

## **Testimony of Judith M. Conti**

National Employment Law Project

# **DOL's Proposed Overtime Rule**

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## **Hearing before the United States House of Representatives**

Committee on Education and the Workforce

Subcommittee on Workforce Protections

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**Judith M. Conti**  
Government Affairs Director

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**National Employment Law Project**  
90 Broad St, Suite 1100  
New York, NY 10004

## Testimony of Judith M. Conti

Good morning, Chairman Kiley, Ranking Member Adams, and members of the committee. My name is Judy Conti, and I am the Government Affairs Director at the National Employment Law Project (NELP), a leading advocacy organization with the mission to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs. NELP has over 50 years of experience advocating for the employment and labor rights of workers paid low wages. NELP seeks to ensure that all employees receive the workplace protections guaranteed in U.S. labor and employment laws, including fair pay and compensation for working excessive hours.

I am grateful for the opportunity to testify at this hearing to discuss why NELP supports the U.S. Department of Labor's (DOL) proposed rule to strengthen and expand overtime protections to include more workers across the country. This proposed rule is an important, though modest, step toward addressing the extremely low salary threshold that results in millions of workers being misclassified as overtime exempt each year. This updated rule will increase the number of workers who will be automatically entitled to overtime compensation and help bring relief both to workers struggling to make ends meet and to those who work too many hours and want some of their time back for personal use.

In my testimony, I will make three primary points:

1. The proposal corrects the previous overly broad exemptions that were stretched to include non bona fide Executive, Administrative, and Professional (EAP) workers who most need the FLSA's protections and often lack power in their workplaces to assert their rights to overtime.
2. By raising the salary threshold to \$55,068 per year, or \$1,059 per week, DOL provides enhanced protections for millions of workers who are working more than 40 hours per week for no additional compensation. Employers can respond by paying those workers more, managing their time more efficiently, or by hiring additional workers, which bolsters workers' lives and communities, and fuels economic growth.
3. By automatically updating this salary threshold, DOL will ensure that overtime protections do not stagnate, that they keep up with actual economic conditions for workers, and that employers will have the predictability of regular and modest adjustments to overtime eligibility that they can plan for in advance.

### **The Proposed Rule Corrects the Current Overly Broad Exclusions of Workers who are not Bona Fide Executive, Administrative, or Professional Employees from Overtime Protections.**

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Congress passed the FLSA to “lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions,” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, by “insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.” *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), quoting Message of the President to Congress, May 24, 1934; 29 U.S.C. §

202(a). Among other things, the Act shields workers from oppressively long working hours and “labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. § 202(a); *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941).

The FLSA’s guarantee of premium pay for overtime hours was meant to encourage employers to spread out extra work to more employees, instead of giving more hours to fewer employees. *Overnight Motor Transport v. Missel*, 316 at 576. Workers protected by the FLSA are presumed entitled to the overtime premium unless they are explicitly exempted under the terms of the Act. Relevant to these comments, section 213(a)(1) exempts “bona fide executive, administrative or professional employees” from minimum wage and overtime coverage. Congress did not define or delimit those terms, instead leaving it to the Secretary of Labor to do so “from time to time by regulations.”<sup>1</sup>

The EAP exemptions apply only to “bona fide” EAP workers, to distinguish them from a general exemption for so-called “white-collar” workers or even from the subset of all EAP employees.”<sup>2</sup> Of the exemptions included in the originally-enacted FLSA, the EAP exemptions are the only ones to use the qualifier of “in a bona fide capacity” for the class of workers to which the exemptions apply.<sup>3</sup> These exemptions are based on the understanding that bona fide EAP employees have more power in the workplace and can set their own schedules and negotiate their own pay and benefits.<sup>4</sup> The EAP definitions were meant to be limited to workers who earned salaries well above the minimum wage and those that earned privileges above the baseline fringe benefits that set them apart from non-exempt workers entitled to overtime pay.<sup>5</sup> Congress also anticipated that exempt workers performed the type of work that was “not easily standardized to a particular period and could not be easily spread to other workers after 40 hours in a week.”<sup>6</sup>

The NPRM proposes objective measures to define and delimit the scope of the exemptions, noting that titles or job descriptions by themselves are not dispositive, and nor is simply paying someone a salary.<sup>7</sup>

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<sup>1</sup> 29 U.S.C. § 213(a).

<sup>2</sup> Congressional Research Service Report R45007 (October 31, 2017), pp. 3-4, (“As noted in the supporting analysis for the 1940 rule, ‘if Congress had meant to exempt all white-collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act.’”) See Harold Stein, “Executive, Administrative, Professional...Outside Salesman Redefined”, U.S. Department of Labor, Wage and Hour Division, Washington, DC, October 10, 1940, pp. 6-7 (hereafter cited as “Stein Report”).

<sup>3</sup> Congressional Research Service Report R45007, p. 4.

<sup>4</sup> Report of the Minimum Wage Study Commission Volume IV, pp. 236 & 240 (June 1981).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., 88 Fed. Reg. 62157.

This adjustment is necessary because the current salary threshold is so low that it encourages and allows employers to misclassify millions of workers as overtime exempt who should be receiving overtime. In January 2023, the National Bureau of Economic Research (NBER) released new research documenting the prevalence of this practice.<sup>8</sup> The abstract for the paper tells the story:

We find widespread evidence of firms appearing to avoid paying overtime wages by exploiting a federal law that allows them to do so for employees termed as “managers” and paid a salary above a pre-defined dollar threshold. We show that listings for salaried positions with managerial titles exhibit an almost five-fold increase around the federal regulatory threshold, including the listing of managerial positions such as “Directors of First Impression,” whose jobs are otherwise equivalent to non-managerial employees (in this case, a front desk assistant). Overtime avoidance is more pronounced when firms have stronger bargaining power and employees have weaker rights. Moreover, it is more pronounced for firms with financial constraints and when there are weaker labor outside options in the region. We find stronger results for occupations in low-wage industries that are penalized more often for overtime violations. Our results suggest broad usage of overtime avoidance using job titles across locations and over time, persisting through the present day. Moreover, the wages avoided are substantial—we estimate that firms avoid roughly 13.5% in overtime expenses for each strategic “manager” hired during our sample period.

The researchers concluded that in 2019 alone, employers used job titles to avoid paying overtime on 151 million employee hours, worth about \$4 billion in money stolen from workers. The average worker lost about 13.5 percent of their salary based on this misclassification. Clearly, this is a problem DOL needs to mitigate, and given the scope and consequences of this misclassification, it must be done through regulations.

### **The Proposed Increase to the Salary Threshold is a Better Indicator of Who Should Fall Within the Exemption**

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By raising the salary threshold to the historically modest \$55,068 per year (\$1,059/ week)<sup>9</sup> and pegging it to the lowest cost of living region in the country, DOL will provide new and enhanced protections for millions of workers who are working more than 40 hours per

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<sup>8</sup> Lauren Cohen, Umit Gurun & N. Bugra Ozel, “Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments,” National Bureau of Economic Research, Working Paper 30826 (January 2023), <https://www.nber.org/papers/w30826#:~:text=Too%20Many%20Managers%3A%20The%20Strategic%20Use%20of%20Titles%20to%20Avoid%20Overtime%20Payments,-Lauren%20Cohen%2C%20Umit&text=We%20find%20widespread%20evidence%20of,a%20pre%20Ddefined%20dollar%20threshold.>

<sup>9</sup> As the Economic Policy Institute details in its comments for the administrative record, had the relevant 1974 salary threshold for the current duties test merely been updated for inflation, it would stand at \$1,304 per week/\$67,808 per year. The proposed threshold is 19% lower than what it should be had it been merely updated for inflation from 1974. If we go back further in time, the gap between what DOL is proposing and what it’s value in today’s dollars would be grows even larger. Moreover, in 1975, 62.5% of full-time, salaried workers earned less than the overtime salary threshold. DOL’s current proposal would only cover 28.2% of the current full-time, salaried workforce. See, <https://www.regulations.gov/comment/WHd-2023-0001-26255>, pp.2-3.

week without premium pay. This is a much-needed adjustment to the inadequate current level of \$684 a week, which means that a person who works full time making \$35,568 a year could be characterized as a bona fide EAP employee and be required to work long hours without any extra compensation.

An even higher threshold would better encompass workers at the lower end of the earnings scale who are intended to be covered. Earlier this year, at a Congressional hearing, Democratic lawmakers urged then-Secretary Walsh to peg the salary threshold to the 55<sup>th</sup> percentile of earnings, which would set the threshold at \$82,732 by 2026. The Restoring Overtime Pay Act, introduced by Senator Sherrod Brown (D-OH) and Representative Mark Takano (D-CA), would increase the ceiling to around \$75,000 by 2026, followed by annual automatic updates.

Having a salary threshold is an efficient method for marking a bright line for employers and workers, under which no employee can be called exempt. A salary level test has been included in all of the DOL's definitions of the EAP exemptions dating back to the earliest regulations<sup>10</sup> because the "final and most effective check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question."<sup>11</sup> The salary level test has been updated multiple times, and every time the DOL has recognized that the salary level test works in tandem with the duties test to identify bona fide EAP employees.<sup>12</sup> In 1975, the relevant salary threshold was set at a level that meant 63 percent of full-time salaried workers were covered by overtime regardless of their duties. By 2023, that share has dropped to just 9 percent.<sup>13</sup> As a result, the 40-hour workweek no longer exists for millions of underpaid U.S. workers in a wide range of occupations. Workers, including so-called "managers," in fast food chains and retail stores, are routinely asked to work 50, 60, or even 70-hour weeks, pulling them away from their families and communities. Restoring overtime pay protections is crucial for workers seeking greater work-life balance and boosting workers' stagnant paychecks.

A more robust salary threshold is also necessary because of changes to the overtime regulations made by the Bush Administration in 2004. The salary threshold works in tandem with duties tests that are applied to the work done by those who make a salary above the threshold set in regulations. The duties tests are designed to determine who is doing genuinely bona fide EAP work. Prior to the 2004 revisions, most workers who earned more than the salary threshold were measured against a far more rigorous duties test than the one adopted by the Bush Administration.<sup>14</sup> This weaker duties test, when coupled with the lack of transparency and knowledge of how it is applied to each worker, is why, as NBER found, many employers get away with giving workers managerial-sounding job titles, even though their work should not be overtime exempt because their duties do not

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<sup>10</sup> Ross Eisenbrey, Economic Policy Institute, "Updated Overtime Rules Will Help Millions of Middle-Class Workers," Testimony Before the U.S. House of Representatives Subcommittee on Workforce Protections' Hearing on "Examining the Costs and Consequences of the Administration's Overtime Proposal," July 23, 2015, <https://www.epi.org/publication/congressional-testimony-updated-overtime-rules-will-help-millions-of-middle-class-workers/>

<sup>11</sup> *Id.* at pp. 6-7.

<sup>12</sup> 81 Fed. Reg 32391 at 32444 (May 23, 2016).

<sup>13</sup> Under the new rule proposed by the DOL, that share would increase to 28.2 percent.

<sup>14</sup> Ross Eisenbrey, Economic Policy Institute, "Updated Overtime Rules Will Help Millions of Middle-Class Workers," *supra* note 8.

meet the tests. In both the 2015 and 2023 proposed overtime regulations, DOL described and documented how the 2004 weakening of the duties test gutted protections for workers and allowed misclassification and resultant wage theft to thrive.

A stronger salary threshold means that employers will no longer be able to take advantage of unpaid overtime hours for workers earning less than the threshold. Employers have many tools available to manage the new overtime obligations. Assuming the workers' duties pass the duties test, employers can raise salaries over the new threshold, reassess workloads, including better oversight and management of workers' time, hire additional staff, or convert part-time workers to full-time. This shift will foster both a healthier work-life balance and an environment where employees are compensated with fair pay.

The workers who would likely benefit from the salary adjustments are women and people of color who hold the most underpaid jobs even when they are in salaried positions. The Economic Policy Institute estimates that roughly 2 million women, including 700,000 women of color, will benefit from this rule—representing more than half of the 3.6 million affected workers overall.<sup>15</sup>

Many of the establishments DOL expects to be impacted include workers who are underpaid and often work long hours because employers misclassify them as overtime exempt. These industries include construction, retail,<sup>16</sup> food service,<sup>17</sup> hospitals, health care services,<sup>18</sup> and warehousing, Table 31, Fed. Reg. 62227. Many of the workers in these sectors have brought unpaid overtime pay claims.

In 2015, NELP published a report sharing stories of workers who would be impacted by a higher overtime threshold. Their stories still resonate today as workers continue to earn low wages and work long hours, meaning that reforms are sorely needed.<sup>19</sup>

Media reports and litigation have highlighted the problems fueled by a low overtime salary threshold. Employers deliberately understaff their retail and restaurant operations and rely on employees labeled managers who perform large amounts of non-exempt, frontline work.

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<sup>15</sup> Economic Policy Institute analysis of Current Population Survey microdata, 1975-2023.

<sup>16</sup> “Retail workers’ unpaid overtime pay lawsuit reinstated,” Business Insurance, October 16, 2023, [https://www.businessinsurance.com/article/20231016/NEWS06/912360455/Retail-clerks%E2%80%99-FLSA-suit-over-overtime-pay-reinstated-Gabriel-Herrera,-et-al-v](https://www.businessinsurance.com/article/20231016/NEWS06/912360455/Retail-clerks%E2%80%99-FLSA-suit-over-overtime-pay-reinstated-Gabriel-Herrera,-et-al-v;); “Publix employees claim overtime owed,” Grocery Dive, October 31, 2023, <https://www.grocerydive.com/news/publix-lawsuit-hourly-assistant-managers-overtime/698300/>

<sup>17</sup> “You’re Now a ‘Manager.’ Forget About Overtime Pay: New evidence shows that many employers are mislabeling rank-and-file workers as managers to avoid paying them overtime,” N.Y. Times, March 6, 2023, <https://www.nytimes.com/2023/03/06/business/economy/managers-overtime-pay.html>

<sup>18</sup> “Unpaid Overtime in Healthcare,” <https://lipskylowe.com/services/nyc-wage-and-hour-attorney/unpaid-overtime/unpaid-overtime-in-healthcare/>

<sup>19</sup> Judy Conti, “The Case for Reforming Federal Overtime Rules: Stories from America’s Middle Class,” National Employment Law Project, December 2014, <https://s27147.pcdn.co/wp-content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf> (collecting individual worker stories from several retail, oil and gas, and financial service jobs).

For example, assistant store managers who work for the retail chain Burlington are suing for unpaid overtime because they routinely perform non-exempt work, including stocking shelves, operating cash registers, and cleaning floors. Burlington offered plaintiffs an \$11 million proposed settlement, but the judge declined to approve the settlement because all potential plaintiffs have yet to be notified that the lawsuit even exists.<sup>20</sup>

As Paige Murdock, a Dollar General store manager from Eliot, Maine explained, “[b]ecause our overtime hours are free for the company, they make us work 60 to 70 hours a week. I was working so much I couldn’t make it to my church. My family was always asking, ‘Why aren’t you at home, Mom?’ And most of my hours weren’t even spent managing the store, but instead stocking shelves or running the cash register since we never had enough staff.”<sup>21</sup> The New York Times has reported how this practice is common among dollar stores.<sup>22</sup>

Similar practices are common in public sector employment. For example, NELP has been informed about a 38-year-old “assistant director” at a public university in North Carolina. Her job duties include helping students navigate financial aid applications, registering them for classes, helping them apply to graduate schools, and finding resources to help them purchase things like books or food. She is not a manager, she makes a salary of approximately \$40,000 a year and works 45-50 hours a week, with no added compensation for any hours over 40 hours worked per week.

The experiences of the states with overtime thresholds comparable to or higher than the Department’s proposal suggest that the proposal will be manageable for employers. Four states currently have overtime salary thresholds that are substantially higher than the current federal level of \$35,568: Colorado, New York, California, and Washington State. Colorado’s threshold will be \$55,000 as of 2024—approximately the same level as the proposed new federal salary threshold.<sup>23</sup> New York’s will range from \$58,500 to \$62,400 as of 2024.<sup>24</sup> California’s will be \$66,500 as of 2024.<sup>25</sup> And Washington’s will be \$67,725 as of 2024—and will phase up to \$92,560 by 2028.<sup>26</sup> There is no evidence that these higher

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<sup>20</sup> “Burlington Workers Nab Collective Cert. After Axed \$11M Deal,” Law 360, October 31, 2023, [https://www.law360.com/articles/1738755?e\\_id=1827b198-e173-47f5-bcfc-b20f93b336a8&utm\\_source=engagement-alerts&utm\\_medium=email&utm\\_campaign=case\\_updates](https://www.law360.com/articles/1738755?e_id=1827b198-e173-47f5-bcfc-b20f93b336a8&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates)

<sup>21</sup> Rebecca Dixon & Heidi Shierholz, “Time to Expand Overtime Pay,” Democracy Journal, November 1, 2021, <https://democracyjournal.org/arguments/time-to-expand-overtime-pay/>

<sup>22</sup> “‘Everything Going the Wrong Way’: Dollar Stores Hit a Pandemic Downturn,” N.Y. Times, September 30, 2021, <https://www.nytimes.com/2021/09/30/business/dollar-stores-struggling-pandemic.html>

<sup>23</sup> Colo. Overtime and Minimum Pay Standards (“COMPS Order”) #38, 7 CCR 1103-1 (effective 1/1/2022), <https://cdle.colorado.gov/sites/cdle/files/7%20CCCR%201103-1%20COMPS%20Order%20%2338%20%5Baccessible%5D.pdf>

<sup>24</sup> NYS Dep’t of Labor, Proposed Amendments to Section 141-3.2(c)(1)(i)(e)(2) of 12 NYCRR, October 4, 2023, <https://dol.ny.gov/system/files/documents/2023/09/mw-orders-update-9.20.23.pdf>

<sup>25</sup> State of Cal., Dep’t of Indus. Rel., News Release Number: 2023-66, “California’s Minimum Wage to Increase to \$16 per hour in January 2024,” September 26, 2023, <https://www.dir.ca.gov/DIRNews/2023/2023-66.html#:~:text=An%20employee%20must%20earn%20no.to%20meet%20this%20threshold%20requirement.>

<sup>26</sup> Wash. State Dep’t of Labor & Indus., “New salary threshold implementation schedule,” <https://www.lni.wa.gov/forms-publications/f700-207-000.pdf>

salary thresholds have been unmanageable for employers and, in fact, there has been little controversy associated with them.

Indeed, given the complaints of employers that the tight labor market is making it harder for them to hire and retain a good workforce, there couldn't be a better time to enact overtime reforms to make more jobs into better quality jobs. Excessive overtime is associated with negative health effects including cardiovascular disease, chronic fatigue, stress, depression, increased alcohol and tobacco use, hypertension, and mental health issues, among others.<sup>27</sup> Excessive overtime can lead to increased absenteeism, low productivity, low morale, and higher turnover, all of which can lead to significant costs to employers and make their workplaces less attractive to their current workforce and potential job candidates.<sup>28</sup> Workers are increasingly willing to leave jobs where they have to work excessive overtime, especially when not compensated for it, and are even willing to strike over too much overtime work.<sup>29</sup>

When the salary threshold is too low, as it is now, and so many workers who should be covered by overtime protections aren't because of the misclassification that the NBER details, the costs of overwork, including all the negative impacts described above, are overwhelmingly shouldered by workers. The overtime law was passed in the first instance to make sure that when non-exempt workers were made to work more than 40 hours per week, there was an economic cost to the employer and an economic benefit to the worker in the form of time-and-a-half pay.

When finalized, this overtime regulation will give employers even more powerful incentives to better manage the resource of their employees' valuable time, and either return more of it to their workforce, or compensate them for all the hours they work, rather than essentially profiting off of workers' unpaid overtime hours as they do now.

Moreover, to be clear, while the significance of this new regulation will be profound on the affected employees, the overall impact on employers will be quite discrete. According to the Economic Policy Institute, when taking into account both the likely additional wages employers will have to pay and the costs they will have associated with compliance with this new regulation, it will account for a mere 0.023% of the total wage bill employers paid in 2022.<sup>30</sup> Costs will go down in successive years as compliance costs will dissipate and

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<sup>27</sup> The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6617405/>.

<sup>28</sup> How excessive overtime is impacting your organization; <https://www.celayix.com/blog/how-excessive-overtime-is-impacting-your-organization/>.

<sup>29</sup> "Should I stay or should I go? The impact of working time and wages on retention in the health workforce,"

<https://link.springer.com/article/10.1186/1478-4491-12-23>; "Retaining nurses in their employing hospitals and in the profession: Effects of job preference, unpaid overtime, importance of earnings and stress,"

<https://www.sciencedirect.com/science/article/abs/pii/S016885100500299X>; "Overwork and overtime on turnover intention in non-luxury hotels: Do incentives matter?"

[https://www.researchgate.net/publication/341726800\\_Overwork\\_and\\_overtime\\_on\\_turnover\\_intention\\_in\\_non-luxury\\_hotels\\_Do\\_incentives\\_matter](https://www.researchgate.net/publication/341726800_Overwork_and_overtime_on_turnover_intention_in_non-luxury_hotels_Do_incentives_matter); "Striking to End 'Suicide Shifts,' Frito-Lay Workers Ask People to Drop the Doritos," <https://www.npr.org/2021/07/21/1018634768/frito-lay-workers-are-in-the-third-week-of-a-strike-over-wages-and-working-condi>.

<sup>30</sup> See <https://www.regulations.gov/comment/WH01-2023-0001-26255>, p. 9.

employers will have already either raised wages and/or better managed or reassigned work to other employees.

Of course, these costs are aggregate to employers as a whole, but there are many voices of small businesses in the administrative record that also persuasively make the case for both why these regulations are good for business, as well as workers, and why small businesses can comply with them too. Mitch Cahn, President and Founder of Unionwear in Newark, NJ, writes about how his company pays overtime to all supervisory employees earning less than \$52,000 per year and it is one of the many things they do to create good jobs for their workers and their community, and explains how these working conditions lead to higher productivity and lower turnover.<sup>31</sup>

Rebecca Hamilton, Co-Owner and Co-CEO of W.S. Badger Company, a small business with about 80 employees, supports this regulation because she knows that respect for her workers' hours leads to "lower turnover and training costs, less waste and fewer errors, and increased productivity and innovation."<sup>32</sup> Brian England, owner of BA Auto Care in Columbia, MD, refuses to rely on overtime and instead hires additional staff when he needs more labor in his business. He believes that the 40-hour workweek, and the work-life balance it affords, means that his employees are valued, and they "provide better service, better relationships with our customers, work harder, and are more productive."<sup>33</sup> These are but a few of the comments in the record that demonstrate that better overtime policies benefit workers and employers alike.

### **Automatic Updates to the Salary Threshold Will Ensure that Overtime Protections do not Stagnate, and Provide Employers with the Predictability of Regular, Modest Adjustments to Overtime Eligibility.**

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DOL's proposal to update the salary threshold every three years based on what wages workers are earning is an important component of the rule.<sup>34</sup> This component was previewed by DOL in its 2019 Final Rule, where it noted that it expected an update to the threshold in about three years. Historically, this regulation has never been updated that frequently, largely because of the extensive resources needed to promulgate a new regulation, even one that is relatively simple.

Indeed, such a result is to be expected. DOL let the 1975 salary threshold stand until 2004. It was not until 2015 that the Obama Administration proposed to update the 2004 threshold. Due to a legal challenge to that final regulation and a change in administration, it was not until 2019 that the threshold was updated to the current level that was not only insufficient at the start, but which has eroded substantially because of inflation and wage growth over the past few years. Four years after the pronounced intent to update every three years, this NPRM proposes a more efficient way to avoid the years-long intervals

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<sup>31</sup> <https://www.regulations.gov/comment/WHD-2023-0001-24589>.

<sup>32</sup> <https://www.regulations.gov/comment/WHD-2023-0001-24075>.

<sup>33</sup> <https://www.regulations.gov/comment/WHD-2023-0001-17785>.

<sup>34</sup> Please see the Comment in the administrative record from Professor Peter Shane and seven additional Administrative Law Professors detailing why DOL has the authority to automatically update the salary threshold. <https://www.regulations.gov/comment/WHD-2023-0001-24233>.

between rulemakings that erode thresholds meant to assist in identifying bona fide EAP employees.

While an annual update would be better for ensuring that the intended workers are protected, automatic updating every third year will help ensure that the salary threshold does not get wildly out of sync with the intent of the threshold and will provide predictability for workers and employers. Employers will benefit from regular, predictable increases that are easily absorbed and implemented rather than larger increases at longer intervals.

The four states noted above—Colorado, New York, California, Washington State, and also Maine—have all provided automatic annual increases in their salary thresholds to keep up with the rising cost of living.<sup>35</sup> This best practice of providing predictability for employers and protecting workers against erosion in the salary threshold has proven successful in these states. The experiences of these states demonstrates why the federal overtime threshold should similarly be updated automatically on a regular basis to help protect against erosion and ensure predictability.

## Conclusion

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DOL’s proposed overtime regulation is a much-needed improvement over the current status quo that fosters a climate of misclassification of millions of workers as overtime exempt which robs them both of wages and their own personal time. The current proposal is a modest one by any historical standards, and is one that employers will not only be able to adjust to, but which will also provide them with a more stable and productive workforce. NELP commends DOL for taking such action and we look forward to working with DOL on implementing this new regulation next year.

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<sup>35</sup> Colo. Overtime and Minimum Pay Standards (“COMPS Order”) #38, 7 CCR 1103-1, Rule 2.5.1, *supra* note 19 (state overtime salary threshold increases each year to keep up with cost of living). N.Y. Labor Law § 652(1) (all “monetary amounts” relating to the state minimum wage, including overtime salary threshold, increase in the same proportion as the minimum wage); *id.* § 652(1-b) (beginning 2027, state minimum wage increases each year to keep up with cost of living). Cal. Labor Code § 515(a) (overtime salary threshold defined as monthly salary equivalent to two times the state minimum wage); Cal. Labor Code § 1182.12(c) (state minimum wage increases each year to keep up with cost of living). Wash. Admin. Code § 296-128-545 (defining salary threshold as a multiple of the state minimum wage, phasing up to 2.5 times the minimum wage by 2028); Rev. Code of Wash. § 49.46.020(2)(b) (state minimum wage increases each year to keep up with cost of living). 26 Maine. Rev. Stat. § 663(3)(K) (overtime salary threshold defined as 3,000 times the state minimum wage); *id.* § 664(1) (state minimum wage increases each year to keep up with cost of living).