

THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

November 7, 2023

By Electronic Filing (<http://www.regulations.gov>)

The Honorable Julie A. Su
Acting Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 88 Fed. Reg. 62,152 (Sep. 8, 2023) RIN 1235-AA39.

Dear Secretary Su and Director DeBisschop:

We write on behalf of the States of Massachusetts, California, New York, Washington D.C., Arizona, Michigan, Rhode Island, Illinois, Pennsylvania, Delaware, New Jersey, Maine, Minnesota, and Colorado (the "State AGs") to support the proposed rulemaking by the U.S. Department of Labor (the "Department" or "DOL") regarding the regulations at 29 C.F.R. part 541, which define exemptions from minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") for certain executive, administrative, and professional ("EAP") employees.

The Department proposes to increase the standard salary level to \$1,059 per week, increase the highly compensated employee total annualized salary threshold to \$143,998, and to add an automatic updating mechanism that would trigger an increase in the salary thresholds every three years. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 88 Fed. Reg. 62,152 (Sep. 8, 2023) (the "Proposed

One Ashburton Place
Boston, MA 02108
(617) 727-2200

700 Pleasant St., Suite 310
New Bedford, MA 02740
(508) 990-9700

10 Mechanic St., Suite 301
Worcester, MA 01608
(508) 792-7600

1441 Main St., 12th Fl.
Springfield, MA 01103
(413) 784-1240

Rule”). The state AGs strongly support all three of the Department’s proposed changes to the current rule.

The undersigned’s enforcement experiences in protecting workers favor adoption of the Proposed Rule. The Proposed Rule updates outdated salary thresholds that have not remained consistent with inflation nor the high cost of living in our respective states. The salary level increases are important for our Offices to effectively protect workers that are misclassified as overtime exempt employees, and the automatic increase is important for employers in our respective states to have predictability in their labor costs.

I. The State AGs Are Interested Parties with Expertise in Labor and Employment Issues

The undersigned state AGs are interested parties with expertise in labor and employment issues. Some State AGs directly investigate and prosecute violations of minimum wage and overtime laws, among other labor laws, while some defend enforcement actions by state departments of labor in administrative or judicial appeals. The minimum wage and overtime laws are among the most basic employee protections, which protect the most vulnerable, low-wage workers. The signatory AGs have an interest in ensuring that the overtime exemption salary thresholds are meaningful and *remain* meaningful to effectively protect against misclassification of EAP employees.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. When the 2019 salary test replaced—and decreased—the 2016 salary level, more than 8 million employees lost overtime protections.¹ The number of employees adversely affected by the salary threshold decreasing in 2019 from \$913 to \$684 is compounded by the fact that there is not an automatic increase attached to the current rule. Therefore, this \$229 delta grows each year as inflation increases. Accordingly, each year that passes, the salary level threshold for overtime exempt employees becomes less meaningful as a tool for our Offices to enforce EAP misclassification.

Based on our enforcement experience, we have observed that large categories of employees can be and are misclassified as EAP overtime-exempt, such as fast-food first-line supervisors (executive), clerical workers (administrative), or film and television production assistants (professional). Many of the dominant industries of our states (healthcare, financial services, biotechnology, education) include high numbers of EAP employees.² This fact, coupled with the higher costs of living in our states in comparison to other states, makes it vital to have a meaningful

¹ Economic Policy Institute, “More than eight million workers will be left behind by the Trump overtime ruleWorkers would receive \$1.4 billion less than under the 2016 rule,” <https://www.epi.org/blog/more-than-eight-million-workers-will-be-left-behind-by-the-trump-overtime-rule-workers-would-receive-1-4-billion-less-than-under-the-2016-rule/>

² See NPRM at 62215

increase in the EAP overtime exempt salary threshold levels in order for workers in our states to be able to afford housing and other necessities. *See infra*, pp. 8-10.

All the interested states have their own overtime laws and rules; however, most closely follow the FLSA's overtime exemption test.³ Massachusetts, New Jersey, and Washington, D.C. explicitly follow the FLSA test to determine if an EAP employee is overtime eligible or overtime exempt. *See* 454 Code of Mass. Regs. 27.03(3), N.J. Admin. Code § 12:56-7.2, D.C. Code § 32-1004(a). New York has a higher salary threshold test in place for administrative and executive employees (\$1,125 or \$1,064.25 depending on region), but none for professional employees. *See* 12 NYCRR 141-3.2(c), 12 NYCRR 142-2.14(c)(4), 12 NYCRR 146-3.2(c). Since these states' laws are directly tied to the FLSA, the Proposed Rule will have a direct impact on our authority, we believe for the better. Even those undersigned states that do not tie their state overtime exemption salary thresholds to the FLSA's have an interest in seeing the Proposed Rule implemented, as it helps advance the protection of employees' rights generally and better accords with their approaches.

Nonpayment or underpayment of overtime is a problem in each of the signatory states and accounts for a large proportion of the state AGs' labor and employment work. For example, in the period from July 12, 2021 through October 5, 2023, the Massachusetts AG's Office has issued 86 citations for failure to make overtime payments, totaling \$2,568,032.69 in restitution and penalties for 1,187 employees.

Given the enforcement data above, the State AGs rely on the DOL for meaningful enforcement tools to continue and advance the work of preventing the misclassification of overtime exempt employees. The Proposed Rule addresses all these objectives by increasing the salary level threshold and including automatic increases every three years, providing predictability, and enabling all interested parties to plan accordingly. Based on our collective knowledge in labor and employment enforcement, the State AGs urge the DOL to adopt the Proposed Rule.

II. The Proposed Increase to the Standard Salary Level for the EAP Overtime Exemption is Necessary and Proper

The exemption from the FLSA's overtime requirements for Executive, Administrative, or Professional (EAP) employees must be understood in the overall context of the purposes of those requirements. These purposes include discouraging employers from requiring employees to work extremely long workweeks, compensating employees for the burden of such workweeks, and encouraging employers to hire more workers and spread employment throughout the workforce.

³ The EAP exemption makes minimum wage and overtime protections under the FLSA inapplicable to workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Historically, USDOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary that does not change based on the quality or quantity of work done (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive (management, supervision, hiring/firing), administrative (office/non-manual work, discretion/judgment), or professional (advanced scientific/academic knowledge) in nature (the "duties test"). *See* 29 C.F.R. § 541.0 *et seq.*

See Overnight Motor Transp. Co v. Missel, 316 U.S. 572, 577–78 (1942). Defining the EAP exemption too broadly creates the risk of inadvertently drawing non-EAP employees into the ambit of the exemption when they do not belong there, and of incentivizing unscrupulous employers to intentionally misclassify non-EAP employees as overtime exempt. Setting a meaningful standard salary threshold, as well as an appropriate Highly Compensated Employee (HCE) salary threshold is key to avoiding that risk.

There is no question that the current standard salary threshold of \$684 per week is too low (and was arguably too low even when the current rule was implemented in 2019). Regardless of whether that level was appropriate in 2019, economic trends in the intervening years have rendered that level obsolete. The 2019 rule became effective on January 1, 2020. There has been significant inflation since that time: \$684 in January 2020 has the same buying power at \$816.90 in September 2023.⁴ By any measure, this is a major change in the value of a \$684 weekly salary in a comparatively short time. Simply put, the 2019 salary level has utterly failed to keep pace with inflation. Wages of salaried workers have similarly increased in that intervening time. In 2019, the New York State Average Weekly Wage (“NYSAWW”) was \$1,450.17⁵. In 2022, it had risen to \$1,718.15⁶. The Massachusetts Average Weekly Wage in 2019 was \$1,431.66.⁷ In 2023, it had risen to \$1,765.34.⁸ California’s statewide average weekly wage was \$1,242.78 in 2019. It is currently at \$1,651.00.⁹ These increases illustrate how large numbers of workers have been drawn into the EAP exemption who previously were eligible for overtime but whose spending power, due to inflation, has stayed the same or even gone down. This is contradictory to the purposes of the FLSA overtime provisions.

The current salary threshold of \$684 per week corresponds to an annual salary of \$35,568 and an hourly rate of \$17.10 (\$684 divided by 40 hours). This is little more than what a full-time worker at minimum wage in many states and the District of Columbia earns, thereby denying overtime premiums to even low wage, salaried workers. The effective hourly rate of the current standard salary threshold is \$17.10 (\$684 divided by 40 hours). Given that many salaried employees work in excess of 40 hours per week, many salaried workers in the undersigned states who earn at or near the \$684 weekly threshold are close to, if not right at, the state minimum wage.

To illustrate, below is a chart showing how much a worker being paid the minimum wage in each of the undersigned states earns in a week and year, and how many hours that worker needs to work in a week to hit the currently overtime exemption salary threshold.

⁴ Bureau of Labor Statistics, “CPI Inflation Calculator,” https://www.bls.gov/data/inflation_calculator.htm

⁵ New York State Department of Labor Research and Statistics Division

⁶ <https://dol.ny.gov/new-york-state-average-weekly-wage-nysaww-0>

⁷ Massachusetts Executive Office of Labor and Workforce Development

⁸ <https://www.mass.gov/info-details/how-pfml-weekly-benefit-amounts-are-calculated-and-or-changed>

⁹ <https://www.dir.ca.gov/dwc/WorkersCompensationBenefits.htm#SAWW>

State	Hourly Minimum Wage	Weekly Earnings at MW	Annual Earnings at MW	Hours to work at MW to hit \$684/week
Massachusetts	\$15.00	\$600.00	\$31,200.00	45.60
California	\$15.50	\$620.00	\$32,240.00	44.13
New York	\$15.00/ \$14.20 ¹⁰	\$600/ \$568	\$31,200/ \$29,536	45.60/ 48.16
District of Columbia	\$17.00	\$680.00	\$35,360.00	40.24
Arizona	\$13.85	\$554.00	\$28,808.00	49.4
Michigan	\$10.10	\$404.00	\$21,008.00	67.7
Rhode Island	\$13.00	\$520.00	\$27,040.00	52.6
Illinois	\$13.00	\$520.00	\$27,040.00	52.6
Pennsylvania	\$7.25	\$290.00	\$15,080.00	94.3
Delaware	\$11.75	\$470.00	\$24,440.00	58.2
New Jersey	\$14.13	\$565.20	\$29,390.40	48.4
Maine	\$13.80	\$552.00	\$28,704.00	49.6
Minnesota	\$10.59/ \$8.63 ¹¹	\$423.60/ \$345.20	\$22,027.20/ \$17,950.40	64.6/ 79.3
Colorado	\$13.65	\$546.00	\$28,392.00	50.1
Connecticut	\$15.00	\$600.00	\$31,200.00	45.6

As the Department of Labor (DOL) states in the Notice of Proposed Rulemaking (NPRM):

[T]he EAP exemption is premised on two policy considerations. First, the type of work exempt employees perform is difficult to standardize to any time frame and cannot be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium. **Second, exempted workers typically earn salaries well above the minimum wage** and are presumed to enjoy other privileges to compensate them for their long hours of work.¹²

While the minimum wage referred to above is the federal minimum wage, and not the state-mandated minimum wage rates discussed above, the DOL should take notice of these state minimum wage rates and the proximity of the current standard salary level to those rates. Those

¹⁰ The first rate is for New York City and the counties of Nassau, Suffolk and Westchester, and the second rate is for the rest of New York state.

¹¹ The first rate is for “large employers,” and the second is for “small employers.”

¹² NPRM at 62154.

state minimum wage rates represent, to some extent, a determination by policymakers in those states as to the lowest wage necessary to maintain an employee with only the most basic necessities of life. Even those state minimum wage rates often do an imperfect job at that.

Economists and policy advocates often speak instead of a “living wage,” as distinct from the minimum wage. The Massachusetts Institute of Technology (MIT) Living Wage Calculator¹³ describes a living wage in this manner:

[W]e developed the Living Wage Calculator starting in 2003 to more comprehensively estimate the employment earnings – or the **living wage** – that a full-time worker requires to cover or support the costs of their family’s basic needs where they live. Today, the calculator features geographically-specific costs for food, childcare, health care, housing, transportation, other basic needs – like clothing, personal care items, and broadband, among others – and taxes at the county, metro, and state levels for 12 different family types.¹⁴

The chart below shows the “living wage” for various family sizes and configurations in Massachusetts (taken from MIT’s Living Wage Calculator), as well as a comparison of each such wage to the current salary level for the EAP exemption as well as the proposed salary level:

Adults in household	1 adult			2 adults (1 working)			2 adults (both working)		
	0	1	2	0	1	2	0	1	2
Children in household									
Living Hourly Wage per working adult	\$21.35	\$45.57	\$61.58	\$31.75	\$38.84	\$43.60	\$15.87	\$24.72	\$32.46
Living Weekly wage per working adult	\$854.00	\$1,822.80	\$2,463.20	\$1,270.00	\$1,553.60	\$1,744.00	\$634.80	\$988.80	\$1,298.40
Amount above current threshold	\$170.00	\$1,138.80	\$1,779.20	\$586.00	\$869.60	\$1,060.00	Below	\$304.80	\$614.40
% above current threshold	24.85%	166.49%	260.12%	85.67%	127.13%	154.97%	Below	44.56%	89.82%
Amount above proposed threshold	Below	\$763.80	\$1,404.20	\$211.00	\$494.60	\$685.00	Below	Below	\$239.40
% above proposed threshold	Below	72.12%	132.60%	19.92%	46.70%	64.68%	Below	Below	22.61%

¹³ <https://livingwage.mit.edu/>

¹⁴ <https://livingwage.mit.edu/pages/methodology>

The chart below shows the same categories of information for California:

Adults in household	1 adult			2 adults (1 working)			2 adults (both working)		
Children in household	0	1	2	0	1	2	0	1	2
Living Hourly Wage per working adult	\$21.24	\$43.44	\$56.48	\$32.30	\$40.25	\$45.21	\$16.15	\$23.81	\$30.06
Living Weekly wage per working adult	\$849.60	\$1,737.60	\$2,259.20	\$1,292.00	\$1,610.00	\$1,808.40	\$646.00	\$952.40	\$1,202.40
Amount above current threshold	\$165.60	\$1,053.60	\$1,575.60	\$608.00	\$926.00	\$1,124.40	Below	\$268.40	\$518.40
Percentage above current threshold	24.21%	154.04%	230.35%	88.89%	135.38%	164.39%	Below	39.24%	75.79%
Amount above proposed threshold	Below	\$678.60	\$1,200.20	\$233.00	\$551.00	\$749.40	Below	Below	\$143.40
Percentage above proposed threshold	Below	64.08%	113.33%	22%	52.03%	70.76%	Below	Below	13.54%

Finally, the chart below shows those figures for New York:

Adults in household	1 adult			2 adults (1 working)			2 adults (both working)		
Children in household	0	1	2	0	1	2	0	1	2
Living Hourly Wage per working adult	\$21.46	\$41.59	\$54.39	\$31.20	\$37.82	\$42.70	\$15.60	\$22.75	\$29.03
Living Weekly wage per working adult	\$858.40	\$1,663.60	\$2,175.60	\$1,248.00	\$1,512.80	\$1,708.00	\$624.00	\$910.00	\$1,161.20

Amount above current threshold	\$174.40	\$979.60	\$1,491.60	\$564.00	\$828.80	\$1,024.00	Below	\$226.00	\$477.20
Percentage above current threshold	25.50%	143.22%	218.07%	82.46%	121.17%	149.71%	Below	33.04%	69.77%
Amount above proposed threshold	Below	\$604.60	\$1,116.60	\$189.00	\$453.80	\$649.00	Below	Below	\$102.20
Percentage above proposed threshold	Below	57.09%	105.44%	17.85%	42.85%	61.28%	Below	Below	9.65%

As illustrated by these charts, in all three of these states, all but one household type in the above has a living wage level that is in excess of (and often significantly so) the current standard salary level of \$684 per week. Even the proposed salary level is significantly below the living wage for many of the above household types.

A key increased cost that has eroded all employees' spending power, including salaried and EAP employees, is housing. In Massachusetts, the annual household income needed to afford a two-bedroom rental home at the Fair Market Rent determined by the Department of Housing and Urban Development (HUD) is \$86,613.¹⁵ A household with two working adults must earn \$1,665.63 per week, or an average of \$832.82 each. This is well above the current \$684 threshold. For a household with one working adult, it is well above both the current and proposed thresholds (\$606.63 above the \$1,059 salary level). A single bedroom rental apartment requires an annual income of \$70,899, which corresponds to a weekly wage of \$1,363.44. This is almost double the current threshold of \$684 per week and is \$304 more than the new proposed threshold of \$1,059 per week.

In Washington, D.C., a two bedroom rental apartment requires an annual income of \$73,520, which corresponds to a weekly wage of \$1,413.85, or \$706.92 per person in a two-income household, which is above the current \$684 threshold.¹⁶ A one-bedroom rental in the District's least expensive zip code requires an annual income of \$42,000, corresponding to weekly wages of \$807.69, also well in excess above the current \$684 threshold.¹⁷

In California, a two-bedroom rental home at HUD's Fair Market Rent requires an annual household income of \$87,877. This is equal to an individual making \$1,689.94/week or \$844.97/person in a two-income household—well above the current salary level threshold.¹⁸

In New York, the annual household income needed to afford a two-bedroom rental home at the Fair Market Rent determined by the Department of Housing and Urban Development (HUD)

¹⁵ National Low Income Housing Coalition, <https://nlihc.org/housing-needs-by-state/massachusetts>

¹⁶ <https://nlihc.org/housing-needs-by-state/district-columbia>

¹⁷ <https://dhs.dc.gov/page/monthly-income-limits-fair-market-rent>

¹⁸ <https://nlihc.org/housing-needs-by-state/california>

is \$83,375.¹⁹ A household with two working adults must earn \$1,603.37 per week, or an average of \$801.69 each. This is well above the current \$684 threshold. For a household with one working adult, it is well above both the current and proposed thresholds (\$544.37 above the \$1,059 salary level). A single bedroom rental apartment requires an annual income of \$72,440, which corresponds to a weekly wage of \$1,393.08. This is more than double the current threshold of \$684 per week and is \$334.08 more than the new proposed threshold of \$1,059 per week.

These data more than amply demonstrate that the current salary level threshold is too low and no longer predicts which employees are EAP with sufficiently high salaries to legitimately exempt them from overtime protections. The DOL acknowledges this in the NPRM, where it points out that the current standard salary level of \$684 per week “is roughly equivalent to the Federal poverty level for a family of five and makes the family eligible for many social assistance programs.”²⁰

Throughout the history of the FLSA overtime requirements and the use of a minimum salary level in the EAP exemption, there have been long periods in which DOL did not update that salary level. In each instance, this has diminished the spending power of EAP overtime-exempt employees over time, swept non-EAP employees into the exemption, and undermined the role that a salary level plays in delineating the EAP exemption. We agree with DOL’s acknowledgement noting: “that large gaps between rulemakings did not serve employer or employee interests and diminished the usefulness of the salary level test, and that regular increases promoted predictable and incremental change.”²¹ Also: “even a well-calibrated salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over time. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees.”²²

At some point, the failure to update the salary level results in that level deviating so far that it no longer accurately delimits the boundaries of who is an EAP and constitutes a failure by DOL to exercise its authority under 29 U.S.C. 213(a)(1). The DOL cannot establish or maintain a salary level that is so low that it categorically *includes* those who perform bona fide EAP duties based on those duties alone, essentially without regard to their salary (or by being so overinclusive as to render the salary test a nullity). Given current economic circumstances, this is what maintaining the current salary level would be tantamount to.

This perverse result is illustrated by a point made in the NPRM:

The Department estimates that in Year1, 3.4 million currently exempt employees who earn at least the current salary level of \$684 per week but less than the proposed standard salary level of \$1,059 per week would, absent the employer paying them at or above the new salary level, gain overtime protection. For more than half of these employees, this proposal

¹⁹ <https://nlihc.org/housing-needs-by-state/new-york>

²⁰ NPRM at 6221.

²¹ NPRM at 62156.

²² Id. at 62154

would restore overtime protections that the employees would have been entitled to under every rule prior to the 2019 rule.²³

Once a standard salary level is set, nonexempt employees earning below that level are like passengers on a boat adrift at sea – as the tide of inflation inevitably increases and wages increase along with it, that tide carries the boat and its passengers further and further from the shores of overtime protection.

To carry the metaphor one step further, the DOL is tasked with navigating this boat between drifting too far to sea on the one hand (by failing to update the salary level) and crashing into rocks on the shore (by setting the salary level too high and rendering the duties test meaningless). The proposed level charts a safer course between these two hazards than the current level, striking a better balance and “[s]etting a dividing line between nonexempt and potentially exempt employees’ by screening out only those employees who, based on their compensation level, are unlikely to be bona fide executive, administrative, or professional employees.”²⁴ The proposed level also does more to take into account the shift to a one-test system in 2004 and establishes more of a middle ground between what the previous short- and long-test methodologies. The fact that under the proposed level “most salaried white-collar employees paid less than the proposed standard salary level do not meet the duties test, whereas a substantial majority of salaried white-collar employees earning above the proposed standard salary level meet the duties test” demonstrates that the balance struck is a more appropriate one.²⁵

In sum, the undersigned states are in support of the proposed standard salary level and recommend its adoption in a final rule.

III. The Proposed Increase to the Highly Compensated Employee (HCE) Salary Level for the EAP Overtime Exemption is Necessary and Proper

As the DOL states in the NPRM, “The HCE test’s primary purpose is to serve as a streamlined alternative for very highly compensated employees because a very high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed duties analysis.”²⁶ But “as with the standard salary level, the HCE total annual compensation level must be updated to ensure that it remains a meaningful and appropriate standard to pair with the minimal HCE duties test. To maintain the HCE test’s role as a streamlined alternative for those employees most likely to qualify as EAPs, the HCE total annual compensation level must be high enough to exclude all but those employees ‘at the very top of [the] economic ladder.’”

²³ NPRM at 62154

²⁴ NPRM at 62165

²⁵ The fact that some states’ overtime laws set a salary level that is more even than the proposed one demonstrates that an even higher threshold might be appropriate, particularly in high-cost and high-wage states. Nonetheless, the proposed salary level is a significant improvement over the current level.

²⁶ NPRM at 62153.

Like the standard salary level, the HCE salary level is long overdue for an update. Significant inflation since the 2019 rule became effective in January 2020 has eroded the purchasing power of the HCE salary level. An employee earning \$107,432.00 in January 2020 would have to earn \$128,178.70 in September 2023 to maintain the same level of purchasing power. All of the rationales in favor of increasing the standard salary level apply with equal force to increasing the HCE salary level²⁷, and the undersigned states incorporate them as if fully restated herein.²⁸

IV. The Proposed Increases to the Standard and HCE Salary Levels would be a Net Benefit to Both Employees and Employers

As the DOL states in the NPRM:

[S]ome salaried, white-collar employees who meet the salary level threshold but do not meet the duties test may be misclassified as exempt from overtime protection due to misapplication of the duties test. To the extent that some of the 4.1 million salaried, white-collar employees who do not meet the duties test and earn between the current \$684 per week salary level and the proposed \$1,059 per week salary level are misclassified as exempt, the proposed salary level would make it more clear for workers and employers that such workers are not EAP exempt.”²⁹

Misclassification of non-EAP employees as overtime exempt is very common. A Rand Corporation study estimated that “11.5 percent of salaried workers are misclassified as exempt--and therefore do not receive overtime compensation--even though their primary duty is not exempt work or they earn less than the current salary level...”³⁰ The National Employment Law Project reported in December 2019 that:

Since the 1970s, the salary threshold for being an overtime-exempt “white collar” worker has steadily eroded, causing the share of full-time salaried workers guaranteed overtime to plummet from 63% in the 1970s to less than 7% today. As a result, salaried employees like assistant managers at fast-food chains or retail stores are currently denied overtime protections even when they spend over 90% of their time performing the same tasks as the overtime-eligible employees they supervise.³¹

²⁷ As noted above in regards to the standard salary level, the salary threshold for the Highly Compensated Employee exemption could arguably be made even higher than the proposed level, particularly for high-cost, high-wage states, but the proposed level is a significant improvement over the current level.

²⁸ As previously noted, New York’s state overtime law does not have a Highly Compensated Employee exemption.

²⁹ NPRM at 62212

³⁰ Current Developments in Employment Law: FLSA DEVELOPMENTS: DOL AND THE COURTS, Camille A. Olson and Abigail Cahak (2017)

³¹ Worker Rights Groups Applaud Washington State for Restoring Overtime Pay and Fighting the Trump Overtime Roll-Back, National Employment Law Project, December 2019, <https://www.nelp.org/news-releases/worker-rights-groups-applaud-washington-state-restoring-overtime-pay-fighting-trump-overtime-roll-back/>

Misclassification of non-EAP workers as overtime-exempt has obvious and serious effects. It deprives those workers of significant income; it forces those workers to work longer hours, increasing stress and related health problems, burnout, and turnover; it undermines employees' work-life balance; and it reduces employment opportunities for other workers as employers rely on misclassified employees to work additional hours rather than expanding their workforces, among other negative effects.

Finalizing and implementing the proposed rules, however, will have net positive effects for both employees and employers. As the NPRM describes, there are various approaches employer could take when faced with increases in the standard and HCE salary levels:

Employers might respond by paying overtime premiums; reducing or eliminating overtime hours; reducing employees' regular wage rates to keep overall compensation consistent (provided that the reduced rates still exceed the minimum wage); increasing employees' salaries to the updated earnings threshold to preserve their exempt status); or using some combination of these responses.³²

Each of these responses benefits employees: Workers who become overtime eligible will begin receiving additional wages at the overtime rate for the overtime hours they work. Workers who see their overtime hours reduced or eliminated will have more time for their families and personal pursuits, increasing employee job satisfaction and reducing stress and its health impacts. Increasing employees' salaries to keep them within the overtime exemption will increase their income. Even reducing employees' regular wage rates to keep overall compensation consistent will benefit them by directly compensating for each hour worked (whether at their regular rate or their overtime rate) rather than paying them a flat salary regardless of how many hours they work.

The current salary thresholds bring many low-income workers within the overtime exemption, and many such low-income workers are forced to rely upon various public benefits from assistance programs such as SNAP, WIC, TANF, free school lunch programs, and various state social assistance programs. By restoring the overtime eligibility of many such low-income salaried workers and increasing their income, it will rightfully shift the responsibility of paying a living wage to the employers who financially benefit from the work provided by these workers.

Increasing the salary thresholds will also promote racial and gender equity and reduce racial income disparities. As the NPRM describes, "Potentially affected women, Black workers, Hispanic workers, young workers, and workers with less education are all more likely to be affected than other worker types. This is because EAP exempt workers with these characteristics are more likely to earn within the affected standard salary range than EAP exempt workers without these characteristics."³³ As DOL acknowledges, "Among potentially affected workers, certain demographic groups—women, Black workers, Hispanic workers, young workers, and workers

³² NPRM at 62195

³³ NPRM at 62198

with less education—have an increased likelihood of being affected by this rulemaking, even though workers in these demographic groups are less likely to be EAP exempt in the first place.”³⁴

The proposed rule will also benefit employers, and any increased costs will be offset by these benefits. Making workers who were excluded from overtime protections under the 2019 rule now eligible for overtime will increase employee satisfaction and retention, increasing productivity, reducing turnover, and thus reducing employer costs for hiring, retention, and training. Increasing EAP employee salaries to match or exceed the new salary levels and keep them within the exemption will have similar effects, including making jobs more attractive to qualified applicants in a competitive labor market. Increased spending power of these employers will have positive effects throughout the consumer economy, increasing demand for employer products and services.

In sum, the proposed rule will positively impact both employees and employers and should be finalized and adopted.

V. The Proposed Automatic Updates to the Salary Levels will Help Ensure that those Levels Continue to Accurately Delineate EAP from non-EAP Employees and Should be Adopted

“[E]ven a well-calibrated salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over time.”³⁵ The history of FLSA overtime rulemaking is characterized by long periods, sometimes exceeding a decade, when the salary levels were not updated. This has often been despite the DOL’s stated intent to adjust those salary levels on a regular basis. An automatic updating mechanism is the best way to ensure that the levels remain accurate and effective at their screening function. It also ensures that employees who cease to fall within the EAP exemption by virtue of inflationary-caused reductions in their effective salary are not deprived of overtime wages for excessive periods of time.

While an annual or biennial update might do more to keep the salary level in line with current economic conditions, DOL’s proposed three-year updating period is an acceptable compromise that will guarantee regular updates to ensure meaningful access to overtime pay. Automatic updating also gives employers much needed predictability. Not knowing when or whether the salary levels will be updated or by how much prevents employers from doing medium- and long-term planning and budgeting and may make employers unnecessarily cautious in hiring and increasing employee compensation, to the detriment of employees, and economic growth and stability generally. Less-frequent and more drastic salary level increases are more disruptive and burdensome on employers. The inclusion of a fail-safe mechanism allowing the DOL to delay an automatic scheduled increase gives the Department flexibility to adjust to changed circumstances and economic conditions when necessary. In sum, an automatic updating system fulfills the purposes of the statute, ensures the continued accuracy of the EAP test, and should be adopted.

³⁴ Id.

³⁵ NPRM at 62177.

VI. Conclusion

For all the reasons detailed above, the undersigned Attorneys General support the proposed regulations and urge the Department of Labor to adopt them.

Sincerely,



Andrea Joy Campbell
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108



Rob Bonta
Attorney General of California
1300 I Street
Sacramento, CA 95814



Letitia James
Attorney General of New York
28 Liberty Street
New York, NY 10005



Brian Schwalb
Attorney General of Washington, D.C.
400 6th Street NW
Washington, D.C. 20001



Kwame Raoul
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601



Peter Neronha
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903



Dana Nessel
Michigan Attorney General
525 West Ottawa Street
Lansing, Michigan 48906



Kris Mayes
Arizona Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004



Michelle A. Henry
Attorney General of Pennsylvania
Pennsylvania Office of Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120



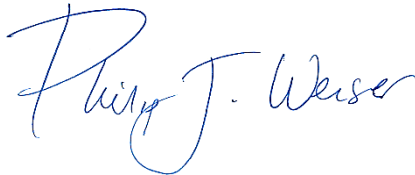
Kathleen Jennings
Attorney General of Delaware
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801



Matthew J. Platkin
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625



Aaron M. Frey
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006



Philip J. Weiser
Attorney General of Colorado
Office of the Attorney General
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, CO 80203



Keith Ellison
Attorney General of Minnesota
Office of Minnesota Attorney General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2128



William Tong
Attorney General of Connecticut
165 Capitol Avenue
Hartford, CT 06106