

Congress of the United States
Washington, DC 20515

March 25, 2021

The Honorable Marty J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave, N.W.
Washington, DC 20054

Dear Secretary Walsh:

We write to urge the Department of Labor (DOL) to take strong action to restore overtime pay protections for millions of workers.

Under the *Fair Labor Standards Act* (FLSA),¹ covered employees are guaranteed overtime pay of not less than one-and-a-half times their regular pay rate for any hours worked in excess of 40 hours in a workweek.² Overtime standards were created to prevent workers from being forced to work excessive hours without additional compensation and to incentivize employers to hire additional employees rather than overworking current ones.³ The FLSA does, however, exempt from overtime protections bona fide executive, administrative, and professional employees (“white collar” exemption),⁴ who are likely to possess the individual bargaining power needed to push back against substandard wages and excessive working hours.⁵

Under FLSA regulations, salaried employees who earn below a certain salary threshold do not fall under the “white-collar” exemption and are thus automatically eligible for overtime pay.⁶ An inadequate salary threshold decreases the number of workers who are eligible for overtime protections based on their pay, making more workers vulnerable to being misclassified as exempt by their employers. In 1975, more than 60 percent of full-time salaried workers earned less than

¹ 29 U.S.C. §§ 201 et seq.

² 29 U.S.C. § 207(a)(1).

³ *See, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981); *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009).

⁴ 29 U.S.C. § 213(a)(1).

⁵ *See generally* Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMPLO. L.J. 19, 98–100 (2000).

⁶ 29 C.F.R. § 541.600(a) (2021).

the salary threshold and were eligible for overtime based on their pay.⁷ In 2016, when the salary threshold had languished at \$23,660 for over a decade, that number was less than seven percent.⁸

In 2016, the Obama Administration's DOL finalized a rule (Obama Rule) that would have increased the salary threshold to the 40th percentile of earnings of full-time, salaried workers in the lowest wage Census Region, a rate equaling \$47,476 in 2016.⁹ This threshold represented a conservative salary threshold. Historically, the salary threshold has ranged from the 35th to 55th percentile of weekly earnings for full-time, salaried workers *nationwide*.¹⁰ The Obama Rule, announced by then Vice President Biden in Columbus, Ohio, was nonetheless a step in the right direction after years without a meaningful update.¹¹

The Obama Rule would have partially restored the value of the salary level by ensuring 33 percent of full-time salaried workers were eligible for overtime protections based on their pay.¹² It would have extended overtime protections to 4.2 million workers and strengthened existing overtime protections for an additional 8.9 million workers.¹³ The Obama rule would have also established automatic updates every three years to reflect increases in wages over time and ensure the salary threshold was not eroded.¹⁴ Unfortunately, in 2017, a Texas federal district court invalidated the Obama Rule based on flawed reasoning that rejects the jurisprudence and legislative history behind the white-collar exemption.¹⁵

Instead of defending the Obama Rule before the Fifth Circuit Court of Appeals, the Trump Administration finalized a rule (Trump Rule) that fell far short by setting the salary level to \$35,568 per year in 2020 with no automatic increases, allowing its value to be eroded over time.¹⁶ The Economic Policy Institute (EPI) estimates the Trump Rule, in effect since January 2020, covers only 15 percent full-time salaried workers based on their pay.¹⁷ EPI further estimates that the Trump Rule leaves behind 8.2 million workers who would be covered under the Obama Rule, costing workers \$1.2 billion in lost wages each year.¹⁸

⁷ CELINE MCNICHOLAS, SAMANTHA SANDERS & HEIDI SHIERHOLZ, ECONOMIC POLICY INSTITUTE, WHAT'S AT STAKE IN THE STATES IF THE 2016 FEDERAL RAISE TO THE OVERTIME PAY THRESHOLD IS NOT PRESERVED—AND WHAT STATES CAN DO ABOUT IT: STATE ACTION TO MODERNIZE OVERTIME RULES 2 (2017), <https://files.epi.org/pdf/136291.pdf>.

⁸ *Id.*

⁹ Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016). Under this rule, the salary threshold would have reached \$51,053 in 2020 and \$59,098 in 2028. HEIDI SHIERHOLZ, ECONOMIC POLICY INSTITUTE, MORE THAN EIGHT MILLION WORKERS WILL BE LEFT BEHIND BY THE TRUMP OVERTIME PROPOSAL 7 (2019), <https://www.epi.org/publication/trump-overtime-proposal-april-update/>.

¹⁰ ECONOMIC POLICY INSTITUTE, REVISITING A TRUMP REGULATORY ROLLBACK: STRENGTHENING OVERTIME PROTECTIONS FOR WORKING PEOPLE 5 (2020), <https://files.epi.org/pdf/214676.pdf>.

¹¹ Jessica Wehrman, *Biden, speaking at Jeni's, says threshold for overtime pay will double*, THE COLUMBUS DISPATCH (May 18, 2016), <https://www.dispatch.com/article/20160518/NEWS/305189840>.

¹² MCNICHOLAS, *supra* note 7, at 2.

¹³ 2016 Defining & Delimiting the Exemptions for EAP, 81 Fed. Reg. at 32405.

¹⁴ *Id.* at 32430.

¹⁵ *Nevada v. U.S. DOL*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

¹⁶ Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed. Reg. 51230, 51231 (Sept. 27, 2019).

¹⁷ SHIERHOLZ, *supra* note 9, at 2.

¹⁸ *Id.*

Even before the pandemic, our nation’s weakened labor standards, including an out-of-date federal minimum wage and inadequate overtime pay standards, left too many workers unable to earn enough to provide for themselves and their families. The pandemic has only underscored and exacerbated these conditions. Many workers, including essential workers, are overworked and underpaid. Other workers struggle to work enough hours to make ends meet. These workers deserve a raise.

As our economy recovers, it is imperative that we prioritize policies that boost pay and encourage hiring. Extending overtime protections by raising the overtime salary threshold will boost wages for millions of lower- and middle-income salaried employees. It will also help prevent these employees from working excessive hours and instead incentivize employers to hire additional employees or shift hours to the underemployed, part-time workers who need them.

That is why it is critical that the Biden Administration’s DOL pursue bold action to provide more workers with overtime protections. We urge DOL to quickly begin the rulemaking process to update the salary threshold and to propose a strong threshold. We encourage DOL to adopt a salary threshold in line with the historical high point of salary thresholds—the 55th percentile of earnings of full-timed salaried workers nationwide. This threshold would be at least \$82,732 by 2026.¹⁹ We also suggest DOL include annual automatic updates to prevent erosion of the salary threshold over time.

Now, more than ever, it is critical that we stand up for millions of low-income and middle-class workers and defend the 40-hour workweek. We thank you for your attention to this matter.

Sincerely,



MARK TAKANO
Member of Congress



ROBERT C. “BOBBY” SCOTT
Member of Congress

¹⁹ ECONOMIC POLICY INSTITUTE, *supra* note 10, at 5.



ALMA S. ADAMS, Ph.D.
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