



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

Lorelei Salas
Commissioner

September 25, 2017

Liz Vladeck
Deputy Commissioner,
Office of Labor Policy and
Standards

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, RIN 1235-AA20

Jill Maxwell
Legal Director, Office of
Labor Policy and Standards

Dear Director Smith:

42 Broadway
8th Floor
New York, NY 10004

The Department of Consumer Affairs Office of Labor Policy and Standards (“OLPS”) strongly urges the U.S. Department of Labor (“DOL”) to retain the 2016 Final Rule Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (the “2016 Rule”)¹, or a rule that is substantially similar.

Dial 311
(212-NEW-YORK)

OLPS is charged with enforcing the New York City’s workplace laws, developing innovative policies to raise job standards, and providing a central resource to help working New Yorkers assert their rights under local, state, and federal law. In the course of providing guidance, education, and compliance tools to support these efforts, OLPS receives and incorporates feedback from the diverse array of employers and businesses in New York City.

nyc.gov/consumers

As the largest municipal jurisdiction in the nation to implement a law providing workers with the right to paid sick time, New York City has demonstrated that government can play an essential role in improving family and public health while business and the economy grow.² Recently, Mayor Bill de Blasio signed the Fair Work Week Law, which provides fast food and retail workers with advance notice of their work schedules and creates a path for fast food workers to obtain full-time work. These worker protections promote individual financial security without sacrificing a robust local economy; as such, they share a similar policy goal to the Fair Labor Standards Act (“FLSA”), which is to “[to eliminate] labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”³

The 2016 Rule is the product of an extensive rulemaking process that reinforces the FLSA’s purpose. DOL considered 290,000 comments and applied a sophisticated regulatory impact analysis.⁴ The time and money required for DOL to conduct a

¹ 81 Fed. Reg. 32,391 et. seq., (May 23, 2016) (codified at 29 C.F.R. §541).

² NEW YORK CITY, OFFICE OF THE MAYOR, “TWO YEARS AFTER MAYOR DE BLASIO EXPANDS PAID SICK LEAVE TO ONE MILLION NEW YORKERS, CITY’S ECONOMY STRONGER THAN EVER,” April 1, 2016, available at <http://www1.nyc.gov/office-of-the-mayor/news/318-16/two-years-after-mayor-de-blasio-expands-paid-sick-leave-one-million-new-yorkers-city-s-economy>.

³ 29 U.S.C.A. § 202 (West 2017).

⁴ 81 Fed. Reg. 32,391 (compare with 75,280 comments received in response to the 2004 Notice of Proposed Rulemaking, 69 Fed. Reg. 22122).

comparable expansive analysis so soon after the 2016 Rule’s adoption would unnecessarily duplicate the rulemaking process for little added value.

OLPS recommends retaining the indexing method for the salary level threshold and automatic updates to the salary threshold contained in the 2016 Rule because they are based on actual salaries and salary trends, and provide clear, consistent, predictable guidance to employers. In addition, OLPS recommends pairing the 2016 Rule salary threshold with the 2016 Rule duties test, unless the 2016 Rule duties test is strengthened to further clarify the FLSA’s language.

I. The 2016 Rule was Adopted After Rigorous Analysis and Deliberation

The 2016 Rule addresses the critical problem that arose when the regulation was amended in 2004: workers were exempted from overtime protections who were not intended to be exempted under the FLSA. At the time of that amendment, the exemption rule paired the standard duties test, which assesses whether a worker primarily manages the enterprise or its operations, directs or supervises employees, exercises authority over the change of status of employees, or applies specialized knowledge (the “standard duties test”), with a salary threshold that was so low that it almost always favored exemption. As discovered during the rulemaking process for the 2016 Rule, the exemption was so expansive that it quickly became “ineffective at distinguishing between overtime-eligible and overtime exempt white collar employees.”⁵ Reverting to the 2004 regulation would be contrary to the purpose of and undermine the FLSA.⁶

The 2016 Rule realizes the purpose of the FLSA by pairing the standard duties test with a higher salary threshold—one that is indexed at the 40th percentile of all full-time salaried workers in the lowest-wage Census region.⁷ A salary threshold indexed to the 40th percentile excludes from the exemption workers who are obviously entitled to overtime payments. Because it is paired with the standard duties test, the 2016 Rule’s salary threshold performs much of the screening to determine whether a worker is exempt from overtime requirements, making the 2016 Rule simple to apply, administer, and enforce. Accordingly, the 2016 Rule furthers the current administration’s goal of “reducing the regulatory burdens on the American people.”⁸ It is only when a worker is paid above a certain salary—\$913 per week—that there is a fact-intensive, individualized analysis of the worker’s daily activities. In other cases, when the salary threshold is not met, the minimum wage and overtime provisions apply.⁹

DOL would need to adopt a rigorous duties test to account for any lowering of salary in order to effectuate the FLSA’s language.¹⁰ The malleable and subjective standard duties test paired with the 2004 low salary threshold

⁵ 81 Fed. Reg. 32,391, 32,403 (“For example, at the time of the 2004 Final Rule, the salary levels for the long duties tests were \$155 for executive and administrative employees and \$179 for professional employees, while a full-time employee working 40 hours per week at the federal minimum wage (\$5.15 per hour) earned \$206 per week.”).

⁶ 29 U.S.C.A. § 202 (West 2017).

⁷ 81 Fed. Reg. 32,391, 32,404.

⁸ Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (February 24, 2017).

⁹ 29 U.S.C.A. § 213(a)(1) (West 2017).

¹⁰ One court has questioned whether DOL ran afoul of *Chevron* in indexing the salary threshold to the 40th percentile of all full-time salaried workers in the lowest-wage Census region. Without citing any evidence that such would be the case, the court reasoned that DOL could not set a salary level that would not exempt from overtime workers whose duties are executive,

meant that over 700,000 workers who would be newly overtime-eligible under the 2016 Rule did not receive overtime pay based on their salaries alone, even though they did not truly fulfill overtime-exempt roles.¹¹ For these workers, overtime exempt status is determined by their salaries alone. The problem, however, is that implementing a duties test that is sufficiently rigorous to fulfill the FLSA's purpose—which is necessary if there were to be a lower salary threshold than provided by the 2016 Rule—is ill-advised because of the administrative burden on employers and government that would be imposed by the application of a predominately subjective test.

In OLPS' enforcement experience, employers concerned about noncompliance prefer bright-line rules over complicated formulas—the 2016 Rule is about as close to a bright line rule as possible in light of the FLSA's language and purpose. The simplicity and ease of administration that accompany a bright line rule, however, come with trade-offs: there will always be workers who fall close to the line. But an overly broad exemption test—like the one in the 2004 regulation—is more problematic than one that is narrow, like the 2016 Rule, in light of the legislative intent of the FLSA. The FLSA's purpose is to ensure that workers with the least bargaining power are protected from low wages and overwork, while exempting those workers with more workplace authority and bargaining power. The FLSA provides a minimum labor standard. As such, an overtime exemption rule that is occasionally over-inclusive is preferable—and more legally defensible—to one that is occasionally under-inclusive.

II. The 2016 Rule Properly Addressed Regional Wage Disparities

The 2016 Final Rule establishes a weekly salary level threshold that is uniform throughout the United States. This is appropriate and we recommend implementing it without changes. At the time the rule was adopted, the 40th percentile of all full-time salaried workers in the lowest-wage Census region was equivalent to a \$913 weekly salary.¹² Although basing a national weekly salary threshold on full-time salaries in the lowest-wage Census region in the country might depress earnings in regions with higher costs of living,¹³ this was a fair approach which addressed stakeholder concerns at the time that a salary level based on a national average did not account for regional disparities and would make it difficult for poor regions to comply.¹⁴ A national standard is the most common-sense approach in an economy where business is routinely conducted across state and regional borders. We recommend implementing one uniform salary threshold.

A. The 2016 Rule Salary Threshold is Based on the Appropriate Measure

DOL should not revert to the 2004 regulation's salary level and instead should maintain a clear and fair standard that reflects the actual wages paid to hourly workers, consistent with the FLSA's purpose in setting minimum pay

administrative, or professional without an individual analysis of their duties. Although the court states that such a result is not its intent, its reasoning would lead to a result that would invalidate any salary threshold paired with the existing standard duties test. *See Nevada v. United States Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3837230, at 7 (E.D. Tex. Aug. 31, 2017).

¹¹ 81 Fed. Reg. 32,391, 32,463.

¹² 81 Fed. Reg. 32,391, 32,404.

¹³ 81 Fed. Reg. 32,391, 32,407; DREW DESILVER, THE REAL VALUE OF A \$15 MINIMUM WAGE DEPENDS ON WHERE YOU LIVE (August 3, 2015) <http://www.pewresearch.org/fact-tank/2015/08/03/the-real-value-of-a-15-minimum-wage-depends-on-where-you-live/> (stating that \$15 in New York City has the purchasing power of \$11.10 in Cincinnati).

¹⁴ 81 Fed. Reg. 32,391, 32,407.

for work. As discussed above, the 2004 regulation was deeply flawed because it paired a low salary with a light duties test. And simply adjusting the threshold for inflation would leave workers in regions where costs of living are high—like New York City—without the protections of the FLSA. Similarly, lowering or wholly abandoning a salary threshold would create a need to formulate a highly rigorous and inherently subjective duties test to ensure that the FLSA’s overtime protections are meaningful. When paired with the potentially lenient standard duties test, the 2016 Rule is easy for employers to implement and legally defensible because it is set at a level that is a strong indicator of whether the worker is employed in a “bona fide executive, administrative, . . . professional, outside sales, [or] computer” role.¹⁵ A weekly salary of \$913 amounts to an annual gross salary of \$47,476, which is still far below the 2016 national median income of \$59,039 and is likely to exclude from the exemption those who should clearly be entitled to overtime.¹⁶

A salary threshold any lower than \$913 per week would begin to erode FLSA protections in regions where the cost of living is among the highest in the country. For example, a fast food worker in New York City will soon be entitled to a \$15 minimum hourly wage;¹⁷ \$15 per hour amounts to \$600 weekly for a 40-hour work week—well above the \$455 weekly salary threshold in the 2004 regulation, even if adjusted for inflation.¹⁸ Without a substantially strengthened duties test, lowering the salary level would subject more of these workers to the standard duties test based on geography would mean that some are entitled to overtime and others are not, despite performing the same work.

Nevertheless, a national threshold is preferable to regional thresholds because it furthers the administration’s goal of simplifying the regulatory regime.¹⁹ In its 2004 regulation rulemaking process, DOL acknowledged that adopting different regional salary levels is not administratively feasible “because of the large number of different salary levels this would require.”²⁰ Employers subject to multiple salary levels, or for whom the salary level is unclear, would have a greater compliance burden. Moreover, if DOL adopted regional salary levels, there would be more “winners” and “losers” and, therefore, more opportunities for legal challenges as each determination of exemption would be subject to litigation.²¹ Defending these lawsuits will not only divert government resources better spent on other initiatives, it will delay workers receiving the earnings to which they are entitled.

¹⁵ 29 U.S.C.A. § 213(a)(1) (West 2017).

¹⁶ JESSICA L. SEMEGA ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-259, INCOME AND POVERTY IN THE UNITED STATES: 2016, U.S. Government Printing Office, Washington, DC, 2017 *available at* <https://www.census.gov/library/publications/2017/demo/p60-259.html>.

¹⁷ N.Y. Lab. Law § 652 (McKinney 2017).

¹⁸ According to the U.S. Bureau of Labor Statistics’ Consumer Price Index (CPI) Calculator, <https://data.bls.gov/cgi-bin/cpicalc.pl>, the adjusted value is \$596.05.

¹⁹ Exec. Order No. 13777, 82 Fed. Reg. 12285 (February 24, 2017).

²⁰ 69 Fed. Reg. 22,122, 22,171 (April 23, 2004) (codified at 29 C.F.R. §541).

²¹ DREW DESILVER, COST-OF-LIVING DISPARITIES WITHIN STATES COMPLICATE MINIMUM-WAGE DEBATE (April 7, 2016) <http://www.pewresearch.org/fact-tank/2016/04/07/cost-of-living-disparities-within-states-complicate-minimum-wage-debate/>.

B. Any Change to the 2016 Rule Salary Threshold Should Be an Increase

The salary threshold set by the 2016 Rule could even be higher and still exclude only those who are obviously not exempt from overtime. Ideally, an indexed salary level would equal at least \$1,270 per week to reflect the salaries of professionals. Actual salaries of executive, administrative, and professional workers identified by the Bureau of Labor Statistics' 2011 American Compensation Survey were already well above this amount, ranging from \$1,520 to \$3,995.²² This higher cutoff would ensure that regions and industries in which wages are lowest could comply while preventing a mismatch between workers' earnings and their duties. This threshold would promote the FLSA's stated purpose to ensure "a fair day's pay for a fair day's work"²³ by guaranteeing overtime pay to workers below the range of actual salaries paid to executive, administrative, and professional workers.

In industries where unpredictable scheduling is prevalent, such as retail, restaurant, building maintenance and security, and paid care work,²⁴ overtime pay helps to ensure that the costs of schedule changes are shared by the employer. A worker who is required to work additional hours at the last minute incurs unexpected expenses, such as for child care or transportation, which can be somewhat offset by overtime pay.²⁵ And women, particularly women of color and single mothers, are sorely in need of overtime wages in light of longstanding gender and racial disparities in pay.²⁶ Newly covered women workers could earn as much as an additional \$254 per week— up to \$13,208 per year—if paid the premium for all of their overtime hours.²⁷ In New York City, \$13,000 is roughly what the parent or parents of a toddler pay for one year of child care.²⁸ The increased threshold would also have a dramatic impact in the leisure and hospitality industry, expanding the right to overtime pay to 37.3 percent of workers.²⁹

C. Automatic Updates to the Salary Threshold Conserve Resources for Government and Employers

OLPS supports the establishment of an automatic increase to the salary threshold no less frequently than every three years. In 2015, the Economic Policy Institute reported to Congress that the share of the salaried workforce guaranteed overtime protection under the FLSA had fallen from more than half in 1975 to fewer than 10 percent

²² Ross Eisenbrey, Congressional Testimony 10 (July 23, 2015) <http://www.epi.org/publication/congressional-testimony-updated-overtime-rules-will-help-millions-of-middle-class-workers/>.

²³ *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942), quoting message of President Franklin D. Roosevelt.

²⁴ See generally COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES (April 2017), <https://nwlc.org/wp-content/uploads/2017/04/Collateral-Damage.pdf>.

²⁵ JUDY CONTI, THE CASE FOR REFORMING FEDERAL OVERTIME RULES: STORIES FROM AMERICA'S MIDDLE CLASS 3 (December 2014), <http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf>.

²⁶ LAWRENCE H. LEITH, U.S. BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW (June 2014) available at <https://www.bls.gov/opub/mlr/2014/beyond-bls/pdf/why-do-women-still-earn-less-than-men.pdf>.

²⁷ HEIDI HARTMANN ET AL. at 14.

²⁸ LETITIA JAMES, OFFICE OF THE NEW YORK CITY PUBLIC ADVOCATE, 3 (Nov. 2015) available at http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/child_care_report_nov_2015.pdf.

²⁹ ROSS EISENBREY AND WILL KIMBALL, THE NEW OVERTIME RULE WILL DIRECTLY BENEFIT 12.5 MILLION WORKING PEOPLE 2 (May 17, 2016) <http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/>.

of these workers.³⁰ Automatic updates will protect against such a steep decline in the share of the workforce with access to these protections. Consistent, incremental increases over time will also ensure that workers are properly categorized and will be predictable for employers, who otherwise suffer a strain on their resources to accommodate sudden, dramatic increases, such as when the salary-level was tripled in 2004.³¹ The automatic approach would ensure that workers remain protected and prevent the long periods of neglect that have historically plagued this law.³² Finally, this approach reduces the need for future rulemaking regarding the salary level, helps to limit misclassification litigation, and conserves DOL resources for outreach and enforcement.

III. The Duties Test is Critical

A duties test remains essential to ensure that workers who are not employed in a “bona fide executive, administrative, . . . professional, outside sales, [or] computer”³³ capacity are not excluded from the FLSA overtime protections based on meeting the salary threshold alone. Not only do many skilled workers make more than \$913 per week—such as carpenters³⁴—but in regions like New York City’s, where wages are higher, the duties test helps control for the gap that results from a salary threshold based on salaries in the nation’s poorest region. And, if the 2016 Rule’s salary is lowered, the duties test must be strengthened significantly—so much so that even assuming such a duties test could be devised, the resources it would take to enforce would potentially create a regime rife with enforcement challenges, undermining the FLSA.

OLPS considers the duties test to be sufficient in light of the 2016 Rule’s salary threshold, but the test could be improved. The 2004 standard duties test is subjective and potentially easy to manipulate because it does not clearly define the term “primary duties” as used in the 2016 Rule.³⁵ OLPS suggests adopting a rule that if a worker spends fifty percent or more of their time on work that is not “bona fide executive, administrative, . . . professional, outside sales, [or] computer”³⁶ work, they would not be exempt based on the duties test. A fifty-percent rule is true to the plain language of the FLSA’s regulations use of “primary duty” in the overtime exemption and would establish a bright line rule to ensure that workers with nominal supervisory duties or discretion are not exempted.³⁷

³⁰ WILL KIMBALL AND LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, NEARLY ONE-THIRD OF SALARIED WORKERS WILL BE GUARANTEED OVERTIME (June 1, 2016) <http://www.epi.org/publication/nearly-one-third-of-salaried-workers-will-be-guaranteed-overtime-under-the-new-rule-but-that-falls-short-of-the-half-covered-in-the-mid-1970s/>.

³¹ 69 Fed. Reg. 22,122. 22123.

³² 69 Fed. Reg. 22122, 22122.

³³ 29 U.S.C.A. § 213(a)(1) (West 2017).

³⁴ U. S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, 47-2031 CARPENTERS (May 2016) (stating that the average earnings for the 75th percentile of carpenters is \$58,700).

³⁵ 29 C.F.R. § 541.700.

³⁶ 29 U.S.C.A. § 213(a)(1) (West 2017).

³⁷ 29 C.F.R. § 541.700 (b) (West 2017) (“The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.”)

OLPS urges DOL to implement and enforce the 2016 Rule as adopted. Further delay in implementing the 2016 Rule will increase the enforcement burden on the agency as employers fall out of compliance, resulting in more and more workers become misclassified with the implicit knowledge of the enforcement agency. The 2016 Rule reflects a culmination of an extensive and thoughtful process that responds to the information presented by stakeholders nationwide. If changes are to be made, OLPS urges only those improvements discussed above.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized initial 'L' followed by a long horizontal stroke.

Lorelei Salas
Commissioner
New York City Department of Consumer Affairs