

Revisiting a Trump regulatory rollback

Strengthening overtime protections for working people

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The Trump administration's actions in effect rolled back the Obama administration's rulemaking expanding overtime coverage in favor of a weaker rule that left more than 8 million workers behind. The next administration should launch a new rulemaking effort to expand overtime protections by significantly raising the salary threshold under which workers must be paid overtime.

Summary

President Trump has claimed that he built the **greatest economy the world has ever seen**. But by key measures of job quality, including pay, Trump's economy was not delivering for middle-class families even before the federal government's botched response to the COVID-19 pandemic sank our country into a deep recession. Underneath low topline unemployment figures and booming markets, working families had **barely recovered** from their pre–Great Recession peaks, and **income and wealth gaps continued to grow**.

According to a **recent analysis by the Economic Policy Institute and *Capital and Main***, 48 states saw slower household income growth under President Trump than under President Obama, even while the **richest of the rich have benefited handsomely**. And rampant inequality has broader effects, too, in that it “**obstructs, subverts, and distorts**” economic growth. Contributing to these dynamics is the fact that actions by the Trump administration have left overtime standards very weak, meaning that millions of workers who would be eligible for overtime protections if overtime standards were stronger may have to work long hours with no additional pay.

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The Obama administration’s 2016 rule restoring overtime coverage for working families was a **tangible step to lift wages** for middle-class families, raising the monetary threshold below which an employee must be paid overtime. But after the 2016 rule was enjoined by a court just after the 2016 election, the Trump administration failed to vigorously defend it, and instead **replaced it with a weaker rule**, leaving behind more than 8 million workers who would have benefited from the Obama administration rule, costing them \$1.4 billion in lost wages annually.

It’s unclear what the economy will look like after COVID-19, but it is clear that elevated unemployment will depress worker bargaining power and wages for a very long time, compounding the preexisting challenges. The next administration should therefore revisit the Trump administration’s overtime regulations to raise wages for more middle-class families across the nation once again.

In particular, the Department of Labor’s Wage and Hour Division should launch a new rulemaking to update the overtime rule again. The Department could take the following concrete steps to do so:

1. Issue a presidential memorandum directing the Department to pursue a new rulemaking;
2. Launch a series of informal stakeholder engagement sessions to inform development of the rule;
3. Proceed expeditiously with notice-and-comment rulemaking to update the rule to restore the Obama-era rule and indeed go beyond; and
4. Use the bully pulpit to call for companion legislative reforms that close loopholes excluding too many Black and brown workers and women from overtime protections.

The specifics

1. Issue a presidential memorandum on overtime rulemaking

In March 2014, President Obama **issued a memorandum** recognizing that the overtime rules were outdated, and directed Secretary of Labor Tom Perez to propose revisions to “modernize and streamline” the existing overtime regulations to ensure that everyone who should be protected was protected. The next president could issue a similar memorandum—perhaps coupled with a public event—to direct the Department of Labor to pursue this sort of rulemaking.

2. Launch a series of informal stakeholder engagement sessions to inform development of the rule

It is vital for the Department of Labor to move quickly to issue a rule. The administration needs time to defend the rule in response to any litigation and to ensure that the rule is implemented successfully within four years.

Given that, the Department should not waste time collecting duplicative information involving aspects of the rulemaking that have already been well studied. The record made through the Trump-era RFIs (requests for information) and NPRMs (notices of proposed rulemaking) already contains ample evidence of the need for a more rigorous salary threshold than the one presently in effect.

If the Department feels that stakeholder engagement is important to start the process, it could build a record as to why the 2019 rule is inadequate through a series of more informal listening sessions. These could be pursued through an inclusive but expedited process.

3. Proceed expeditiously with notice-and-comment rulemaking to update the rule to restore the Obama-era rule and indeed go beyond

The law that establishes the federal minimum wage, the Fair Labor Standards Act (FLSA), also requires that employees be paid overtime (one-and-one-half times their regular hourly rate) when they work more than 40 hours in a week unless they fall into certain exemptions—including one for administrative, executive, or professional employees, as those terms are defined by the Secretary of Labor.¹ For decades, the Department of Labor's Wage and Hour Division has issued regulations that require workers to meet three criteria for being exempt administrative or executive employees: (1) they must be paid on a salary basis (rather than, e.g., hourly); (2) they must perform the duties of an exempt administrative or executive employee (managing, hiring, firing, etc., for an executive); and (3) they must be paid at least a minimum salary threshold.² That salary threshold was stuck at \$23,660/year since 2004—a level that was set too low from the beginning due to a flawed methodology,³ which allowed employers to treat too many workers making low wages as overtime-exempt and force them to work more than 40 hours per week for no additional pay.⁴

After conducting dozens of stakeholder meetings and collecting hundreds of thousands of comments on a proposed rule, the Department of Labor (DOL) issued a final rule in May 2016 raising the required overtime threshold to \$47,476 per year and providing for automatic increases every three years thereafter.⁵ That rule would have extended new overtime protections to 4.2 million workers and enhanced protections against

misclassification to 8.9 million workers, boosting wages by nearly \$12 billion over the next 10 years.⁶ Importantly, the rule corrected the methodological flaw in the 2004 rule, which made it easy to misclassify workers by paying them above the salary threshold and assigning them scant administrative, professional, or executive duties in order to classify them as exempt under the weakened duties test implemented in 2004.

But in November 2016, a single federal judge in the Eastern District of Texas issued a nationwide preliminary injunction barring DOL from enforcing the final rule just days before its effective date.⁷ Based on flawed logic and a rejection of the entire regulatory and congressional history of the overtime exemption, the judge concluded that the plaintiffs were likely to prevail on claims that any salary test and automatic updating mechanism in the final rule both exceeded the Department's statutory authority.⁸

While the Department immediately appealed that decision, and the Trump administration filed a reply brief supporting the arguments made by the Obama DOL in its opening brief, the Trump DOL failed to aggressively argue it, asking the Fifth Circuit merely to affirm that the Department had authority to use some salary threshold.⁹ The same judge ultimately issued a permanent injunction the following year,¹⁰ after which the Department again appealed, asking for a stay on the final decision until a new rule could be issued.¹¹

Subsequently, in September 2019, the Trump administration adopted a new overtime rule that lowered the 2016 rule's salary threshold that white-collar employees must earn to be exempt from overtime pay from \$47,476 per year to \$35,568 per year.¹² According to the Economic Policy Institute, the Trump rule leaves behind more than 8 million workers who would have benefited from the 2016 rule, costing them \$1.4 billion dollars in wages each year.¹³

Advocates have made forceful arguments explaining why the case overturning the Obama overtime rule was wrongly decided.¹⁴ The district court's reasoning invalidated every salary test dating back to the passage of the FLSA; in fact, the judge articulated no principled legal or economic reason why the 2004 rule—let alone the 2019 final rule—could survive the same analysis. Had the Department aggressively pursued its appeal of the 2016 rule from this single federal district court decision, there is reason to believe that the rule would have been overturned by the Fifth Circuit. Nor has the ruling deterred a number of states from pursuing substantially similar rulemaking efforts despite the court's decision, predicated on the similar—or even identical—legal authority.¹⁵

Given that, the next administration should pursue a new rulemaking to raise the overtime threshold to a level higher than that proposed by the Obama administration. In designing any new overtime rule, the next administration should consider a number of design issues:

- **Duties test:** Both the Obama and Trump administrations retained the 2004 “standard” duties test that matched the (pre-2004) short test,¹⁶ in part because of opposition from employers to changing the duties test and a focus from workers’ advocates on updating the salary threshold.¹⁷ The next administration should likewise reconsider the duties test, especially if it decides to go with a salary level comparable to an updated version of what the Obama administration proposed. In promulgating a new duties test, DOL could adopt the approach of states like California and require that at

least 51% of a person's duties be those of an exempt employee in order to claim the exemption.¹⁸

- **Setting the salary threshold:** The next administration will also have to decide how to set the salary threshold. The Department should set any new salary threshold to above the level that the 2016 final rule would have been after its regular adjustments.
 - *Methodology:* Following the same methodology that the Obama Labor Department used—setting the threshold at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region, currently the South—could be pursued, if paired with a strengthened duties test. In recent years, however, states have been pushing forward with bolder overtime restorations. Leading them is Washington State, where Governor Jay Inslee's labor agency finalized a rule that will phase its overtime threshold up to \$83,356 by 2028. In light of this growing movement, there is a need for a bolder federal overtime proposal that, like the \$15 minimum wage, can set the benchmark for where our nation needs to go on overtime pay. And, at the 40th percentile of the earnings of full-time salaried workers in the lowest-wage Census region, the Obama salary threshold was in fact at the low end of the historical range of salary threshold. As the Obama U.S. Department of Labor's 2015 overtime rule notice of proposed rulemaking (NPRM) recounted, historically the Fair Labor Standards Act's overtime salary threshold ranged from the 35th to 55th percentile of weekly earnings of full-time salaried workers nationwide. In other words, there is historical precedent in the U.S. for raising the overtime threshold to the 55th percentile of full-time salaried workers nationwide (not just in the lowest-wage region). This level is projected to be \$82,732 by 2026. There is thus plenty of room to set the threshold at a substantially higher level than the level that the Obama methodology would yield, and still be well within historical norms. A much higher benchmark would restore the salary threshold closer to its past highwater mark, when the majority of salaried workers enjoyed overtime pay protections—and the benefits of a 40-hour workweek, and higher paychecks that come with it.
 - *Regional variation:* With good cause, both the Obama and Trump administrations considered and rejected setting different thresholds in different regions, which could lead to higher thresholds in some areas and lower thresholds in others. Indeed, the Chamber of Commerce and most other employer groups opposed regional variation as well. The Department should maintain this approach.
- **Highly compensated employees:** The 2004 overtime rule introduced the concept of "highly compensated" employees who are subject to an even more streamlined duties test as long as they earn at least \$100,000 per year (including commissions and nondiscretionary bonuses) and a set weekly salary of at least \$455 per week (exclusive of such bonuses and commissions).¹⁹ The 2016 rule would have raised that level to \$134,004 with the same salary threshold as the overall rule (\$913 per week),²⁰ but the 2019 rule instead raised it to \$107,432 and at least \$684 per week.²¹ The next administration should use the same approach that was used in the 2016 rule.

- **Automatic adjustments:** Any new rule should be indexed to reflect growth in the earnings of salaried, full-time workers. The 2016 overtime rule for the first time provided for automatic increases to both the salary threshold and the highly-compensated-employees threshold every three years, based on the same methodology underlying the initial establishment of the threshold.²² The every-three-year updating scheme in the 2016 rule was a concession to opponents' concerns about implementation. Given continuing advances in technology that make it easier to update overtime thresholds regularly, we recommend instead updating it every year.²³

4. Call for companion legislation expanding overtime to farmworkers and domestic workers

Beyond this regulatory action, the president should use the bully pulpit to call for ending the long-time, racist exclusions of farmworkers and many domestic workers from overtime protections. This must be done by legislation and the president should work with Congress to end these exclusions.

Why this is critical

While there is an enormous amount of uncertainty in economic forecasts since the outbreak of COVID-19, it is clear that the weak job market will result in reduced bargaining power for workers and wages that continue to be flat (if not worse) in the coming period. Meanwhile, employers may seek to take advantage of the ambiguity caused by the Trump administration's still-too-low overtime threshold to require workers to work overtime without additional compensation even if they do not perform the duties of an exempt worker, in violation of the law. Black and brown workers and women of all races are disproportionately impacted by these forces.

Impact

The ultimate impact of any new overtime rule will depend entirely on the decisions the next administration makes with respect to the salary level and the duties test. But according to the Economic Policy Institute's (pre-COVID-19) calculations, even simply restoring the 2016 Obama rule in 2020 would have benefited 8 million more workers—including more than 1 million Black workers and 1.2 million Hispanic workers—by giving them some combination of \$1.2 billion over the next 10 years and greater protections from being misclassified as overtime-exempt.²⁴

Because Black and brown workers and women of all races who are in salaried jobs are disproportionately concentrated at the low end of the salary scale, they will disproportionately benefit from the expansion of overtime protections. For example, 26% of all salaried women would have gotten new or strengthened protections under the 2016

rule, compared with 20% of salaried men. Further, 31% and 33% of Black and Latinx salaried workers would have gotten new or strengthened protections, respectively, compared with 20% of white salaried workers. For some affected workers, overtime protections will mean hundreds of dollars in additional pay each week; for others, it will mean more time outside of work to spend with their families—and as some employers shift schedules to minimize overtime costs, employees who had been involuntarily working part time may gain the additional hours they want and need.

This policy memo was produced by the Economic Policy Institute and the National Employment Law Project. Contact Heidi Shierholz at hshierholz@epi.org or Judy Conti at jconti@nelp.org.

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Notes

1. 29 U.S.C. § 213(a)(1).
2. 29 CFR § 541.100 (executive), § 541.200 (administrative). The Department's 2016 overtime final rule sets out an exhaustive history of the salary levels. See Wage and Hour Division, Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,400 (May 23, 2016), <https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees>.
3. Prior to 2004, the white-collar regulations created two separate overtime tests: (1) a “short” (less stringent) duties test, which required workers to be paid a higher (more rigorous) salary threshold; and (2) a “long” (more stringent) duties test, which required workers to be paid a lower (less rigorous) salary threshold. The Department in 2004 streamlined down to one “standard” duties test, but in effect paired the “short” (less rigorous) duties test together with the lower (less rigorous) threshold. The 2016 overtime final rule aimed to correct this “mismatch.” See Wage and Hour Division, *supra* note 2, at 32,400.
4. See Ross Eisenbrey, *Longer Hours, Less Pay – Labor Department's New Rules Could Strip Overtime Protection from Millions of Workers* (July 14, 2004), https://www.epi.org/publication/briefingpapers_bp152/.
5. See Wage and Hour Division, *supra* note 2.
6. See *id.*; White House, Fact Sheet: Growing Middle Class Paychecks and Helping Working Families Get Ahead by Expanding Overtime Pay (May 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/05/17/fact-sheet-growing-middle-class-paychecks-and-helping-working-families-0>.
7. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), *available at*

- <http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf>. See also Noam Scheiber, “Judge Suspends Rule Expanding Overtime for Millions of Workers,” *New York Times*, Nov. 22, 2016, <https://www.nytimes.com/2016/11/22/business/obama-rule-to-expand-overtime-eligibility-is-suspended-by-judge.html>.
8. *Id.* at 534.
9. See Dale Hudson, Department of Labor Appeals Overtime Rule (Nov. 6, 2017), <https://www.nixonpeabody.com/en/ideas/articles/2017/11/07/departement-of-labor-appeals-overtime-rule>.
10. *Nevada v. U.S. Dep’t of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).
11. *Id.*
12. See Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (Sep. 27, 2019), <https://www.federalregister.gov/documents/2019/09/27/2019-20353/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>.
13. Heidi Shierholz, The Trump Administration’s Overtime Rule Leaves Millions of Workers Behind (Sep. 24, 2019), <https://www.epi.org/press/the-trump-administrations-overtime-rule-leaves-millions-of-workers-behind/>.
14. See, e.g., Letter from National Employment Law Project to Wage and Hour Division, Comments on Regulatory Information Number (RIN) 1235-AA20: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, May 21, 2019, <https://s27147.pcdn.co/wp-content/uploads/NELP-Comments-Proposed-Exemptions-Overtime-Coverage-Fair-Labor-Standards-Act-May-2019.pdf> (explaining in detail why the judge’s decision was incorrect on the merits).
15. Several states have already taken action to raise their thresholds to nearly the 2016 rule’s level or beyond, including California, Colorado, New York, Pennsylvania, and Washington. See National Employment Law Project and Economic Policy Institute, Federal Overtime Thresholds and State Responses (Feb. 5, 2020), <https://s27147.pcdn.co/wp-content/uploads/Federal-State-Overtime-Proposals-Feb-2020.pdf>. Some have relied upon nearly identical legal theories. See, e.g., Pennsylvania Minimum Wage Law of 1968 at Sec. 5(a)(5), <https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1968&sessInd=0&smthLwlnd=0&act=5&chpt=0&sctn=5&subsctn=0>; Rev. Code of Washington § 49.46.010(3)(c), <https://app.leg.wa.gov/RCW/default.aspx?cite=49.46.010>.
16. See *supra* note 3.
17. See, e.g., 81 Fed. Reg. at 32529 (“Commenters representing employers overwhelmingly opposed DOL making changes to the duties test and stated that changes to the duties test are more burdensome for businesses.”); NELP, *supra* note 17, at p. 12 (presenting a change to the duties test as an alternative should the Department not sufficiently increase the salary threshold).
18. Note, we do not recommend DOL return to the previous “long” test that was in effect before the 2004 revisions, which required that at least 80% of a person’s duties be those of an exempt employee, because that duties test should be paired with a lower salary threshold.

19. See Wage and Hour Division, Fact Sheet #17H: Highly Compensated Employees and the Part 541 Exemptions Under the Fair Labor Standards Act, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17h_highly_comp.pdf.
20. 81 Fed. Reg. 32550.
21. 84 Fed. Reg. at 51231.
22. 81 Fed. Reg. 32551.
23. While the Bush administration's 2004 overtime rule cast doubt on the Department's legal authority to implement automatic increases, that argument was framed more around using inflation as the metric. See Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22171 (Apr. 23, 2004) ("Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases.") The use of wage growth is more consistent with how the overtime threshold has been set over time.
24. See Shierholz, *supra* note 13.