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Center for the American Worker

PROPOSED OVERTIME RULE WOULD HURT WORKERS, LIMIT FLEXIBILITY

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TOPLINE POINTS

- On August 30, 2023, the U.S. Department of Labor announced a new proposed overtime rule that would limit worker flexibility, decrease productivity, and have no impact on worker pay.
- The proposed rule would raise the salary threshold at which overtime had to be paid from \$35,568 to \$55,068. Academic research demonstrates that employers will respond by re-classifying employees, lowering hourly wages, and requiring employees to track and report their work in much more detail.
- The Obama administration proposed a similar rule in 2016. It was rejected by a federal judge, who wrote that the department exceeded its authority by issuing the rule.

The U.S. Department of Labor (DOL) on August 30 [announced a new proposed rule](#) to significantly expand the number of workers eligible for overtime pay. While the Biden Administration and Acting Labor Secretary Julie Su claim that such a rule would “help restore workers’ economic security,” in reality it would limit worker flexibility, decrease productivity, and have virtually no impact on worker pay.

History of Overtime Regulations in the U.S.

Under the Fair Labor Standards Act (FLSA), employers must pay employees a minimum wage, as well as 1.5 times an employee’s regular hourly rate for any hours worked beyond 40 hours per week. The law states that “any employee employed in a bona fide executive, administrative, or professional capacity” is exempt from these requirements,



known as the EAP exemption. To determine whether employees meet the EAP exemption, the DOL looks at three things: (1) the job duties of the employee, (2) how much the employee is paid, and (3) the structure of the employee’s pay—whether the employee is salaried, paid hourly, or paid another way.

Of these three requirements, only the first one—duties of the employee—is contained in the text of the FLSA. Beyond that, the FLSA gives the secretary of DOL some authority to define specific terms of the EAP exemption, which is what led to the creation of the salary threshold and pay structure criteria through federal rulemaking.

Summary of Proposed Overtime Rule

Under current DOL regulations, any salaried employee making less than \$35,568 annually is eligible for overtime, no matter the employee’s job duties. Under the newly proposed rule this “salary threshold” would rise to \$55,068, which is the 35th percentile income level for salaried workers in the South, the lowest-wage Census region. The rule would include an automatic updating mechanism that increases the earnings threshold every three years to ensure it remains aligned with this 35th percentile salaried income level. However, the proposed rule ties the salary threshold to the most recent income data—so the threshold will likely be even higher once the rule is finalized, in part due to ever-increasing inflation. Based on DOL’s projections, if the rule is finalized in the first quarter of 2024—which would be an exceptionally quick process—the threshold could be as high as \$60,209.

The proposed rule would not make any changes to the way the DOL evaluates the duties of EAP employees. Lastly, the rule would increase the salary threshold for determining “highly compensated employees”—who are categorically exempt from overtime if they meet a simplified EAP duties test—to \$143,988 from \$107,432.

DOL estimates this rule would expand overtime eligibility to about 3.6 million U.S. workers and increase employee pay by \$1.3 billion, while costing employers \$664 million to implement. In other words, nearly a third of the \$2 billion overall estimated cost of this new rule would go toward the bureaucracy that businesses would need to set up to put the rule into effect.

Negative Impact on Workers

Upon announcing the rule, Acting Secretary Julie Su said it “would help restore workers’ economic security” and that “workers deserve to continue to share in the economic prosperity of Bidenomics.” [In reality](#), this rule would reduce the job flexibility of many salaried employees and force them to track their hours without raising their pay. It would have three main effects.



First, employers would primarily respond to this rule by re-classifying many salaried employees as hourly workers and reducing their hourly wage to reflect expected overtime—leaving total earnings unchanged. Salaried workers are paid for work performed, not hours logged. When they are re-classified as hourly workers, employers would simply set their hourly rate to equal exactly what they earned before—including expected overtime payments. This is why [economists find](#) that expanding overtime eligibility has little effect on workers’ total pay—and is also part of the reason for the estimated high cost of compliance with the proposed rule. The fact that the salary threshold would be higher in the final rule also would only increase uncertainty and compliance costs for businesses.

Second, this rule would force employers to track the hours of any salaried workers making less than \$55,068, adding more bureaucracy and red tape to salaried employees’ daily responsibilities. A portion of each employee’s day would need to be spent tracking and reporting the employee’s hours in great detail. Whether or not employers formally convert affected salaried employees into hourly workers, this rule would force employers to treat them like hourly workers.

In the past, when a higher percentage of the workforce was employed in the manufacturing industry and other factory work, there was a stronger connection between hours worked and goods produced. In the modern economy, millions more workers have jobs in which they are assigned specific tasks and goals to complete, not a set number of hours per day or week.

This new overtime rule does not make sense in an economy where so many jobs operate on this model, and it would impose administrative burdens on affected salaried employees. Employers are [already analyzing](#) how to comply with this rule should it take effect, including how to track their employees’ time, developing training plans for managers, and making changes to their policies for exempt vs. non-exempt employees.

As a result, labor productivity—the measure of how much the economy produces per labor hour—is likely to decline as employees spend more time on non-productive administrative work instead of producing goods and services. Adding more bureaucracy to workers’ days limits the amount of time they can spend doing the work about which they are passionate, creating products that their customers love, and providing services that help their communities grow—and without consistent productivity growth, salaries cannot grow consistently. Productivity has [already declined](#) more during the Biden Administration than during any other presidential administration in modern history, and this rule would only exacerbate the decline.



Third, employers would respond by restricting flexible work arrangements. Employers must document compliance with overtime rules or risk massive legal liability. This proposed rule would force them to take steps employees dislike but that are necessary for employers to prove they are following the rules. This would likely include limiting remote work, where employees cannot be as easily monitored. Employers would need to balance the liability they face from this new rule with a desire to make their employees as productive as possible during the 40-hour work week—potentially leading to more micromanaging as employers pay more attention to how employees spend each minute of their days.

In the wake of the COVID-19 pandemic, remote work has become commonplace. Many employees who do not work remotely full time have still come to expect the flexibility to work remotely when needed for family reasons or to accommodate personal appointments. Remote work [already poses new challenges](#) for compliance with FLSA—this new rule would only exacerbate them.

In summary, this rule is likely to cost employers hundreds of millions of dollars to implement, while leaving employees' salaries virtually unchanged—and making their workdays more difficult and less productive.

Legal Concerns

Putting aside the economic concerns and harm to workers, it is not clear that this proposed rule would even be legal. The Obama Administration proposed a similar rule in 2016, which would have raised the salary threshold to \$47,476. A federal judge—appointed by President Obama—rejected the rule, determining that the DOL exceeded its authority under the FLSA by raising the salary threshold so high. The FLSA authorizes DOL to exempt employees based on their duties; it says nothing about salary levels. The judge ruled that raising the salary threshold above \$47,000 effectively overrode the EAP duties test—and the EAP duties test is explicitly outlined in the FLSA, while the salary threshold is not. It would have forced employers to track overtime hours for employees whose EAP duties made them statutorily exempt, solely based on their salary level. The judge ruled Congress had not given DOL this authority.

Similarly, in his dissenting opinion in [Helix Energy Solutions Group v. Hewitt](#), Supreme Court Justice Brett Kavanaugh questioned the legality of both the DOL's salary threshold and the salary structure requirements. He points out that the FLSA “focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid” when determining an employee's eligibility for overtime.



Conclusion

Like much of the regulatory action taken by the Biden Administration, the overtime rule proposal would add significant burdens to the daily lives of American workers and business owners. A Department of Labor that truly championed workers would promote flexibility and opportunity and allow all workers to negotiate with their employers for the work arrangements, salary, and benefits that are best for them and their families.

