectness of the idea that the 2016 salary threshold rendered the duties test moot.

A more reasonable interpretation of the data summarized in Figure B is that under the 2016 threshold, the duties test would have been relied on *far too much*. As noted, more than half of full-time white-collar salaried workers who failed the duties test earned at or above the 2016 threshold, so they would have depended on the duties test alone for their eligibility. But because of weak compliance as a result of enforcement challenges and the fact that the duties test is not a bright-line measure, many of those workers would have been misclassified as ineligible for overtime and been vulnerable to wage theft. To avoid misclassification and related wage theft, the salary threshold should be set high enough that a significantly smaller share of white-collar salaried workers who fail the duties test earn at or above the salary threshold.

Figure B

What share of full-time white-collar salaried workers whose duties make them overtime-eligible have their overtime-eligibility determined by the duties test alone?

Among white-collar salaried workers who fail the duties test, share that earn above the salary threshold, pooled 2015–2017 data



Note: Full time is defined as 35+ hours per week at work.

Source: Economic Policy Institute (EPI) analysis of Current Population Survey Outgoing Rotation Group microdata, pooled 2015–2017, EPI Current Population Survey Extracts, Version 1.0.28 (2022), <https://microdata.epi.org>, following the methodology used to generate Figure 3 in the U.S. Department of Labor’s 2016 *final rule*, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541 (published May 23, 2016).

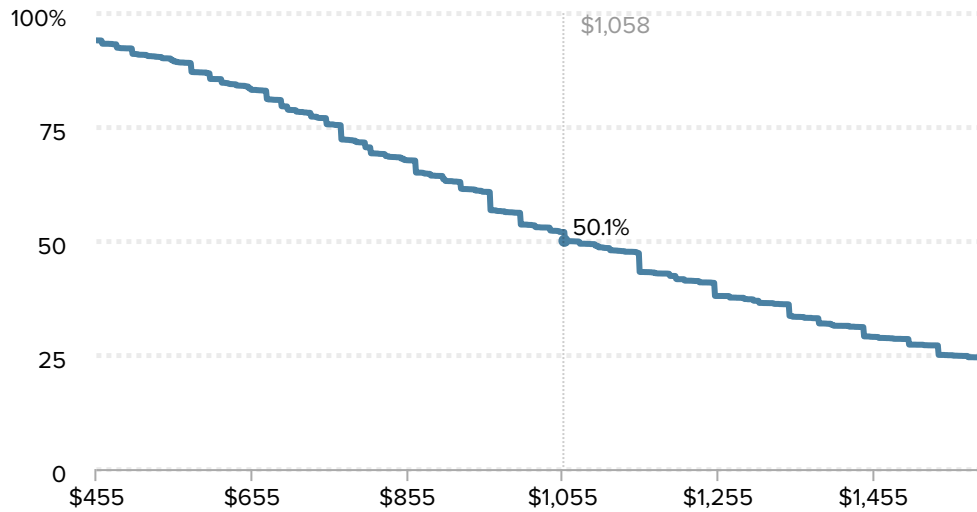
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Figure C reproduces the same analysis for full-time, salaried white-collar workers as in Figure B, but uses pooled 2019–2021 data. If the 2016 salary threshold had been updated annually (instead of every three years as the 2016 final rule dictated), then on January 1, 2022, it would have been updated to the 40th percentile of weekly earnings of full-time salaried workers in the South⁷ in the second quarter of 2021, which was \$1,058, or \$55,016 for a full-year worker. Figure C shows that 50.1% of full-time white-collar salaried workers who failed the duties test in 2019–2021 earned at or above the updated 2016 threshold, and that share would be even higher in 2022 given that prices and wages have risen in the meantime. In other words, the duties test would have remained crucial under automatic updating of the 2016 threshold.

Figure C

What share of full-time white-collar salaried workers whose duties make them overtime-eligible have their overtime-eligibility determined by the duties test alone?

Among white-collar salaried workers who fail the duties test, share that earn above the salary threshold, pooled 2019–2021 data



Note: Full time is defined as 35+ hours per week at work.

Source: Economic Policy Institute (EPI) analysis of Current Population Survey Outgoing Rotation Group microdata, pooled 2019–2021, EPI Current Population Survey Extracts, Version 1.0.28 (2022), <https://microdata.epi.org>, following the methodology used to generate Figure 3 in the U.S. Department of Labor’s 2016 *final rule*, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541 (published May 23, 2016).

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Claim: The 2004 level was an appropriate level.

In particular, Judge Mazzant claimed that “the use of a minimum salary level in this manner [near the low end of the range of salaries for employees Congress intended to exempt, as was done in 2004] is consistent with Congress’s intent.”⁸

The reality: The methodology for setting the standard salary threshold in the 2004 rule was fundamentally flawed.

Prior to the 2004 rule, there were two sets of tests for exemption, each of which involved a duties test and a salary test. The duties test and salary test within each set had always worked together.⁹ One set of tests was the “long-test” set, which combined a stringent duties test (which included a 20% cap—40% in retail—on the amount of time that overtime-exempt employees could spend on nonexempt duties) with a lower salary threshold. The other was the “short-test” set, which combined a much more lenient duties test with a higher salary threshold. Thus, an employer who wanted to assert that a relatively low-paid employee was exempt had to show more rigorously that their duties were “bona fide executive, administrative, or professional” (EAP) in nature, whereas for a more highly paid employee, the employer did not have to make as rigorous a case.

In the 2004 rule, DOL included just one set of tests. For this set of tests, DOL created a “standard” duties test that was essentially the more lenient “short test” for duties. To remain consistent with the prior methodology, DOL should have paired this duties test with a higher salary threshold consistent with a short duties test. Instead, it used a lower salary level consistent with a long duties test. This was a fundamental error.

In the 2004 final rule, DOL at one point implied that its methodology for setting the standard salary threshold at least in part accounted for the elimination of the long test, saying that it chose its methodology in part because of the change from the “short” and “long” test structure.¹⁰ But the fact that the 2004 threshold—\$455 weekly or \$23,660 for a full-year worker—did not in fact account for the elimination of the long test, and instead paired the more lenient duties test with a long-test threshold, is revealed by DOL in numerous places, including in Table 6 of the 2004 final rule, where \$455 is referred to as a long-test salary level; in Table 4 of the 2004 final rule, which shows that \$455 is in fact somewhat *lower* than a long-test threshold, with only 8.2% of exempt workers failing to meet the \$455 salary level in the South, less than the 10% previously used to set the long-test salary level; and in the 2017 request for information, in which DOL notes that “the \$455 per week salary level was equivalent to the lower salary level that would have resulted from the methodology DOL previously used to set the lower long-test salary levels.”¹¹ In other words, any claim that DOL accounted—at all—for the elimination of the long test in 2004 is wholly refuted by DOL’s own statements and data.

Because of the mismatch between the duties test and the salary threshold in the 2004

rule, the methodology from the 2004 rule is not appropriate. One predictable result of the mismatch in the 2004 rule is the misclassification of hundreds of thousands of overtime-eligible employees as exempt. A RAND study identifying the number of workers who may be misclassified as EAP exempt found that 11.5% of salaried workers who did not pass the duties test were classified as exempt.¹²

Because DOL erred in 2004 and paired a “short” duties test with a low, “long-test” salary threshold, the only way the 2004 methodology for calculating the standard salary threshold could be used appropriately would be if DOL were to strengthen the duties test to align with the historical long test and account for Congress’s intent that only bona fide executive, administrative, and professional employees be exempt from overtime pay. For example, DOL could set a bright-line duties test requiring a strong majority of a worker’s work to be exempt, as previous rules did. Because a *long* duties test includes a limit on the amount of nonexempt work that could be performed, it could be paired with a low salary that excluded few employees performing EAP duties. Strengthening the duties test would also promote the proper classification of workers who have limited professional or managerial duties and who are not bona fide EAP workers.



Claim: The threshold excludes from exemption entire categories of workers that have traditionally been covered by exemption.

In particular, Judge Mazzant claimed that “entire categories of previously exempt employees who perform ‘bona fide executive, administrative, or professional capacity’ duties would now qualify for the EAP exemption based on salary alone.”¹³

The reality: The 2016 final rule does not exclude from exemption entire categories of workers that have traditionally been covered by the exemption.

To show this, we calculated, by occupation, the share of full-time salaried workers who are exempt under the salary threshold in the 2016 final rule and showed that none of the occupations that could plausibly be defined as being “excluded from exemption” under the 2016 final rule were traditionally covered by exemption. This means that there are no occupations that were traditionally covered by exemption that the 2016 final rule excluded from exemption.

In the calculation, we use the same 250+ detailed white-collar occupations that were used in both the 2004 and 2016 final rules. **Table 1** shows all white-collar occupations in which the share of salaried workers who are exempt under the 2016 final rule is equal to or below 20%. This is a very high cutoff for “exclusion from exemption,” as anything above 20% would mean that more than 1 in 5 salaried workers in the occupation are exempt, a far cry from exclusion. We selected this high of a cutoff for illustrative purposes. To identify the occupations in this group that were *traditionally* covered by the exemption, the table also

shows the share of salaried workers who are exempt under the salary level set in the 2004 final rule. Again for illustrative purposes, we picked an intentionally weak cutoff for “traditionally covered by the exemption”—more than 50% exempt under the 2004 salary threshold.

This cutoff for “traditionally covered by exemption” is even weaker than it may seem at first blush, for two reasons. First, we have discussed above how, due to the mismatch between the salary threshold and the duties test in the 2004 rule, the 2004 salary threshold resulted in a large share of workers being exempt who should have been overtime-eligible. In other words, 50% exempt under the 2004 salary threshold means that substantially less than half would be “traditionally” covered by exemption under a rule that did not suffer from such a mismatch. Even further, the 2004 threshold was 12 years old when the 2016 final rule was published and so its value has eroded substantially as prices and wages rose in the meantime, resulting in a sizeable share of workers being classified as exempt under that threshold in 2016 who would have been overtime-eligible under the 2004 rule at the time it was published.

We restrict this analysis to full-time workers because those are the workers most impacted by the rule, but an analysis that also includes part-time workers yields similar results. There are a total of 35.0 million full-time salaried workers nationwide in white-collar occupations. Table 1 shows that there are 88 white-collar occupations, representing 5.8 million full-time salaried workers, in which 20% or less of those workers would be exempt under the 2016 final rule. In 81 of those occupations, 6% or less of full-time salaried workers are exempt under the 2016 threshold—meaning that the occupation is indeed largely “excluded from exemption” under the 2016 threshold—but in all but one of those occupations, 6% or fewer are exempt under the 2004 threshold as well, meaning these occupations are traditionally exempt occupations and the 2016 rule did not change that.

Moreover, in none of the remaining seven occupations would more than 50% of full-time salaried workers have been exempt under the 2004 threshold. In other words, we find no full-time white-collar salaried workers in occupations that meet an even extremely lax definition of being “excluded from exemption but traditionally covered by the exemption.” It is also worth noting that there is a very high and statistically significant correlation ($r=0.968$) between the percentage of an occupation that is exempt under the 2004 threshold and the 2016 threshold. This suggests that the 2016 rule was highly consistent with exemption status under the prior rule.

Table 1

Share of full-time salaried workers who are overtime-exempt under the 2004 and 2016 salary levels, by detailed occupation

Includes all white-collar occupations in which the overtime-exempt share under the 2016 salary level is 20% or less, pooled 2015–2017 data

Occupation	Total number of salaried workers	Share exempt under 2016 salary level (\$913 per week)	Share exempt under 2004 salary level (\$455 per week)
<i>Gaming cage workers</i>	400	0%	5%
<i>Telephone operators</i>	4,600	1%	4%
<i>Hosts and hostesses, restaurant, lounge, and coffee shop</i>	11,700	1%	5%
<i>Tellers</i>	46,300	2%	5%
<i>Phlebotomists</i>	13,000	2%	5%
<i>Proofreaders and copy markers</i>	1,600	2%	5%
<i>Pharmacy aides</i>	4,400	2%	5%
<i>Medical transcriptionists</i>	7,000	3%	6%
<i>Medical assistants</i>	81,700	3%	5%
<i>Receptionists and information clerks</i>	181,100	3%	5%
<i>Data entry keyers</i>	57,500	3%	5%
<i>Teacher assistants</i>	220,800	3%	5%
<i>Hotel, motel, and resort desk clerks</i>	16,400	3%	5%
<i>First-line supervisors/managers of personal service workers</i>	40,600	3%	5%
<i>File clerks</i>	38,400	3%	5%
<i>Office clerks, general</i>	309,000	3%	5%
<i>First-line supervisors/managers of housekeeping and janitorial workers</i>	66,000	3%	5%
<i>Library assistants, clerical</i>	14,000	3%	6%
<i>Human resources assistants, except payroll and timekeeping</i>	17,200	3%	5%
<i>Shipping, receiving, and traffic clerks</i>	73,500	3%	5%
<i>Cashiers</i>	216,600	3%	5%
<i>Bill and account collectors</i>	41,400	3%	5%
<i>Mail clerks and mail machine operators, except postal service</i>	12,900	3%	5%
<i>Word processors and typists</i>	26,100	3%	6%
<i>Switchboard operators, including answering service</i>	1,400	3%	6%
<i>Parts salespersons</i>	22,000	3%	5%
<i>Animal trainers</i>	12,300	3%	5%
<i>Miscellaneous health care support occupations, including medical equipment preparers</i>	15,800	3%	5%
<i>Couriers and messengers</i>	42,800	3%	5%
<i>Dispatchers</i>	77,700	3%	5%
<i>Billing and posting clerks and machine operators</i>	106,800	3%	5%
<i>Weighers, measurers, checkers, and samplers, record-keeping</i>	10,100	3%	5%
<i>Secretaries and administrative assistants</i>	915,300	3%	5%
<i>Veterinary assistants and laboratory animal caretakers</i>	4,600	3%	5%

Table 1
(cont.)

Occupation	Total number of salaried workers	Share exempt under 2016 salary level (\$913 per week)	Share exempt under 2004 salary level (\$455 per week)
<i>Door-to-door sales workers, news and street vendors, and related workers</i>	19,600	3%	5%
<i>Health practitioner support technologists and technicians</i>	77,900	3%	5%
<i>Travel agents</i>	26,100	3%	5%
<i>Information and record clerks, all other</i>	38,300	4%	5%
<i>Office machine operators, except computer</i>	6,300	4%	6%
<i>Bookkeeping, accounting, and auditing clerks</i>	287,200	4%	6%
<i>First-line supervisors of farming, fishing, and forestry workers</i>	4,200	4%	6%
<i>Order clerks</i>	26,800	4%	5%
<i>Interviewers, except eligibility and loan</i>	25,700	4%	5%
<i>Models, demonstrators, and product promoters</i>	7,600	4%	6%
<i>Payroll and timekeeping clerks</i>	48,300	4%	5%
<i>Court, municipal, and license clerks</i>	32,500	4%	5%
<i>Office and administrative support workers, all other</i>	185,300	4%	5%
<i>Licensed practical and licensed vocational nurses</i>	95,700	4%	5%
<i>Reservation and transportation ticket agents and travel clerks</i>	34,200	4%	5%
<i>Medical records and health information technicians</i>	32,600	4%	5%
<i>Retail salespersons</i>	592,400	4%	5%
<i>Counter and rental clerks</i>	24,700	4%	5%
<i>Agricultural and food science technicians</i>	7,000	4%	5%
<i>Postal service clerks</i>	26,700	4%	5%
<i>Library technicians</i>	5,500	4%	5%
<i>Communications equipment operators, all other</i>	2,800	4%	5%
<i>Paralegals and legal assistants</i>	186,200	4%	5%
<i>Computer operators</i>	24,200	4%	5%
<i>Miscellaneous life, physical, and social science technicians</i>	67,400	4%	5%
<i>Surveying and mapping technicians</i>	21,100	4%	5%
<i>First-line supervisors/managers of construction trades and extraction workers</i>	214,200	4%	5%
<i>Meter readers, utilities</i>	6,000	4%	5%
<i>Cargo and freight agents</i>	8,000	4%	5%
<i>New accounts clerks</i>	9,300	4%	5%
<i>Production, planning, and expediting clerks</i>	103,700	4%	5%
<i>Private detectives and investigators</i>	32,900	4%	5%
<i>Financial clerks, all other</i>	34,300	4%	5%
<i>Postal service mail carriers</i>	89,200	5%	5%
<i>Chemical technicians</i>	22,600	5%	5%
<i>Postal service mail sorters, processors, and processing machine operators</i>	13,900	5%	5%
<i>Statistical assistants</i>	5,100	5%	5%
<i>Engineering technicians, except drafters</i>	109,000	5%	5%
<i>Telemarketers</i>	8,700	5%	5%

Table 1
(cont.)

Occupation	Total number of salaried workers	Share exempt under 2016 salary level (\$913 per week)	Share exempt under 2004 salary level (\$455 per week)
<i>Procurement clerks</i>	11,600	5%	6%
<i>Computer control programmers and operators</i>	9,300	5%	6%
<i>Geological and petroleum technicians</i>	6,200	5%	5%
<i>Drafters</i>	42,300	5%	5%
<i>Broadcast and sound engineering technicians and radio operators</i>	36,000	5%	6%
<i>Aircraft pilots and flight engineers</i>	17,800	5%	6%
<i>Brokerage clerks</i>	2,400	5%	6%
<i>Biological technicians</i>	10,300	6%	6%
<i>Air traffic controllers and airfield operations specialists</i>	3,900	14%	21%
<i>First-line supervisors/managers of food preparation and serving workers</i>	110,000	15%	28%
<i>First-line supervisors/managers of landscaping, lawn service, and groundskeeping workers</i>	42,500	17%	28%
<i>Insurance claims and policy processing clerks</i>	75,500	18%	30%
<i>Loan interviewers and clerks</i>	48,700	19%	30%
<i>Eligibility interviewers, government programs</i>	20,000	19%	30%
<i>Social and human service assistants</i>	73,100	19%	29%

Note: Full time is defined as 35+ hours per week at work.

Source: Economic Policy Institute (EPI) analysis of Current Population Survey Outgoing Rotation Group microdata, pooled 2015–2017, EPI Current Population Survey Extracts, Version 1.0.28 (2022), <https://microdata.epi.org>.

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Claim: The threshold gave new overtime protections to too many workers.

In particular, Mazzant claimed that “the Department estimates 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible for overtime under the Final Rule without change to their duties....Because the Final Rule would exclude so many employees who perform exempt duties, the Department fails to carry out Congress’s unambiguous intent.”¹⁴

The reality: The raw number of workers affected by any increase in the salary threshold is not an informative metric to use to assess whether the threshold is appropriate.

The raw number affected is the product of factors that are wholly unrelated to the appropriateness of the threshold, including how long it has been since the prior update in the threshold and whether the prior threshold itself was set at an appropriate level.

The longer it has been since the previous update, the more workers will be affected, as inflation and the overall wage structure rise over time, eroding the effective level of the threshold. In the case of the 2016 update, it had been over a decade since the 2004 update in the threshold. And given, as explained above, that the 2004 threshold had been set inappropriately low, the number of workers affected would need to be larger to correct the earlier error.

The number of workers affected by any increase in the salary threshold can be decomposed into two main components: workers affected as a result of the passage of time since the previous update, and workers affected as a result of any change in methodology from the previous update. One way to isolate the “time” component is to simply look at how many workers would have been affected as a result of the 2016 rule if the methodology had been the same in 2004 and 2016—that is, if the 2004 threshold had been set at the 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage census region, as it was in 2016.

In 2002—the data year the 2004 threshold is based on—the 40th percentile of the weekly earnings of full-time salaried workers in the lowest-wage census region, the South, was \$660. If in 2016 the threshold had been increased from \$660 to \$913 instead of from \$455 to \$913, the number of workers affected would have been 2.9 million.¹⁵ That means that all but 1.2 million workers affected by the 2016 rule were affected as a result of the erosion of the effective level of the threshold since the prior update as inflation and the overall wage structure rise over time, not as a result of the change in methodology. The remaining 1.2 million workers were affected as a result of the change in methodology from the flawed 2004 methodology to the more appropriate methodology of the 2016 final rule.

It is important to note that if DOL is ever concerned about the number of workers affected in a given year by raising the salary threshold to an appropriate level, it could simply phase in the threshold over a period of several years.

Conclusion

The economic logic behind the decision to invalidate the 2016 final rule was deeply flawed and must not be used as a reason for DOL to not do another rulemaking with a much more appropriate salary threshold—a salary threshold not just as high as the updated threshold from the 2016 final rule, but one that is substantially higher.

As mentioned above, under the 2016 threshold, the duties test would have been relied on *far too much*—far too large a share of full-time white-collar salaried workers who failed the duties test earned at or above the 2016 threshold, and so would have depended on the duties test alone for their eligibility, which would make them vulnerable to misclassification and wage theft. The salary threshold should be set high enough that a much smaller share of white-collar salaried workers who fail the duties test earn at or above it.

A final point worth emphasizing is that *the duties test remains important for determining exempt status at all plausible salary thresholds*. **Figure D** repeats Figure C above, but with a few additional points labeled. This new version of the figure shows that at the updated threshold from the 2016 final rule, 50.1% of full-time white-collar salaried workers had earnings at or above the threshold. Many of these workers would be vulnerable to misclassification and wage theft.

But substantially fewer workers—40.8% of full-time white-collar salaried workers who fail the duties test—have earnings at or above \$1,250 per week or \$65,000 for a full-year worker, which is what the threshold would be today if it were set at the 50th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region or if it were set at the 45th percentile of weekly earnings of full-time salaried workers nationwide.¹⁶

Figure D also shows that less than one-third (31.1%) of full-time white-collar salaried workers who fail the duties test have earnings at or above \$1,442, or \$74,984 for a full-year worker, which is what the threshold would be if it were set at the 55th percentile of weekly earnings of full-time salaried workers nationwide, which, as described above, is the upper end of the historical range of salary thresholds.

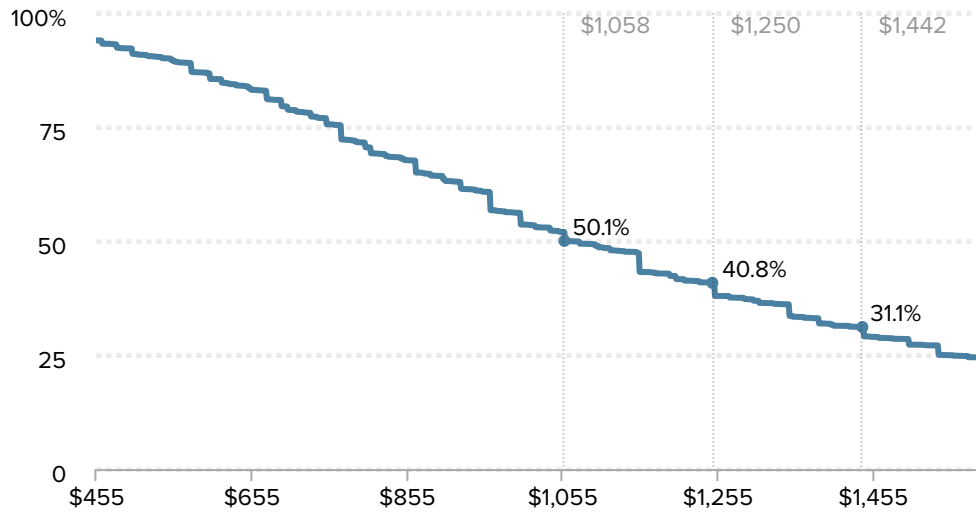
These calculations show that even at the highest end of the range of plausible salary thresholds, the duties test is not rendered moot but instead remains the only way a large swath of full-time white-collar salaried workers who should be eligible for overtime have their overtime-eligible status determined.

In other words, the salary threshold can be set substantially higher than the salary threshold in the 2016 final rule and still easily avoid the concerns raised by the district court that invalidated the 2016 rule. Further, *not* setting a salary threshold that is substantially higher than the salary threshold in the 2016 final rule would knowingly

Figure D

What share of full-time white-collar salaried workers whose duties make them overtime-eligible have their overtime-eligibility determined by the duties test alone?

Among white-collar salaried workers who fail the duties test, share that earn above the salary threshold, pooled 2019–2021 data



Note: Full time is defined as 35+ hours per week at work.

Source: Economic Policy Institute (EPI) analysis of Current Population Survey Outgoing Rotation Group microdata, pooled 2019–2021, EPI Current Population Survey Extracts, Version 1.0.28 (2022), <https://microdata.epi.org>, following the methodology used to generate Figure 3 in the U.S. Department of Labor’s 2016 final rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 29 CFR Part 541 (published May 23, 2016).

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expose a greater number of lower-earning salaried workers to misclassification and wage theft.

Notes

1. Heidi Shierholz, “More Than Eight Million Workers Will Be Left Behind by the Trump Overtime Rule.” *Working Economics Blog* (Economic Policy Institute), September 25, 2019.
2. Celine McNicholas, Samantha Sanders, and Heidi Shierholz, *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*, Economic Policy Institute, November 2017.
3. 80 Fed. Reg. 38534 (July 6, 2015).
4. *State of Nevada v. United States Department of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
5. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule]*, 81 Fed. Reg. 32465 (May 23, 2016).

6. 81 Fed. Reg. 32465 (May 23, 2016). Figure 3.
7. The South here refers to one of the four designated Census Bureau regions.
8. *State of Nevada v. United States Department of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017)
9. “DOL has always recognized that the salary level test works in tandem with the duties requirements to identify bona fide EAP employees and protect the overtime rights of nonexempt white collar workers” ([Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[final rule\]](#), 81 Fed. Reg. 32444 [May 23, 2016]).
10. [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[final rule\]](#), 69 Fed. Reg. 22167 (April 23, 2004)
11. [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[final rule\]](#), 69 Fed. Reg. 22121 (April 23, 2004); [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[request for information\]](#), 82 Fed. Reg. 34616 (July 26, 2017).
12. [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees \[proposed rule\]](#), 84 Fed. Reg. 10943 (March 22, 2019).
13. *State of Nevada v. United States Department of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).
14. *State of Nevada v. United States Department of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).
15. Heidi Shierholz, “[EPI Comments Regarding the Department of Labor’s Proposed Overtime Rule](#),” comments submitted to the Department of Labor, Economic Policy Institute, May 21, 2019.
16. These are calculated using data from the second quarter of 2021, which are the data that would have been used to update the 2016 rule on January 1, 2022, if the threshold had been updated annually instead of every three years.