

Testimony of Paul Sonn

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In support of H. 1609 and S. 1092: Updating the Commonwealth's Overtime Protections to Promote Fair Pay and Work- Life Balance for Workers in Massachusetts

**Before the Massachusetts Joint Committee on Labor and Workforce
Development**

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Chair Jehlen, Chair Brodeur, Vice Chair Lewis, Vice Chair Hay, members of the committee, thank you for the opportunity to testify today. My name is Paul Sonn. I am state policy program director at the National Employment Law Project (NELP). NELP is a non-profit research, policy, and advocacy organization that for nearly 50 years has sought to ensure that all workers, especially those most vulnerable to workplace exploitation or abuse, receive the basic workplace protections guaranteed by our nation's labor and employment laws. While we are a national organization, we have worked frequently with policymakers in the Commonwealth – including in 2016 on the legislation raising Massachusetts' minimum wage to \$15 an hour.

I am testifying today in support of H. 1609 and S. 1092, which would update the Commonwealth's overtime pay laws to restore fair pay protections for workers in Massachusetts and protect them against the rollback of stronger Obama era overtime protections by the Trump Administration's U.S. Department of Labor. Specifically, H. 1609 and S. 1092 would: (1) Gradually raise the salary threshold below which salaried white collar workers are guaranteed overtime pay in Massachusetts until it reaches \$64,000 in 2024, after which the threshold would be adjusted to reflect increases in the median weekly earnings of salaried workers, or two times the Massachusetts minimum wage, whichever is greater; and (2) Eliminate a range of outdated exemptions from Massachusetts' overtime coverage for workers in major industries such as restaurants, hotels, hospitals, non-profit colleges and universities, and seasonal businesses. These exemptions do not exist under the federal Fair Labor Standards Act (FLSA), and it is necessary to eliminate them under state law too in order for Massachusetts' overtime law to be able to fill the gap and protect workers in the Commonwealth in light of weak federal protections. Together these reforms would help deliver stronger overtime pay protections for hundreds of thousands of workers in Massachusetts, ensuring that workers are paid fairly when they put in long hours on the job and promoting work-life balance.

Far More Workers Used to Receive Overtime. Under the federal Fair Labor Standards Act, it used to be that if your boss asked you to put in extra hours at work, you got overtime pay in return. There was an exemption for managers and professional employees (“executive, administrative and professional employees” or “EAP”), but only for workers who were both highly paid above a specified salary threshold, and who had specific management responsibilities or professional roles. Those protections ensured that most workers didn't have to work excessive hours – and that if they did, they would receive extra pay to make up for it.

However, the share of full-time salaried EAP workers guaranteed overtime pay under federal law when they work more than 40 hours a week has plummeted nationwide from 63% to less than 7%.¹ That's because the salary threshold under the federal Fair Labor

Standards Act below which salaried EAP workers are guaranteed overtime when they put in long hours hasn't been updated in years and remains just \$23,660.

As a result, many low-paid employees like assistant managers in fast food restaurants, retail stores, and a wide range of other industries who struggle on modest salaries aren't eligible for overtime pay and can be forced to work 50, 60 or even 70 hours a week, losing time with their families, and not getting any overtime pay for their hard work and dedication. It also means that employers aren't hiring workers to do the extra work.

We at the National Employment Law Project have encountered many such workers around the country. Typical is a Michigan worker I met last year named Julia who manages a local outpost of a thriving national retail chain in Western Michigan. Julia is expected to work at least 52 hours a week—though she often works 60 or 70 hours, or even more. And because she has a management title, minimal management duties, and is paid a salary, Julia isn't paid anything at all for any of the hours she puts in over 40 hours.

Julia is often the only employee on duty. While she's stocking shelves, helping customers and running the cash register, she's also expected to make a schedule for her staff and keep track of invoices. Sometimes the grind makes it hard for her to even find time to use the restroom and some weeks her long hours make it impossible for her to get to church on Sundays.

The long hours are taking a toll on Julia's family and her personal life. She hasn't been there to help her son get to the hospital when he's needed it. Or to help her sister when her husband was ill. And she doesn't have the time to volunteer at her church.

Workers like Julia used to be compensated for their time. Now, they are expected to do some work for free – as a result of the eroded overtime salary threshold.

Obama Administration Action to Restore Overtime. After the overtime salary threshold had languished for years causing the share of protected workers to plummet, in 2016 the Obama Administration's Labor Department ordered a long-overdue updating of it. The Obama rule raised the threshold to \$47,476 a year in 2016 – and would have continued increasing it every three years so that it would have reached approximately \$51,000 in 2020, \$55,000 in 2023, and \$59,000 in 2026. That was a very moderate standard that would have restored overtime coverage to roughly 30% of the fulltime salaried workforce – far less than the 63% that used to enjoy overtime coverage in the 1970's.

Moreover, because the Obama rule was a national benchmark that would have to apply in all fifty states and the District of Columbia, it was set at a level that was deemed appropriate and safe for the lowest wage states in the country such as Alabama, Georgia and Florida.

Trump Administration Overtime Rollback. But a group of Republican state attorneys general blocked the increase — in a district court decision that even the Trump Administration appealed — and this spring the Trump Labor Department proposed replacing it with a meager alternative that would raise the overtime threshold to just \$35,308 in 2020.

That salary level is so low as to be virtually meaningless anywhere in the United States – and certainly in a high wage, high cost-of-living state like Massachusetts. If it is finalized and becomes law, the Trump \$35,308 threshold would soon be barely higher than the earnings of a full-time minimum wage worker in Massachusetts and is not remotely in the range of a highly paid executive who should appropriately be exempted from guaranteed overtime protection.

Massachusetts’ Overtime Law. As has been the case in many states, Massachusetts’ overtime law has played a fairly limited role in recent years because of two key limitations in it. First, its salary threshold for exempt EAP employees has by regulation been linked to the federal FLSA definitions and so incorporates its rock-bottom \$23,660 salary threshold. Second, the Massachusetts overtime law contains many exemptions that do not exist in federal law, such as industry exemptions for restaurants, hotels, hospitals and not-for-profit colleges and universities. The combined effect has been that many Massachusetts workers have had to rely largely on federal overtime protections instead.

That has meant that as the federal overtime threshold has remained frozen at its meager level, the portion of salaried Massachusetts workers guaranteed overtime pay when they work more than forty hours a week has also plummeted.

Action by Other States. The rollback of the Obama overtime restoration has spurred states to start stepping in to protect overtime pay for workers in their states. A group of sixteen states – including Massachusetts through Attorney General Maura Healey – filed comments in May opposing the weak Trump overtime rule.²

And proactively, California, New York, Washington State and Pennsylvania are all taking action raise their state overtime salary threshold to safeguard overtime pay for workers in their states. The table below summarizes the overtime thresholds that have either been adopted or proposed in these four states – which are the states that have taken the most significant action to date:

Other States Raising Their Overtime Thresholds

State	Overtime Threshold Standard	Projected Level	Status
WA³	2.5 x state minimum wage	Projected to be approximately \$77,000 by full phase-in in 2026	Rule proposed by Wash. State Dep't of Labor & Indus. 5/2019, to be finalized later in 2019
CA⁴	2 x state minimum wage	\$62,400 by 2023; will be increased starting in 2024 based on Consumer Price Index; projected to be approximately \$64,000 by 2024	Adopted as law
NY⁵	Overtime threshold increasing in proportion to state minimum wage increase	\$58,500 in NYC by late 2018 and in NYC suburbs by late 2021; will reach \$58,500 upstate when upstate minimum wage reaches \$15	Adopted as law
PA⁶		\$47,892 by approximately 2023	Rule proposed by Pa. Dep't of Labor 2018, to be finalized in 2019

Comparison of Proposed Massachusetts Overtime Update to Other States. Most relevant for Massachusetts are the three states – Washington State, California and New York – that have high wages and high costs-of-living similar to the Commonwealth. They are raising their overtime thresholds to levels roughly comparable to, or even higher than, the threshold proposed under Massachusetts in H. 1609 and S. 1092.

Specifically, California’s overtime threshold is projected to be approximately \$64,000 by 2024 – almost exactly tracking the Massachusetts proposal. New York’s will be slightly lower at \$58,500. And Washington State is proposing an even more significant increase, raising the threshold there to approximately \$77,000 by 2026.

In fact, California’s overtime threshold is benchmarked at 2 times the annual earnings of a full-time minimum wage worker – the same standard proposed for Massachusetts. Washington State has published a proposed rule benchmarking its overtime standard at an even higher level: 2.5 times the annual earnings of a full-time minimum wage worker.

As David Cooper from the Economic Policy Institutes details in his testimony today, translating the Obama U.S. Labor Department salary threshold – the 40th percentile of salaried earnings – to the Northeast Census Region which contains Massachusetts results in a salary threshold of approximately \$68,000 per year by 2024. Thus the H. 1609 and S.1092 proposal of \$64,000 by 2024 is in line with and, in fact, approximately \$4,000 a year lower than the Northeast Census Region equivalent of the Obama overtime standard.

And in historical terms, this proposal is very moderate as it would only partially restore overtime coverage to the 63% portion of the salaried workforce that used to be fall below the overtime salary threshold in the 1970’s.

Closing Outdated Exemptions. In addition to raising the overtime salary threshold for EAP employees, H. 1609 and S. 1092 would conform the coverage provisions and exemptions of Massachusetts’ overtime law more closely to the federal Fair Labor Standards Act by removing many exemptions that do not exist in FLSA. Specifically, it would remove outdated exemptions for workers in the following industries: hotels, restaurants, gas stations, parking garages, hospitals, non-profit colleges and universities, janitors living in residential properties, switchboard workers, and most seasonal workers.

Because none of these exemptions exist under FLSA, most workers in these industries (except for managerial and professional workers) already qualify for overtime pay under FLSA. Removing these exemptions will better conform the Massachusetts law with FLSA – and ensure that the managerial and professional employees in these industries receive the benefit of the proposed higher salary threshold. For example, unless these exemptions are removed, low-paid assistant managers at fast food chains, hotels and hospitals will continued to be excluded from overtime pay in Massachusetts.

In addition, however, small employers in these industries are not covered under FLSA. Closing these loopholes is therefore also important for extending overtime pay protections to hourly workers in small restaurants, small hotels and small gas stations in Massachusetts.

The bill would also clarify that adjunct and non-tenure-track faculty at colleges and universities are entitled to overtime pay. Adjuncts and non-tenure track faculty are very low-paid educational staff that represent a growing share of the college workforce and face high poverty rates. Overtime pay protections will ensure that if they work long hours they will be paid for their hard work.

Employer Options and Responses. If Massachusetts raises the overtime salary threshold to \$64,000 by 2024 as proposed, business owners will have several options: they can raise the salaries of managers above the new threshold in order to keep them overtime-exempt; they can keep them at their current salaries and start paying them for overtime hours at time-and-a-half; or they can hire more employees to help share the heavy workloads that many of these workers are today shouldering on their own.

The announcement of the Obama overtime rule in 2016 led many employers, especially major retail chains, to raise pay of their salaried managers and assistant managers to about \$48,000 – slightly above the Obama threshold level.⁷ The fact that so many employers raised their pay scales in response showed that it was a very moderate proposal to which employers could readily adjust. However, because the Obama overtime standard was later blocked, retail worker organizers report to us that few if any major retail chains have continued raising salaries above that level.

As a result, across the nation and the Commonwealth it is typical for retail store managers in box stores, dollar stores, drug stores, and grocery stores to be paid about \$48,000 a year and then expected to work long hours away from their families – 55, 60 even 70 hours a week – and receive no extra pay for their hard work.

Conclusion. Enacting H. 1609 and S. 1092 will provide long overdue protection for middle class workers in Massachusetts. It will begin restoring the overtime pay protections that the majority of salaried EAP workers enjoyed in the 1970's, giving them back some work-life balance and protecting them against being forced to work long hours for no extra pay. This proposal is in line with the action around overtime pay that states comparable to Massachusetts are currently taking – and, in fact, is a good deal more modest than the overtime pay restoration that Washington State announced a few weeks ago. We urge the legislature to act quickly to adopt it.

Thank you for the opportunity to submit this testimony. And I would be delighted to answer any questions you may have.

¹ 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” (Nov. 15, 2017), available at <https://www.epi.org/publication/whats-at-stake-in-the-states-if-the-2016-federal-raise-to-the-overtime-pay-threshold-is-not-preserved/>

² Letter from Fourteen State Attorneys General to Hon. Alex Acosta & Melissa Smith Re: Notice of Proposed Rulemaking (RIN 1235-AA20) Defining and Delimiting the Exemptions for Administrative, Executive, Professional, Outside Sales, and Computer Employees (May 21, 2019).

³ Wash. State Dep’t of Labor & Indus., “Proposed Changes to Washington’s Overtime Rules” (June 2019), available at <https://www.lni.wa.gov/WorkplaceRights/Wages/Overtime/OvertimeRules/default.asp>. Proposed salary threshold to phase up to 2.5 times the Washington State minimum wage by 2026. Washington State minimum wage, which will be \$13.50 in 2022, is projected to reach \$14.84 by 2026, translating to a 2026 overtime threshold of approximately \$77,000.

⁴ SHRM, “California’s Exempt Salary Threshold Will Rise Regardless of Blocked Overtime Rule” (Dec. 15, 2016), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/overtime-california-employers.aspx>

⁵ New York State Dep’t of Labor, “Administrative Employee Overtime Exemption Frequently Asked Questions (FAQ)”, available at <https://www.labor.ny.gov/legal/counsel/pdf/administrative-employee-overtime-exemption-frequently-asked-questions.pdf>

Note that in the remainder of New York State outside of New York City, Nassau, Suffolk and Westchester counties, the overtime salary threshold will not reach \$58,500 until the state minimum wage finishes phasing up to \$15 an hour. The final schedule for that state-wide phase-up to \$15 is to be announced by the New York State Director of the Budget in consultation with the Commissioner of Labor, per legislation adopted in 2016.

⁶ Penn. Dept. of Labor, “Proposed Overtime Rule” (June 12, 2018), available at <http://www.irrc.state.pa.us/docs/3202/AGENCY/3202PRO.pdf>

⁷ Employer Survey by Compliance HR (Oct. 2017), available at http://event.lv13.on24.com/event/15/06/73/3/rt/1/documents/resourceList1507125242509/web_chr_1004_final.pdf