NATIONAL EMPLOYMENT LAW PROJECT

Christine L. Owens
Executive Director

www.nelp.org

NELP National Office
90 Broad Street
Suite 1100
New York, NY 10004
212-285-3025

Washington DC Office
2040 S Street NW
Lower Level
Washington, DC 20009
202-640-6520

California Office
2030 Addison Street
Suite 420
Berkeley, CA 94704
510-982-5945

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000

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Amy DeBisschop
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Comments on Regulatory Information Number (RIN) 1235-AA20: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Submitted at: https://www.federalregister.gov/documents/2019/03/22/2019-04514/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and#open-comment

Dear Ms. DeBisschop:

The National Employment Law Project submits these comments on the Department of Labor's (Department or DOL) Notice of Proposed Rulemaking regarding the executive, administrative, professional (EAP) and related exemptions from minimum wage and overtime coverage under the Fair Labor Standards Act (FLSA or the Act), RIN 1235-AA20 (NPRM).

NELP is a non-profit research, policy, and advocacy organization that for 50 years has sought to insure 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, including the FLSA. NELP supports groups with members who include low- and middle-wage earners who have been denied minimum wage and overtime protections, and works closely with worker centers, labor unions, lawyers and other economic fairness advocates who promote and protect the rights and interests of workers. NELP's *National Wage & Hour Clearinghouse*, at www.just-pay.org, serves more than 1,000 members, including organizers, scholars, policymakers, lawyers, and others who through organizing, litigation, and policy advocacy work to cement basic wage protections, including the FLSA's minimum wage and 40-hour workweek and overtime pay guarantees, for all workers who are or should be covered by the Act.

NELP has submitted comments on overtime rules in the past, including in 2004, 2016, and 2017, primarily to urge proper coverage of a large and fast growing workforce that includes many workers in low-wage industries.

NELP writes to raise five primary concerns with the Department's proposal:

- The NPRM fails to uphold the purpose of the FLSA and the EAP exemptions, which are meant to cover only bona fide white-collar employees.
- The proposal's low salary threshold paired with the standard duties test perpetuates the mismatch problem created by the 2004 Rule, arbitrarily leaving too many workers out of coverage, in contravention of the statute.
- If the DOL rejects its own 2016 Final Rule and its appropriate balancing of the exemptions to today's labor market, DOL must either align a higher salary threshold to the standard duties test or bring back the long test.
- The NPRM fails to provide for automatic indexing of the salary threshold.
- The workers who will not get overtime protection under this proposed rule are precisely the workers who most need the FLSA's protection.

Finally, NELP agrees with the Department's decision in the proposed rule to decline to create separate geographical or exemption category salary thresholds.

I. The Purpose and History of the EAP Exemption and Regulations, Up to the Texas Court Ruling.

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, 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" (EAP) from minimum wage and overtime coverage. Congress did not define or delimit those terms, instead leaving it to Secretary to do so "from time to time by regulations."[1]

The EAP exemptions apply only to "bona fide" EAP workers, to distinguish them from a general exemption for white collar workers or even from the subset of all EAP employees."[2] Of the

[1] 29 U.S.C. §213(a).

[2] 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

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.[3] These exemptions are based on the understanding that bona fide EAP employees have more power in the workplace such that they can set their own schedules and negotiate their own pay.[4] The EAP definitions were meant to be limited to workers who typically earned salaries well above the minimum wage and those that earned privileges above the baseline fringe benefits that set them apart from nonexempt workers entitled to overtime pay.[5] 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."[6]

The Department issued its first regulations defining the EAP exemptions in 1938. It has subsequently revised them 12 times. The first rule defined the test for the exemption in terms of "duties" performed rather than occupational titles. In order to assure a worker was truly a "bona fide" exempt worker, the duties tests for all the EAP exemptions first promulgated by the DOL included the requirement that they could do "no substantial amount of work of the same nature as that performed by non-exempt employees of the employer."[7] This rigorous duties test, which became known as the "long test,"[8] was developed after a conference of representatives of industry and labor were convened to discuss and then approve the appropriate definition and delimitation of these terms.[9] In effect, the long duties test ensured that employers could not avoid paying overtime by assigning lower-paid employees a minimal amount of exempt work.

A salary level test was also included in most of the original definitions 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."[10] The salary level test has been updated seven times, and every time the Department has recognized that the salary level test works in tandem with the duties test to identify bona fide EAP employees.[11]

In 1949, the Department established a second duties test for each exemption, commonly known as the "short test."[12] This less-stringent duties test, which only applied to employees who were

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of Labor, Wage and Hour Division, Washington, DC, October 10, 1940, pp. 6-7 (hereafter cited as "Stein Report").

[3] Congressional Research Service Report R45007, p. 4.

[4] Report of the Minimum Wage Study Commission Volume IV, pp. 236 & 240 (June 1981).

[5] *Id.*

[6] *Id*.

[7] 3 Fed. Reg. 2518 (October 20, 1938).

[8] In 1940 the "no substantial amount of work" was defined as no more than 20% for executive and professional employees. *See* 5 Fed. Reg. 4077. In 1949, it was defined that way for administrative employees. 14 Fed. Reg. 7705 (Dec. 24, 1949) at 7706. When retail employees were covered by the Act in 1961, it was defined as no more than 40% for them. *See* Public Law 87-30, May 5, 1961.

[9] Stein Report p. 1.

[10] *Id*. at pp. 6-7.

[11] 81 Fed. Reg 32391 at 32444 (May 23, 2016).

[12] "Although commonly referred to as the "short" duties test, the pre-2004 regulations actually referred to these tests as the ''special proviso for high salaried executives," *See* 69 Fed. Reg. 22122 at 22173, (April 23, 2004); *see also* 29 CFR §541.119, the "special proviso for high salaried administrative employees;"

paid at a level well above the long test salary threshold, did not take into account the amount of non-exempt work an EAP employee performed. Rather, under this test, an EAP-exempt employee "must have as a 'primary duty' those of a bona fide executive, administrative or professional employee."[13] The term "primary duty" was defined as the principal activity. Under this test, there was no limit placed on the amount of non-exempt work an employee performed because the employees who met the higher salary level were more likely to meet all of the requirements for exemption, and thus a "short-cut test for exemption . . . would facilitate the administration of the regulations without defeating the purposes of section 13(a) (1)."[14]

The main difference between the long and short duties tests was a quantitative limit in the long test on the amount of time an EAP employee could spend performing nonexempt work (no more than 20% in a workweek; 40% for retail). With the exception of 1975,[15] from 1949 until 2004, the Department, with some variations in data, set the two salary levels using a consistent methodology. For employees who would be subject to the long test, DOL set the salary level so that "no more than about 10 percent" of exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[16] The short test salary level was set ranging from 130 to 180 percent of the long test salary levels.[17] During this 55-year period of using long and short tests, the salary level for the short test averaged 149% of the salary for the long test.

In 2004, the Department abandoned the concept of separate long and short tests for different salary levels. It opted instead for one "standard" test, which it admitted was the functional equivalent of the old short test,[18] and one salary level set at an amount equivalent to the lower old "long test" salary level.[19] The Department set the standard salary level at $455 per week in the 2004 Rule. In arriving at this number, the Department relied on the methodology it had historically used to set the long test salary level, but with two changes. First, the Department set

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see also 29 CFR §541.214; and *see also* the "special proviso for high salaried professional employees" 29 CFR §541.315.

[13] 81 Fed. Reg. at 32400.

[14] Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report") at pp. 22-23.

[15] In 1975, the Department adjusted the salary levels based on the Consumer Price Index. These were interim levels and the Department intended to issue new regulations based on a salary study to be completed six months later. The Department also stated that the 1975 rulemaking should not be considered a precedent. 40 Fed. Reg. 7091, at 7091 (Feb 19, 1975).

[16] Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) ("Kantor Report") at pp. 5–7.

[17] 81 Fed. Reg. at 32400.

[18] In 2004, the Department described the difference as merely "de minimis," and explained that the new standard duties test is "substantially similar" to the old short duties test. 69 Fed. Reg. at 22192–93 and 22214. Although the duties test for executives included an additional requirement separate from the old long test, the Department said that the numbers of workers these differences would impact "is too small to estimate quantitatively." 69 Fed. Reg. at 22193.

[19] 81 Fed. Reg. at 32467 and 69 Fed. Reg. at 22168.

the salary level based on the earnings of exempt and nonexempt full-time salaried employees. In previous rulemakings, the Department had looked only at salary data on employees who met the EAP exemption, who earn higher salaries on average than nonexempt salaried employees.[20] Second, recognizing that "employees earning a lower salary are more likely non-exempt," the Department offset the first change by making an additional adjustment.[21] The 2004 Final Rule set the salary level to exclude from exemption "approximately the lowest 20 percent of all salaried employees," whereas previously the Department set the salary level to exclude "approximately the lowest-paid 10 percent of exempt salaried employees."[22] By setting the salary threshold at a higher percentile of a data set that included employees likely to earn lower salaries, the Department explained that it reached a final salary level that was "very consistent with past approaches" to setting the long test salary threshold.[23]

Although the Department recognized the need to make additional adjustments to the long test salary level methodology because of the move to the weaker standard duties test,[24] the salary level included in the 2004 Final Rule notably did not do so. The Department indicated that the change in percentile could account for both the fact that the data now "included nonexempt salaried employees" and "the proposed change from the 'short' and 'long' test structure."[25] At the same time, however, it is clear from the Department's analysis that the change to the 20th percentile of exempt and nonexempt salaried employees produced a salary that was in fact roughly equivalent to, although a little lower than, the salary derived through the methodology previously used to set the long test salary levels.[26] The prior long test salary levels were based on salaries of approximately the lowest 10 percent of exempt salaried employees in low- wage regions and industries (known as the Kantor long test method). Yet, the $455 salary level excluded only 8.2 percent of likely exempt employees in the South and 10.2 percent of likely exempt employees in retail.[27]

The 2004 Final Rule also for the first time created the "highly compensated employee" (HCE) test for exemption. Under the HCE test, employees who receive at least $100,000 in specified total annual compensation (which must include at least the standard salary amount per week paid on a salary or fee basis), are exempt from the FLSA's overtime requirements if they meet a very minimal duties test. They must customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption.[28]

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[20] *See* 69 Fed. Reg. at 22166–67.
[21] *Id.*
[22] *Id*. at 22168; 22166.
[23] *Id*. at 22167.
[24] *Id*. at 22167
[25] *Id*.
[26] *See* 69 Fed. Reg at. 22168. "The result of this analysis is Table 4, showing salary ranges for likely exempt workers. As shown in Table 4, the lowest 10 percent of all likely exempt salaried employees earn approximately $500 per week. The lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week. The lowest 10 percent of likely exempt salaried employees in the retail industry earn approximately $450 per week."
[27] *Id*.
[28] 29 CFR § 541.601.

In 2016, the Department recognized that

> the effect of the 2004 Final Rule's pairing of a standard duties test based on the less rigorous short duties test with the kind of low salary level previously associated with the more rigorous long duties test was to exempt from overtime many lower paid workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime- eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt—that is overtime exempt—who pass the standard duties test but would have failed the long duties test.[29]

In order to remedy this mismatch of the duties and salary level tests, and in deference to the overwhelming demands of the employer community to not revise the duties test, in the 2016 Final Rule the Department set the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).[30] The Department concluded that this standard salary level would adequately distinguish between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work, as existed under the long duties test.[31] The Department also included in the regulations a mechanism to automatically update the salary and compensation thresholds every three years by maintaining the fixed percentiles of weekly earnings set in the Final Rule.

The 2016 Final Rule was challenged in the Eastern District of Texas, where the judge erroneously enjoined the implementation of the Rule. The Department appealed that decision, and has been granted a stay of the appeal pending the outcome of its current attempt at re-regulation.

A. DOL Relies on a Deeply Flawed District Court Ruling to Support the Need to Re-Regulate and Abandon the 2016 Final Rule.

In proposing to rescind the 2016 rule in the current NPRM, the DOL relies on the questionable opinion of one district court judge. The Texas district court used a faulty analysis to enjoin the DOL's implementation of the 2016 Rule, and should not determine the Department's policy. The Department's over-reliance on the district court's decision is evidenced by the 33 times it cites to the decision and the numerous references to the court's reasoning.[32]

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[29] 81 Fed. Reg. at 32392.

[30] Although the DOL used a slightly different data set in 2016 to calculate the salary level it proposed, the differences resulting from the slightly different data sets are de minimis. For example, the $679 salary level proposed in the 2019 NPRM is set at the 20th percentile when using the 2004/19 data set. Using the 2016 data set, $679 is the 19th percentile.

[31] 81 Fed. Reg. at 32393.

[32] "The Department reconsidered the $913 per week standard salary level set in the 2016 final rule in light of the district court's decisions…"; "To address the district court's and the Department's concerns with the 2016 final rule and set a more appropriate salary level…"; "In proposing a new salary level, the Department considered the district court's conclusion that the salary level set in the 2016 final rule exceeded the Department's authority…"; 84 Fed. Reg. 10900 (March 22, 2019) at 10900, 10901; "As the district court noted in its decision invalidating the 2016 final rule, the increase also untethered the salary

In *Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017), the court determined that a salary level set by the DOL was not valid because it "excludes from exemption an unusually high number of employees who pass the duties test." However, as NELP detailed in its comments in response to the Request for Information, this decision was wrong on the merits and should have no bearing on the Department's overtime regulations.[33] The judge fundamentally misconstrued the Department's historical use of the salary-level test as part of its definition and delineation of the EAP exemptions. He failed to consider any of the vast economic analysis prepared by the Department in support of the 2016 Rule, which demonstrated the mismatch the 2004 regulations created. Instead, the judge was unduly focused on the Department's doubling of the threshold, without addressing why the Department considered such a level necessary. The judge also erred by failing to afford the Department deference with respect its interpretation of the EAP exemptions.[34]

The district court noted that the 2016 Rule raised the salary level to twice the 2004 level, but did not explain why the salary level should be lower simply due to the high number of employees that would suddenly become overtime exempt without any change to their duties. The court failed to account for the fact that those employees are exempt because they pass the standard duties test, but may not have been overtime exempt if the 2004 rule had either kept the more restrictive long duties test, or raised the salary level to one more equivalent to the old short test level. And the court ignored the fact that the salary level has historically worked in tandem with the duties test, so the standard duties test is not the only or necessarily the best way to define who is a bona fide exempt employee.

Though the judge was troubled that workers earning below the salary level are automatically excluded from the EAP exemption without regard to their duties, he failed to realize that this is the point of a salary level test. It has been true of every salary level test since just after the enactment of the FLSA in 1938, including the 2004 salary level. The judge appeared to place great weight on the fact that the Department estimated that 4.2 million workers who were subject to the EAP exemption under the 2004 Rule would become automatically covered under the 2016

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test from its historical justification…" *Id*. at 10901; "The district court's summary judgment decision endorses the Department's [current approach] to setting the salary level…" *Id*. at 10907; "The court then explained that in contrast to these acceptable past practices, the 2016 standard salary level…" *Id*. at 10907; "The court also emphasized the magnitude of the salary level increase…" *Id*. at 10908; "The Department has reexamined the 2016 final rule in light of the district court's decision." *Id*. at 10908; "The district court approvingly cited the Weiss Report and explained that setting 'the minimum salary level as a floor to 'screen[] out the obviously nonexempt employees'' is 'consistent with Congress's intent.'" *Id*. at 10909; "Further endorsing the Department's earlier rulemakings, the district court stated…" *Id*. at 10909; "As the district court recognized…" *Id*. at 10908; "As the district court stated, that increase department from the salary level's purpose…" *Id*. at 10909; "The proposed standard salary level also addresses the concerns raised in the district court's summary judgment decision." *Id*. at 10909; "The district court's decision raised concerns regarding the large number of exempt workers…" *Id*. at 10909; "The district court noted that this relatively high number indicated that the salary level was displacing the role of the duties test…" *Id*. at 10909.

[33] National Employment Law Project Comment Letter response to RIN 1235-AA20, published September 25, 2017, available at: https://s27147.pcdn.co/wp-content/uploads/nelp-opposes-efforts-to-change-overtime-rule-criteria.pdf

[34] *See Id.*, *see also*. *Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017).

Rule, without any change to their duties. However, the promulgation of the 2004 Rule was itself expected to lead to the automatic coverage of 1.3 million previously exempt workers, also without any change to their duties. Furthermore, as discussed below, that number would have been much higher if the 2004 salary level had been set at an amount more appropriate to the standard duties test.

The judge failed to mention, let alone account for, the Department's conclusion in 2016 that there was a mismatch in the 2004 Rule between the salary level – set at the lower long-test salary level – and the standard duties test, which was essentially the short duties test – and so the 2004 salary level should have been set higher. If the 2004 rule had been set at an appropriate level, e.g. between 130% and 180% of the long test level, there would have been far more than 1.3 million workers affected by the 2004 Rule. And as a result, there would have been between 700,000 and 2.8 million fewer workers affected by the 2016 Rule. As the Department concluded in 2016, in the absence of a long test "it is necessary to set the salary level higher (resulting in exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test."[35]

The judge's conclusion that the salary level supplants an analysis of an employee's job duties is belied by the record, which shows that there are 6.5 million white-collar salaried workers who earn above the 2016 salary level and yet are expected to fail the duties test.[36] In fact, fully 47% of the entire salaried white-collar workforce would fail the test, and therefore are overtime-eligible as a result of the application of the duties test.[37]

Finally, to the extent the judge determined that the particular salary level used in the 2016 Rule is inconsistent with the EAP exemption, he failed to support this assertion with any economic or legal analysis. The judge simply relied upon the number of workers affected to distinguish the 2016 salary level from the 2004 level, which he in a footnote suggested – in purely conclusory fashion – was valid.[38]

The current NPRM continues the 2004 error of pairing a low salary level with a duties test that allows the exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense.

II. The Proposed Rule's Low Salary Threshold Perpetuates the Mismatch Created by the 2004 Rule and Fails to Advance the Goals of the FLSA.

This NPRM does not advance the overarching goals of the FLSA because it perpetuates the 2004 mismatch by proposing a low salary level while pairing it with the weaker standard duties test. This NPRM will lead to continued inappropriate classification of overtime-eligible employees, denying overtime to many workers who are not bona fide EAP workers.

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[35] 81 Fed. Reg. at 32409.
[36] 81 Fed. Reg. at 32465.
[37] 81 Fed. Reg. at 32466.
[38] The Judge suggested that if the Department updated the 2004 methodology adjusting for inflation, then the case would not have moved forward because "[the salary level] would still be operating more the way it has. . . as more of a floor." *Nevada v. U.S. Dept't of Labor*, 275 F. Supp. 3d 795, n. 6.

The Department of Labor has long recognized the symbiotic nature of the salary threshold and the duties test in determining the EAP exemptions:

> At a lower salary level, more overtime-eligible employees will exceed the salary threshold, and a more rigorous duties test would be required to ensure that they are not classified as falling within an EAP exemption and therefore denied overtime pay. At a higher salary level, more employees performing bona fide EAP duties will become entitled to overtime because they are paid a salary below the salary threshold. Setting the salary threshold too low reduces the risk that workers who pass the duties test become entitled to overtime protections, but protections but does so at the cost of increasing the number of overtime-eligible employees exceeding the salary level who are subject to the duties test and possible misclassification.[39]

Indeed, this is exactly what happened in 2004, when the Department paired a relatively low salary threshold with a the less rigorous duties test that was previously used to determine bona fide EAP status only at much higher salary levels. When the Department examined the results of this pairing for the 2016 Rule, detailed economic analysis demonstrated that the 2004 regulation created what it termed a "mismatch" between the salary level and the duties test, such that far more people were classified as overtime exempt, well outside of historical ranges. As noted in the 2016 Final Rule, "[r]ather than pair the standard duties test with a salary level based on the higher short test salary level, . . .[the Department] tied the now standard duties test to a salary level based on the long duties test. This resulted in a standard salary level that, even in 2004, was too low to effectively screen out from the exemption overtime eligible white collar employees."[40]

In the current pending NPRM, DOL does not and cannot dispute that in 2004 it paired a duties test substantially similar to the old short test,[41] with a salary level that was equivalent to the old long test level.[42] Now, DOL proposes to rescind the 2016 Rule that was intended to correct the 2004 methodological error. However, by simply reverting to the 2004 methodology, and not considering any alternatives that could help correct the mismatch it does not dispute exists, the DOL has made no effort to assure that lower paid workers, especially those who perform a great deal of non-exempt duties, are appropriately classified as overtime eligible.

DOL claims that the 2016 Rule did not account for the absence of an "effectively dormant"[43] long test allowing for "many"[44] exempt employees to qualify for overtime. NELP believes the DOL set an appropriate salary level in 2016, and that it did account for the absence of the long test by setting the salary level at the low end of the historical level of the short test. In 2016, the Department explicitly determined that, "[b]ased on the historical relationship of the short test salary level to the long test salary level ... a salary between approximately the 35th and 55th

[39] 80 Fed. Reg. 38516 at 38531 (July 6, 2015).
[40] 81 Fed. Reg. at 32404.
[41] 81 Fed. Reg. at 32400.
[42] 69 Fed. Reg. at 22167.
[43] 84 Fed. Reg. at 10906.
[44] 84 Fed. Reg. at 10903.

percentiles of weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test."[45] It further noted that:

> As we noted in the NPRM, we are concerned that at the current low salary level employees in lower-level management positions who would have failed the long duties test may be inappropriately classified as ineligible for overtime. At the same time, the Department proposed a lower salary level than the average salary traditionally used for the short duties test in order to minimize the potential that bona fide EAP employees, especially in low-wage regions and industries, might become overtime- protected because they fall below the proposed salary level.[46]

In the NPRM, the Department further claims that "[t]he 2016 final rule went beyond the limited traditional purpose of setting a salary "floor" to identify certain obviously nonexempt employees, and instead excluded from exemption many employees who had previously been, and should have continued to be, exempt by reference to their duties."[47] However, the NPRM provides no analysis of how many employees should have continued to be exempt or why they should have continued to be exempt.

DOL further states that "[t]he [2016] increase excluded from exemption 4.2 million employees whose duties would have otherwise qualified them for exemption, a result in significant tension with the text of section 13(a)(1)."[48] However, qualification for the exemption was never based on passing a duties test alone; it was always based on a duties test working in tandem with an appropriate salary level.[49] Indeed, DOL still endorses the maxim that a duties test must work with an appropriate salary level in order to determine if one is an exempt EAP employee. For example, with regard to HCE employees, a worker must not only pass the very minimal HCE duties test but must also make above a certain salary in order to be exempt from overtime requirements.

As the Department has long recognized, the salary level threshold "cannot be drawn with precision but at best can be only approximate."[50] From 1949 to 2004, the salary level that worked with the functional equivalent of the standard duties test was 130% to 180% higher than the salary level the DOL is proposing in this NPRM.[51] Because DOL has abandoned the long duties test, a salary level must set a floor that accounts for absence of the long test. The NPRM's proposed salary level does not do that.

One of the more galling assertions in the NRPM is the following:

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[45] 81 Fed. Reg. at 32404.
[46] 81 Fed. Reg. 32391 at 32404.
[47] 84 Fed. Reg. at 10903.
[48] 84 Fed. Reg. at 10901.
[49] The fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee. The salary level test and duties test have always worked in tandem to distinguish those who Congress intended the FLSA to protect from those who are "bona fide" EAP employees. 81 Fed. Reg. at 32413,
[50] Weiss Report at 11.
[51] 81 Fed. Reg. at 32392.

> The mismatch rationale also failed to account fully for the Department's part 541 exemption history. The standard duties test was introduced by the 2004 final rule and has been in effect for 15 years. The short duties test, which it is similar to, was functionally the predominant test in use for the preceding 13 years, since the 1975 long test salary levels were equaled or surpassed by the FLSA minimum wage in 1991. Altogether, most employers and employees have effectively been covered by this one-test system for over 25 years. This practice is highly relevant to any update by the Department's approach.[52]

In effect, DOL is relying on its failure to effectively define and delimit the EAP exemptions over the last 25 years, first by failing to update the salary level, and then by pairing an inappropriately low salary level with a weak duties test to justify its continuing failure to properly define and delimit the exemption. Such reasoning does not justify DOL abdicating its responsibility to promulgate effective and appropriate regulations.

And rather than fashioning any solution to the mismatch, the Department now simply wants to reinstate the deeply flawed 2004 regulation, setting the salary threshold once again at approximately the 20th percentile of full-time salaried workers in the lowest wage region in the country and in the retail sector. Not only does the Department simply return to the flawed 2004 methodology, but it does so without consideration of any other alternative that could solve the problem of the mismatch that it concedes exists.

Contrast that with the 2016 Final Rule, which explicitly discussed a number of other methods of setting the salary threshold. First, DOL looked at updating the threshold based on a number of different measures of inflation, but decided, consistent with longstanding DOL practice, that while inflation is a useful tool to underscore how a threshold may have eroded, the threshold should be updated by relying on the annual earnings of workers as the best evidence of prevailing salary levels.[53]

The Department also contemplated updating the 2004 methodology, as it is proposing to do now, or using the Kantor method discussed above. Both methodologies were rejected because the 2004 regulation created the mismatch, and the Kantor method only works if the salary threshold is paired with a long test. DOL also considered setting the salary threshold "equal to the median earnings for all full-time wage and salaried workers combined," but decided it wasn't appropriate to include hourly workers' wages in the calculation because it would have resulted in too low a salary level when combined with current duties test. And finally, DOL considered setting the threshold at 50 % of median earnings for salaried workers but determined that would be too high for some low-wage regions in the country.[54]

Instead of a thoughtful approach that examines many alternatives, the current NPRM simply follows the path of least resistance (coincidentally that which was suggested by the business community's largest lobbying associations), and in conclusory fashion decides to simply update the 2004 regulations with the mismatch, and not examine any other meaningful alternatives.

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[52] 84 Fed. Reg at 10908.
[53] 81 Fed. Reg. at 32461.
[54] 81 Fed. Reg. at 32495.

Though the Department looked at various inflation-based indices it could use to bring the 2004 threshold to a current value, in spite of its long history of rejecting inflation as a proper tool to update the salary threshold, it did not consider a single alternative that would actually correct the mismatch it acknowledges exists.

DOL did not consider any alternatives to the 40th percentile solution fashioned in the 2016 Final Rule. As noted above, in 2016, the Department concluded that a salary threshold somewhere between 35% and 55% of the weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test and correct the mismatch, but in this NPRM, there's no consideration of setting the salary threshold consistent with the 35% level, which would result in a weekly threshold of $919, a present value of $47,788 per year, or any other level that attempts to address the issues with the 2004 rule. Nor did the Department even consider the possibility of phasing in an appropriate salary level.

As previously mentioned, NELP believes the DOL set an appropriate salary level in 2016 and that it did account for the absence of the long test by setting the salary level at the low end of the historical level of the short test. If DOL continues to disagree, it should propose and adopt a salary level that it believes does account for the absence of the long test. The 2004 method clearly does not do that since it is nowhere near the short test salary level; in fact it is lower than the long test salary level.[55]

Finally, the Department should set the threshold at a level that is found in a series published on a regular basis by the Bureau of Labor Statistics (BLS), as the 2016 Rule did. To return--as the NPRM proposes--to a methodology that requires a sophisticated and time-consuming analysis of microdata would be a major step backwards in transparency.

III. If DOL Will Not Implement a Significantly Higher Salary Threshold, Then it Must Reinstate the Long Test.

If DOL refuses to revise the salary threshold high enough to remedy the mismatch, then it must reinstate the long duties test. Though the Department attempts to minimize its longstanding emphasis on the importance of the salary level test,[56] if it so chooses to do so, then it must adopt a duties test appropriate to the salary level it chooses. The DOL reasoned that "[s]alary is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees. But it is not 'capacity' in and of itself."[57] By the same reasoning, any particular duties test, in and of itself, is not a true indicator of "capacity" either. Through 1949 to 2004, the Department recognized that lower salary levels require a more rigorous duties test in determining exempt status, and it still does in terms of the differences between the standard duties test and the HCE duties test, which the Department continues to endorse.

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[55] *See, infra,* footnotes 19 and 25.

[56] "More fundamentally, except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee's duties. It is, at most, an indicator of those duties. For most white collar, salaried employees, the exemption should turn on an analysis of their actual functions, not their salaries, as Congress commanded." 84 Fed. Reg. at 10908.

[57] 84 Fed. Reg. at 10907.

As discussed above, when the FLSA was passed, and the first definitions of the EAP exemptions were promulgated by the Department, they did not all have a salary level test, but they all had a duties test which required that exempt employees could not perform a substantial amount of non-exempt duties. It was only when the highly compensated salary level was introduced in 1949 that the minimal duties test, which has evolved into the standard test, came into being. From 1949 to 2004, the more restrictive duties test was what the Department required to determine who was a bona fide exempt employee if they were not highly compensated. Therefore, if the Department chooses to abandon the emphasis it has placed on the salary level and instead emphasize an analysis of duties, it cannot keep the standard duties test, which places no limit on the amount of non-exempt work that an employee can perform.

The NPRM proposes setting the salary level using the 2004 methodology, which results in a salary level that the DOL acknowledged in 2004,[58] 2016,[59] and 2017,[60] and that the district court[61] recognized was the equivalent of the long duties test salary level. At that salary level, DOL must reintroduce the long duties test in order to assure that employees are indeed "bona fide" exempt workers.

In 2016, the DOL opted to increase the salary level in large part because business opposed any changes to the standard duty test. Because the salary level and duties tests have always worked in tandem, the DOL has two choices: it can increase the salary level to a level more appropriately paired with the standard duties test, or it can use a duties test more appropriately paired with the salary level it is proposing. DOL is arbitrary when it does neither, proposing a low salary level and no changes to the less than rigorous standard duties test.

IV. DOL Has Ample Authority to Index the Salary Threshold and Should Do So in the Final Rule.

Though the Department favored indexing the salary threshold on a regular basis in its 2016 Rule, in its current NPRM, it has bowed to threats from corporate lobbyists, who favor the difficulty of intermittently updating the EAP regulation to the benefit of employers.[62]

NELP is in favor of an updating salary threshold to prevent the dramatic erosion of the standard's value in the face of DOL's failure to act. Even though the FLSA is meant to reduce wage inequality, today's poverty-level salary threshold is a potent example of the harms that accompany a lack of salary level indexing. Growing wage inequality is a continuing and significant problem for our nation, and the loss of coverage from the lower salary level will be substantial. Failure to index the threshold will only exacerbate these losses. According to recent data from the Economic Policy Institute (EPI), due to the lack of indexing, the earnings loss for

[58] *See, infra,* footnote 19.
[59] 81 Fed. Reg. at 32401-402.
[60] 82 Fed. Reg. 34616 (July 26, 2017) at 34618.
[61] "In addition, the Department set the salary level equivalent to the lower minimum salary level previously used for the long test." *State of Nevada et al v. U.S. Dept. of Labor*, 275 F. Supp. 3d. 795, 795 (E.D. TX Aug. 31, 2017).
[62] Chris Opfer, *Punching In: Legal Drama for Labor Department*, Bloomberg Law, February 11, 2019, https://news.bloomberglaw.com/daily-labor-report/punching-in-legal-drama-for-labor-department-19.

workers from this proposal will grow from $1.2 billion to $1.6 billion over the first 10 years of implementation.[63]

DOL has updated the salary threshold only eight times in 75 years, and only once since 1975; there is thus no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. While the DOL has used different methods over the decades as it has adjusted the EAP salary thresholds, regulatory adjustments to the thresholds have slowed in recent years, causing the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions, as happens now.[64]

The FLSA exemption from the minimum wage and overtime protections for EAP employees specifies that these exemptions must be "defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). As indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL would be acting entirely reasonably and within its statutory authority[65] to adopt indexing as a means to define and delimit the EAP exemptions in a timely manner. And, in the current NPRM, the Department acknowledges that Congress has instructed the Department to make these determinations "from time to time."[66]

Indexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming federal regulations.[67] Even if the Department finalizes its proposal to "commit" to updating the rule through notice and comment rulemaking every four years based on the same methodology used in the Final Rule, benchmarking the rule to a regularly-published BLS series would still provide a crucial planning tool for the regulated community and for affected workers.

V. The Workers Who Will Not Get Overtime Protection Because of this Proposed Rule are Precisely the Workers Who Most Need the FLSA's Protection.

The Supreme Court, citing the statute, stated that "[t]he principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'"[68] Worried about over-work, Congress enacted a time-and-one-half premium pay requirement for hours worked beyond 40 in one week.[69] Congress recognized, however, that

[63] Heidi Shierholz, *More than eight million workers will be left behind by the Trump overtime proposal*, Economic Policy Institute, April 8, 2019, https://www.epi.org/publication/trump-overtime-proposal-april-update/
[64] *See,* 81 Fed. Reg. at 32392.
[65] Law Professors Overtime Comments in response to RIN 1235-AA11 (September 4, 2015) letter on DOL's authority to index the salary threshold: https://www.regulations.gov/document?D=WHD-2015-0001-4585.
[66] 84 Fed. Reg. at 10914.
[67] The Department cites industry stakeholders' views that indexing would not account for unique economic circumstances and would be "unduly disruptive." 84 Fed. Reg. at 10914. These vague and unsubstantiated assertions are not a proper basis for the Department's determination not to index.
[68] *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)).
[69] 29 U.S.C. § 207.

while many workers did not have sufficient individual bargaining power to protect themselves against abuses like low pay and excessive hours, some workers did enjoy the kind of labor market and workplace power that would enable them to protect themselves. These are the workers they decided should be exempted from minimum wage and overtime protections based on their status as bona fide executive, administrative or professional employees.[70]

The workers losing protections under this proposed Rule, as compared to the Obama-era 2016 Rule, are the very ones meant to get coverage: those without the requisite power to protect themselves in their job hours and including a disproportionate number of women and people of color. The Economic Policy Institute estimates that 8.2 million workers will be left behind by this proposed rollback of the Obama Rule.[71] Of those workers, 4.2 million are women, 3.0 million are people of color, 4.7 million are without a college degree, and 2.7 million are parents with children under the age of 18.[72] Leading categories of jobs left behind by this NPRM include retail, health, education, services, and manufacturing.

NELP's own analysis of publicly-noted cases alleging EAP misclassification abuses, filed as an Appendix to its comments on the 2015 Rule, shows that the following sectors are well-represented in those with overtime abuses: retail, restaurants, hotels, banks, oil and gas inspection and repair, insurance company and call center service jobs.[73]A recent update to that case compendium shows that gas station attendants, logistics workers, oil drillers, fast food managers, and retail workers continue to work long hours and are treated as exempt under the EAP exemptions by their employers.[74]

VI. The Department is Correct to Reject Overly Confusing and Complex Regional Salary Levels and Separate Levels for E, A, and P Employees.

The Department rightly declines to revise its definitions of the EAP exemptions to contain multiple salary levels, based on either geographic or job category bases for distinct thresholds. NELP believes the approach of a single salary level is best.

Segmenting the salary level adds legal risk of a challenge to the Rule. As the Department knows, there is a wide array of possible methods for dividing salary levels, and selection of one method over an alternative would need to be carefully reasoned and empirically justified to survive

[70] 29 U.S.C. §213(a)(1).
[71] And because the NPRM does not index, this number rises to 11.5 million workers left behind in ten years, https://www.epi.org/publication/trump-overtime-proposal-april-update/.
[72] *Id*. at Table 1.
[73] National Employment Law Project, comments submitted in response to RIN 1235-AA11, September 4, 2015, https://www.regulations.gov/document?D=WHD-2015-0001-5653.
[74] *See, Goussen v. Mendez Fuel Holdings LLC*, No. 1:18-cv-20012 (S.D. Fla. Oct. 2018); *Hudgins et al. v. Total Quality Logistics, LLC,* No. 1:16-cv-07331 (N.D. Ill. Jan. 2019); *McQueen et al v. Chevron Corp.*, No. 4:16-cv-02089 (N.D. Ca. Feb. 2019); *Watt v. Fox Restaurant Venture LLC et al (aka Jimmy Johns)*, No. 2:17-cv-02104 (C.D. Ill. Feb. 2019); *Misa Choi v. LG Electronics USA, Inc. et al*, No. 2:19-cv-12236 (D.N.J. May 2019).

judicial review. [75] Second, classification of employers as between the different salary levels would be administratively difficult, require more of the Department's resources, and would invite more lawsuits as stakeholders second-guess the Department's line-drawing. Whether the levels are divided by geography or industry, or type of exemption, there are bound to be close-calls that will generate litigation. As the Department explained when it rejected regional salary thresholds in the 2004 rulemaking, adopting multiple different salary levels is not administratively feasible "because of the large number of different salary levels this would require."[76]

Finally, the compliance burden for employers subject to different salary levels, or for whom the applicable salary level is unclear, would escalate under the multi-level regime. Corporations often operate in multiple areas of the country, transfer workers frequently, and require work to be conducted across state lines, even within a single day or workweek. And the three EAP-exemption categories of employment are not always easily distinguishable. There is significant overlap between these exemptions, resulting in workers in many occupations being potentially covered by more than one exemption.[77]

Applying multiple different salary levels, or attempting to discern which single level applies to a job or a geographical area, would constitute a new and unwarranted cost to the regulation.[78]

Conclusion

For the reasons stated above, NELP is opposed to the NPRM as currently composed. It arbitrarily does not resolve the mismatch between the salary level and the standard duties test and it does not include automatic updating, in contravention of the purposes of the Fair Labor Standards Act (FLSA). The Department's proposed rule to define and delimit the Executive, Administrative and Professional exemptions (EAP) does not go far enough to reduce inappropriate classification of workers and reduce wage inequality and would especially hurt those workers in low wage industries who need the protections of the FLSA the most.

Sincerely,

Christine L. Owens, Executive Director

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[75] *See,* 82 Fed. Reg. 34616; National Employment Law Project, comments submitted in response to RIN 1235-AA20, September 15, 2017 at pp. 5-7, https://www.regulations.gov/document?D=WHD-2017-0002-140183.

[76] 69 Fed. Reg. at 22171.

[77] *See,* 69 Fed. Reg. at 22192.

[78] Indeed, such a scenario would appear to be the opposite of what many employer groups have advocated. For example, according to the HR Policy Association, "It is imperative that stakeholders work with policymakers to reach agreement on which employees continue to need the law's overtime protections *and establish clear lines distinguishing between exempt and non-exempt employees*." HR Policy Association, Classification of Employees as Exempt/Nonexempt, http://www.hrpolicy.org/issues-and-advocacy/sub-issues/classification-of-employees-as-exemptnon-exempt-2201 (last visited September 17, 2017) (emphasis added).