

BUSINESS *for a* **FAIR MINIMUM WAGE**

November 6, 2023

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

Re: Comments on proposed rule “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” RIN 1235–AA39

Dear Ms. DeBisschop:

Business for a Fair Minimum Wage, a national network of business owners and executives who believe fair pay makes good business sense, supports strengthening overtime protections as delineated in proposed rulemaking “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.” Numerous members of Business for a Fair Minimum Wage – most of them small business owners – have also submitted comments strongly supporting the proposed new rule.

Federal overtime law was established as part of the landmark 1938 Fair Labor Standards Act (FLSA), along with the federal minimum wage and child labor standards. The FLSA was enacted to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers” and prevent unfair methods of competition among businesses.

The right to a 40-hour week, with time-and-a-half for overtime, is vital in protecting workers from being overworked and underpaid for long hours. It encourages employers to instead hire additional staff or shift more hours to part-time employees who would prefer to work full-time.

Overtime protections enable workers to have a life while they make a living. Unfortunately, overtime protections have deteriorated significantly over the years. The salary threshold that is crucial for assuring overtime protection for salaried employees has been increased too infrequently – and by too little. A low salary threshold, like that currently in place, makes it easier to misclassify low-paid employees as managers to avoid paying them overtime.

Hourly employees are generally guaranteed overtime pay for working over 40 hours in a week. Employees who are paid a salary and work over 40 hours do not have the same protection. Salaried employees are exempt from overtime pay if they are paid more than a specific salary level and they are primarily responsible for bona fide executive, administrative or professional duties (the “duties test”). These managerial employees are exempted with the expectation they

have better pay and benefits, more decision-making authority, flexibility and advancement opportunities, and more bargaining power to protect themselves against being overworked and undercompensated.

Unfortunately, the salary threshold is very outdated, and many so-called “managers” are working long hours for low pay. More than 60% of full-time salaried employees qualified for overtime pay in 1975. But since the 1970s, the salary threshold has gone long periods without any increase and has not been increased enough to keep pace with wage rates and the rising cost of living. About 9% of full-time salaried employees qualify for overtime pay, according to the Economic Policy Institute’s latest data, under the current threshold of \$684 per week (\$35,568 annually). Under the proposed new threshold of \$1,059 per week (\$55,068 annually), about 30% would qualify.¹

Many employees in low-paid jobs are misclassified as “managers” so employers can impose very long work weeks without paying overtime even though these employees are doing little to no managing and spending 50, 60, 70 and more hours a week performing tasks such as cleaning, stocking shelves, preparing food, unloading trucks and so forth.

A National Bureau of Economic Research working paper documented “widespread and systematic evidence of firms exploiting the provision of the FLSA that allows them to be exempt from having to pay overtime wages if an employee has a ‘managerial title’ and is paid a salary above a bright-line threshold.” The study found a 485% increase in the usage of managerial titles for salaried employees just above the overtime salary threshold. These include mislabeling non-managerial employees with boilerplate titles such as manager, assistant manager and supervisor as well as misclassification gimmicks such as carpet shampoo manager and food cart manager and rebranding front desk attendants as “Directors of First Impression.”²

In explaining the need for the new rule, the Department of Labor said, “Many low-paid salaried employees work side-by-side with hourly employees, doing the same tasks and often working over 40 hours a week. But because of outdated and out-of-sync rules, these low-paid salaried workers aren’t getting paid time-and-a-half for hours worked over 40 in a week. The department’s proposed salary level would help ensure that more of these low-paid salaried workers receive overtime protections traditionally provided by the department’s rules.”³ We strongly agree.

We also welcome the provision in the proposed rule to automatically update the salary threshold every three years. This will keep the salary threshold more current and make it harder for companies to avoid paying overtime in the future by misclassifying low-paid salaried employees. We would go even further to support annual indexing, which would keep the threshold even more up to date and predictable for employers.

The current outdated overtime threshold is ripe for abuse and fosters unfair pay, worker burnout, poorer health and safety, and increased employee turnover. Strengthening overtime protections will boost compensation, reduce overwork, discourage understaffing, reduce turnover, improve morale and health and safety, and increase productivity. It will help foster the work-life balance that is important for workers, families, businesses and communities.

In supplementary information with the notice of proposed rulemaking, the Department of Labor cited research showing the connection between increased compensation and increased worker productivity. The DOL also cited research showing “a correlation between increased earnings and reduced employee turnover,” noting that reduced turnover can reduce firms’ hiring and training costs.⁴

The research on the benefits of increased compensation is very robust and extensive, and fundamental to Business for a Fair Minimum Wage’s business case for increased minimum wage and stronger overtime protection. Business for a Fair Minimum Wage produces a regularly updated summary of research on the benefits of better pay, including the impact of wages on productivity, employee turnover, customer service, consumer spending, employment, prices, health, safety, and more.⁵

Strengthening overtime protection will also help foster fairer competition among businesses, as many business owners in Business for a Fair Minimum Wage stressed in their own comments in support of the proposed rule. When large chains abuse overtime rules to make employees work long hours for low pay, it hurts local businesses who are playing by the rules and providing good jobs for their employees and their communities.

Strengthening the FLSA’s overtime protection is even more important in light of the falling real value of the federal minimum wage, which has been stuck at just \$7.25 an hour for over 14 years – the longest period in history without a raise. When the minimum wage is set at too low a level, it means that many workers can be making above the minimum and still not be making a living wage. Increasing the overtime salary threshold and then updating it automatically will help assure that millions more people are more fairly compensated for their work.

The proposed new overtime rule is a very positive step forward.

Sincerely,
Holly Sklar
CEO
Business for a Fair Minimum Wage

¹ Alexandra Olson, Associated Press, “Millions more workers would be entitled to overtime pay under a proposed Biden administration rule,” August 30, 2023. <https://apnews.com/article/work-labor-overtime-pay-biden-ba1613a766bd45c4f15650bb7d361063>.

² Lauren Cohen, Umit Gurun, and N. Bugra Ozel, *Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments*, National Bureau of Economic Research, NBER Working Paper, January 2023. https://www.nber.org/system/files/working_papers/w30826/w30826.pdf.

³ News Release, U.S. Department of Labor, Wage and Hour Division, “Department of Labor Announces Proposal to Restore, Extend Overtime Protections for 3.6 million Low-Paid Salaried Workers,” August 30, 2023. <https://www.dol.gov/newsroom/releases/whd/whd20230830>.

⁴ U.S. Department of Labor, Wage and Hour Division, Notice of Proposed Rulemaking, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, Supplementary Information, Benefits and Cost Savings, September 8, 2023. <https://www.regulations.gov/document/WHD-2023-0001-0001>.

⁵ Holly Sklar, Business for a Fair Minimum Wage, *Business and Minimum Wage Research Summary*, September 2023. <https://www.businessforafairminimumwage.org/resource/business-and-minimum-wage-research-summary> and <https://www.businessforafairminimumwage.org/sites/default/files/2023-10/BFMW%20Business%20and%20Minimum%20Wage%20Research%20Summary%20September%202023.pdf>.