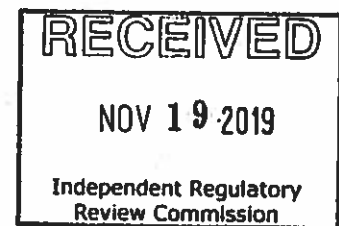


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November 19, 2019

Independent Regulatory Review Commission  
333 Market St  
14<sup>th</sup> Floor  
Harrisburg Pa. 17101  
irrc@irrc.state.pa.us

Re: Comments on the Department of Labor and Industry's proposal clarifying the definitions of Executive, Administrative, and Professional salaried workers who are exempt from receiving minimum wage and overtime pay

Dear Commissioners:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on economic policy and on the economic status of working people, and advocates for policies that lead to broadly shared economic growth. EPI submits these comments to the Department of Labor and Industry's (the Department) proposal clarifying the definitions of Executive, Administrative, and Professional salaried workers who are exempt from receiving minimum wage and overtime pay (EAP exemptions).

The Department proposed rule will phase in an overtime salary threshold of \$45,500 by 2022, providing 65,000 Pennsylvanians with new overtime protections and strengthening the protections of over 100,000 more (these calculations were done using the same methodology used by the U.S. DOL to calculate the economic impact of overtime protections, described in the U.S. Department of Labor's 2019 final rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees").<sup>1</sup> This proposed threshold is higher than the new Trump administration rule, which will set the salary threshold under which salaried workers are automatically entitled to overtime pay to \$35,568 a year in 2020. However, it is lower than the carefully-vetted 2016 rule published by the Obama administration, which would have set the threshold at roughly \$51,000 in 2020. The 2016 rule was the result of an exhaustive rulemaking process spanning more than two years. However, shortly before the 2016 rule was set to go into effect, a single district court judge in Texas, using highly flawed logic, enjoined the Department of Labor from enforcing the rule, and the court later erroneously held the rule to be invalid. Despite what the judge claimed, the 2016 rule was by no means overly expansive. In fact, it covered far fewer workers than the threshold had covered historically. In 1975, more than 60 percent of full-time salaried workers earned below the threshold. By 2016, the share of workers covered had dropped to less than 7 percent. The 2016 rule would have only partially restored this coverage, to roughly 33 percent. But despite the fact that the 2016 threshold was well within historic norms, the Trump administration abandoned it and finalized an overtime rule with a dramatically lower threshold. It's worth noting that if the rule had simply been adjusted for inflation since 1975, today it would be roughly \$56,500—more than \$20,000 higher than the Trump administration's threshold.

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 29 CFR Part 541, (September 24, 2019).

Governor Wolf's original proposed rule—the 30th percentile of the Northeast region—was much nearer the Obama threshold. The proposed final rule is, unfortunately, substantially below the Obama threshold. Further, while we are pleased the proposed rule includes automatic indexing, as it provides predictability for employers and employees alike and ensures stability and efficient government by eliminating the need for constant rulemaking, we have concerns about whether the proposed rule's procedure for updating every three years will keep pace with the wage distribution of salaried workers.

### **Effect on Pennsylvania businesses, employment, and the broader Pennsylvania economy**

How would a higher overtime threshold affect Pennsylvania businesses? When considering the impact on businesses, it is important to note that there are many ways employers can adjust if they have employees who are affected by the new regulations, and employers will likely use different strategies for employees who are situated differently. One option is to provide an affected worker a raise to the new salary threshold so that they remain exempt from overtime protections. Another option is to pay an affected worker overtime pay (time and a half) when they work more than 40 hours in a week. The impact of this latter option could be mitigated by managing employees' time more efficiently, for example, avoiding late-in-the-day meetings and requiring that employees complete their weekly tasks within 40 hours, or by spreading the additional hours to part-time workers or other workers who haven't hit the 40-hour mark and who would likely benefit from the additional hours and pay. Some employers may find it advantageous to hire new staff instead of paying overtime premiums.

Importantly, *none* of these changes would require reclassifying any salaried staff as hourly employees—all that's required is keeping a record of hours worked. Because most employers already have at least some nonexempt staff, every major payroll system can already process overtime pay, meaning that most employers will not need to adopt new payroll or compliance systems. The change would also not impede employers from having flexible scheduling policies. Employees could still arrange highly flexible schedules—they would simply need to keep their hours within 40 per week if their employer wants to avoid overtime pay.

These changes will provide benefits to Pennsylvania's employers. First, a higher overtime threshold will likely increase productivity. As mentioned above, employers may look for ways to organize workers' time more efficiently in response to these changes. Reducing overwork is one possible way to increase efficiency, since overworked employees are less productive. Research shows that employees who have adequate time to rest and recuperate each week, or between shifts, are more productive and less prone to at-work accidents and injuries. Relatedly, excessive work hours are linked to a variety of worse health outcomes, including increased risk of stroke and heart disease, which can be expensive to employers. In addition, research demonstrates a correlation between earnings and employee turnover. As a result, it is likely that some of the costs to employers of increased overtime pay will be offset by a reduction in turnover, which is expensive to employers and also reduces productivity.<sup>2</sup>

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<sup>2</sup> See John Pencavel, "The Productivity of Working Hours," *Economic Journal* 125, no. 589 (2014): 2052–2076; Lonnie Golden, "The Effects of Working Time on Productivity and Firm Performance, Research Synthesis Paper," *International Labor Organization (ILO) Conditions of Work and Employment Series* no. 33 (2012); Allard E. Dembe, J. Bianca Erickson, Rachel G. Delbos, and Steven M. Banks, "The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States," *Occupational and Environmental Medicine* 62, no. 9 (2005): 588–597; Heather Boushey and Bridget Ansel, *Overworked America: The Economic Causes and Consequences of Long Work Hours*, Washington Center for Equitable Growth, May 2016; Mika Kivimäki et al., "Long Working Hours and Risk of Coronary Heart Disease and Stroke: A Systematic Review and Meta-Analysis of Published and Unpublished Data for 603,838 Individuals," *The Lancet* 386 (October 31, 2015); Defining

This rule will also likely boost employment since employers may hire additional staff instead of paying overtime premiums for extra hours by existing staff. As noted by the U.S. Department of Labor in its 2016 final rule, even Goldman Sachs and the National Retail Federation found this to be true—Goldman Sachs estimated that an increase in the national salary threshold from \$455 to \$970 per week would result in a total of 120,000 new hires nationwide, and an analysis by the National Retail Federation estimated that such an increase would create 117,100 jobs in the retail industry alone.<sup>3</sup>

Finally, because at least some portion of affected workers will receive higher pay, expanding overtime protections can strengthen consumer buying power, particularly for middle-class households whose spending is the core driver of U.S. economic growth. This will be good for Pennsylvania's businesses.

We thus respectfully suggest that Governor Wolf reconsider the decision to shift away from the 30th percentile of the NE region which he originally proposed. Over time, in fact, Pennsylvania should consider setting a level that is substantially higher in real terms. After all, the Obama threshold was a nationwide threshold, set so that it would work for the entire country, including very low-wage states in the South. A state like Pennsylvania, which is not a low-wage state, could and should set a meaningfully higher threshold. However, even at the less adequate level of \$45,500, the Wolf proposed final rule is a vast improvement on the new federal rule and we appreciate Governor Wolf's effort to make Pennsylvania's economy a little less rigged against lower-paid salaried workers and their families.

Thank you for the opportunity to submit these comments and please do not hesitate to contact me for further information.

Sincerely,

Heidi Shierholz  
Senior Economist and Director of Policy  
Economic Policy Institute

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and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32465 (May 23, 2016) pp. 32502–32504.

<sup>3</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 81 Fed. Reg. 32465 (May 23, 2016) p. 32503.