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How the Administration's Overtime Rule Could Cost Workers More Than They Gain—Including Flexibility and Income Security

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KEY TAKEAWAYS

The Biden Administration's proposed overtime rule could hurt millions of workers through lost jobs, earnings, benefits, and flexibility.

Even workers who receive salary increases could lose valuable benefits, and the rule could push workers into underground employment that lacks workplace protections.

Instead of mandating higher salaries that cost workers more than their wage gains, policymakers should open doors to rising incomes and flexible work opportunities.

The Biden Administration's Department of Labor has proposed to increase the overtime-salary threshold by approximately 69 percent, which would subject millions of currently salaried workers to overtime laws. Instead of increasing workers' pay, the proposed rule would cause employers to shift millions of salaried workers to hourly workers, eliminating remote and flexible work options and potentially resulting in fewer work hours, irregular paychecks, and lower overall compensation. Even workers who receive salary increases could lose valuable benefits.

If implemented, the overtime rule will disproportionately affect workers in lower-cost areas, as well as female, black, and Hispanic workers. Moreover, the proposed rule could upend labor markets in U.S. territories and push workers into underground employment that lacks workplace protections. Instead of imposing costly new regulations, policymakers should enact policies that open doors to rising incomes and flexible work opportunities.

What Is the Overtime Rule?

Under the Federal Fair Labor and Standards Act (FLSA), employees who are paid hourly rates are entitled to receive overtime pay, at a rate of 1.5 times their hourly rate, for any hours over 40 that they work in a given week. Most, but not all, employees who receive regular salaries regardless of the specific number of hours they work are exempt from overtime requirements. In particular, section 13(a)(1) of the FLSA provides exemptions for executive, administrative, and professional employees (EAP).[1] Those exemptions apply to workers who perform certain job duties, such as executive or administrative functions, working in professional roles, or engaging in outside sales.[2]

Congress gave the Labor Department the authority to "define and delimit" the terms of the EAP exemptions from time to time.[3] While the FLSA defines the EAP exemptions based on duties alone, the Labor Department has applied various salary-level tests to weed out obviously nonexempt employees. In practice, this has led to a two-part test for the duties exemptions: (1) Workers must first meet the salary test by receiving weekly salaries equal to or greater than the salary threshold, and (2) must also perform at least some of the duties included in the duties test. The current standard salary threshold is $684 per week ($35,568 annually). This threshold was set in 2019 when the Trump Administration increased it from $455 per week ($23,660 annually), which had been in place since 2004. The Obama Administration finalized a rule in 2016 to increase the threshold to $913 per week ($47,476 annually), but a federal judge struck down that proposed rule[4] because he concluded that it violated Congress's intent by setting a salary threshold so high as to create a de facto salary-only test.[5]

How Does the Administration's Proposal Change the Overtime Rule?

The Biden Administration's Department of Labor published a proposed rule in September 2023 to increase the salaried threshold by 55 percent, from $684 per week to $1,059 per week ($55,068 annually).[6] The actual threshold will be higher than $1,059, however, because the Labor Department notes that the $1,059 level is based on 2022 earnings and the actual threshold will be set when the rule is finalized. For example, the department estimates that the proposed threshold will equal $1,158 per week ($60,209 annually) in the first quarter of 2024.[7] This would be a 69 percent increase over the current threshold.

In contrast to periodic updates as specified by Congress, the proposed rule would establish automatic updates to the threshold in future years.[8] The proposal would also apply the increased overtime threshold to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI), which currently are subject to significantly lower overtime thresholds than the mainland.

Why Does the Overtime Rule Matter?

The purpose of having an overtime rule is to prevent employers from paying workers low salaries and requiring them to work long hours that could result in them receiving less than required minimum wages on an hourly basis. On the surface, it may seem that a higher overtime threshold would simply result in higher pay for workers further up the income scale. Yet, the economics of raising the overtime threshold are more complex than simply increasing worker pay, and workers, employers, and ordinary Americans stand to lose out as a result.

When employers set compensation, they base the pay and other benefits on workers' total expected output. When jobs are routine—such as grocery store cashiers, bus drivers, or auto manufacturing workers—hourly pay makes sense. When jobs are less consistent from day to day and center on objectives as opposed to measured output, paying regular salaries typically makes more sense as it enables greater flexibility and discretion to accomplish the goal.

Requiring employers to change their pay structures by either paying workers higher salaries or paying workers overtime will not necessarily result in higher total compensation for workers, but it will significantly disrupt compensation, workplace circumstances, and the allocation of work. The proposed overtime rule will almost certainly affect total employment levels, workers' paychecks and benefits, their autonomy, and workplace flexibility and remote-work options.

Employers will likely respond to the proposed overtime rule in three ways—by increasing base salaries, by shifting workers to hourly pay, and by reducing the workforce. Each of those shifts will have unintended consequences.

Employers Might Increase Some Workers' Salaries, But Will Also…

To avoid having to keep track of workers' hours and pay them overtime, employers could increase the salaries of all employers who meet the duties-test exemption to the new salary threshold (at least $60,209 in 2024). If workers are currently making within a few hundred dollars of the new threshold, employers may raise their pay with little or no other changes. Of course, this money would have to come from somewhere, and often that somewhere is reflected in higher prices for consumers.

But because the proposed threshold is roughly 69 percent (about $24,650 annually) above the current threshold, employers will not be able to simply raise everyone's salaries without making other changes.[9] Thus, while some workers might receive substantial raises—say, $5,000 more per year—in order to offset this higher pay, employers will most certainly also:

- **Reduce workplace benefits.** Since pay is only a portion of workers' total compensation, employers may be able to hold total compensation relatively constant by reducing or eliminating benefits, such as employer-provided health insurance, retirement contributions, and tuition and childcare subsidies.

- **Reduce paid time off.** The Bureau of Labor Statistics reports that 78 percent of workers have access to paid sick leave and 79 percent have access to paid vacation.[10] If employers increase workers' wages to accommodate the higher overtime threshold, they could reduce workers' paid time off to keep their labor costs constant.

- **Raise prices.** Just as wage increase caused by COVID-19-related policies contributed to higher prices, employers may raise prices on the goods and services they sell to account for higher salaries.[11]

Employers Could Convert Salaried Workers to Hourly Employees

Given the magnitude of the proposed increase and the establishment of automatic future increases, it is likely that most affected workers will be converted to hourly employees. A small portion of workers may benefit from this shift through an increase in pay, but most workers are likely to experience one or many unintended consequences. Employers who shift workers to hourly employees could:

Reduce Workers' Base Pay, Keeping Compensation and Hours Unchanged. If workers regularly put in more than 40 hours, employers can then incorporate overtime hours into total compensation by reducing workers' base pay. For example, if workers regularly work 42 hours a week, an employer can divide the weekly salary by 43 hours to set an hourly base pay that builds in two hours at 1.5 times the usual pay rate. This is exactly what IBM did when it reclassified 7,000 salaried employees as overtime-eligible as part of a lawsuit settlement; the company reduced the workers' base pay by 15 percent, keeping their total compensation unchanged and significantly adding to the required paperwork and bureaucracy.[12]

A reduction in base pay could also mean a reduction in total pay if workers do not log a full 40 hours every week. Consequently, multiple studies have found that a reduction in the statutory workweek causes an increase in moonlighting, where affected workers take on second, part-time jobs to maintain their same level of income.[13]

Restrict Hours Below Full Time to Reduce Benefit Costs. Benefits can be a significant portion of worker compensation, currently equaling 42 percent of total worker compensation, on average.[14] Many employers only offer benefits for full-time workers, and the Obamacare health insurance mandate only applies to employees who regularly work 30 hours or more per week. Thus, some employers could prevent compensation increases while maintaining the same output level by reducing workers' hours and using more part-time workers. The consequence for workers would be lower total pay and a loss of benefits.

For example, a company that currently has 20 workers each working an average of 42 hours per week could cut all workers' hours to 29 per week and achieve the same output and significantly lower employee costs using 29 part-time workers instead of 20 full-time workers.[15] A study found that this happened in response to a minimum-wage increase in California: Each $1 increase resulted in 23 percent of workers dropping below 20 hours a week and becoming ineligible for the retirement benefits, and 14.9 percent having their hours reduced below 30 and losing their eligibility for health insurance benefits.[16] Another study that examined low-income workers' and families' access to employer-sponsored health insurance and retirement benefits between 2005 and 2016, which included many state-level minimum-wage increases, found that every $1 increase in the minimum wage was followed by a 1 percentage point decrease in the probability of workers and their dependents having employer-sponsored health insurance.[17]

Employers Could Reduce Their Workforce

An increase in employers' costs of employment will tend to reduce employers' demand for workers. The way the overtime proposal is structured, it could encourage employers to reduce their workforce by shifting more work to fewer workers and by increasing automation. Employers could:

Eliminate Jobs by Shifting More Work to Fewer Employees. Employers—especially large companies—may be able to hold total compensation constant by eliminating jobs. For example, an employer could eliminate one of 10 shift manager positions (presumably the lowest-performing one) and require the remaining nine shift managers to do slightly more work. Because benefits are such a significant portion of workers' compensation—currently equaling 42 percent of wages—eliminating entire jobs could be more advantageous for employers than raising wages.[18]

A recent economic analysis of the effects of federal and state overtime rule changes between 2014 and 2020 found significant employment losses from increased overtime thresholds, including 4.3 percent of all affected jobs.[19] The ratio of employment losses to income gains was more than three to one; for each percentage increase in earnings, employment fell by 3.25 percent.[20] The authors of the study concluded that "[t]aken together, the distribution of income and employment effects imply that raising the federal overtime exemption threshold increased the salaries of a small group of workers earning close to the new threshold but cost jobs paying further below it, and thereby exacerbated inequality."[21]

Expedite the Pace of Automation. When workers become more expensive to employ, companies have a greater incentive to invest in machinery to eventually replace employees. The substitution of cashiers with self-service kiosks at fast food restaurants and grocery stores is just one example. Automation is an ongoing process that has been at work for centuries. Organic automation is ultimately a good thing because it increases productivity and reduces consumers' costs; but an artificially expedited pace of automation will increase the number of displaced workers. In addition to the steep increase in the proposed overtime threshold, the proposal to automatically update the threshold in the future will increase employers' pace of automation by guaranteeing that they will not experience any relief from heightened overtime costs.

Proposed Overtime Threshold Could Upend Labor Markets and Eliminate Worker Protections in U.S. Territories

The proposed rule subjects U.S. territories to the same overtime thresholds as the U.S. mainland (with the exception of American Samoa, to which it applies a lower overtime threshold). This marks a shift from the 2019 rule, which maintained lower thresholds for the U.S. territories due to their substantially lower earnings levels. As a result, the proposed overtime threshold would equal a 155 percent increase in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI from the current level of $455 per week to $1,158[22] per week. This is significantly greater than the roughly 69 percent increase in the threshold for the mainland U.S.

In Puerto Rico, where the median wage is $451 per week or $23,480 per year, more than 90 percent of the workforce earns below the proposed overtime threshold, and in Guam, about 80 percent of workers earn below the proposed threshold.[23] Consequently, the salary test alone will be determinative instead of the duties test for a large share of workers in the U.S. territories. The Department of Labor estimated that 49 percent of salaried workers with earnings between the current and proposed threshold in Puerto Rico will have their exemption status determined by their salaries instead of their job duties.[24] In the other territories, the percentages of salaried workers with the salary threshold precluding consideration of their duties equal 38 percent in Guam, 32 percent in the Virgin Islands, 48 percent in American Samoa, and 48 percent in the CNMI.[25]

This large jump in the overtime threshold will increase pressure on employers to push workers into underground employment without workplace protections. This is particularly relevant in Puerto Rico where existing overtime rules—notwithstanding the overtime threshold—are more stringent than in the U.S. For example, workers in Puerto Rico are entitled to 1.5 times their hourly rate for any hours over eight in a given day and are entitled to 2.0 times their hourly rate for any hours over 40 in a given week and for work on statutory rest days.

While the precise size of the underground economy in Puerto Rico is unknown, its existence is widely recognized. In May 2018, a Government Accountability Office (GAO) report on Puerto Rico's debt crisis noted that a reason for Puerto Rico's dismally low labor force participation rate is "that a relatively large share of Puerto Rico residents work in the informal, or underground, economy."[26] The GAO noted that costly labor regulations, such as overtime laws, can lead to businesses hiring workers in underground employment:

> Former Puerto Rico officials and experts on Puerto Rico's economy told us businesses looking to avoid either minimum wage requirements or the burdens of complying with Puerto Rico government taxes and regulations may have opted to hire workers from the informal labor market to bypass these regulations.

Workers who are hired in the informal, or underground, labor market are not operating under the FLSA or any other labor laws, and thus have no protections beyond what their employers choose to provide them. The proposed threshold is so high as to likely have the opposite of its intended effect in Puerto Rico and other territories, by pushing more workers into the underground labor market and stripping them of existing workplace protections.

CBO Finds Major Costs, Modest Benefits to Higher Overtime Threshold

In 2016, when the Obama Administration's proposal to increase the overtime threshold to $913 per week (equivalent to $47,476 per year) was undergoing legal challenges, the Congressional Budget Office (CBO) produced a report, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations."[27] The report noted that canceling the scheduled changes would have similar-sized and opposite effects to enacting the scheduled changes.[28]

The CBO report indicated that the 2016 overtime rule would have imposed upwards of $6.9 billion in compliance costs on employers over the first seven years.[29] Those compliance costs include employers having to familiarize themselves with the regulation, educate employees, adjust payroll systems, change work assignments and practices, and pay managers to spend time monitoring workers' hours.

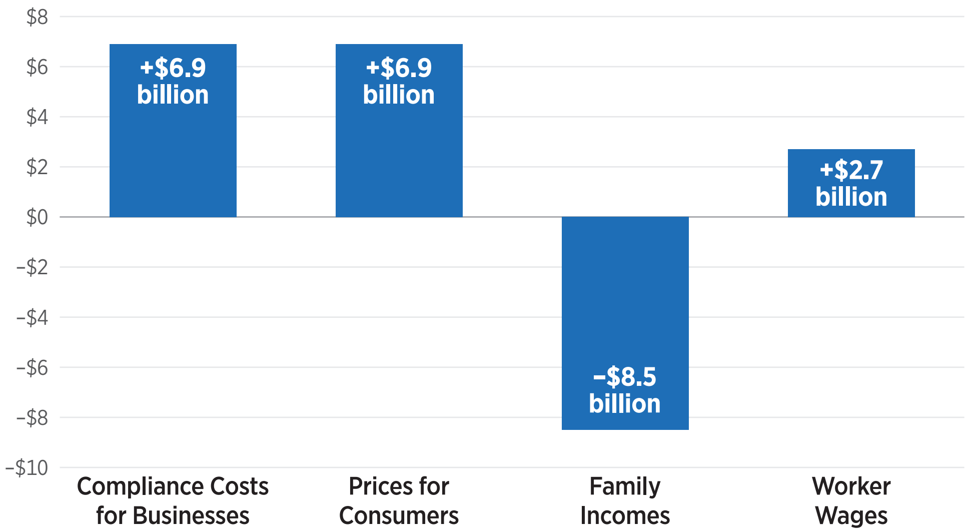
The CBO report found significant negative effects for American households, including a $6.9 billion increase in prices for consumers and a net reduction in overall family incomes of $8.5 billion over the first seven years.[30] The only positive impact would have been a $2.7 billion increase in earnings spread across fewer than 900,000 workers.[31]

The proposed 2016 threshold equaled 104 percent of workers' average weekly earnings across the U.S., and the proposed 2023 threshold equals at 96 percent of workers' average weekly earnings.[32] Thus, the measured economic effects of the current, 2023 proposed threshold will likely be close to, but slightly lower than, those of the 2016 rule.

CHART 1

Estimated Effects of An Increased Overtime Threshold

ESTIMATES OF A PRIOR 2016 PROPOSED INCREASE IN THE OVERTIME THRESHOLD*



* CBO estimates of the prior 2016 proposed increase were for a threshold equal to 104 percent of workers' average weekly earnings across the U.S. The current 2023 proposed threshold equals 96 percent of workers' average weekly earnings. Thus, the economic effects of the 2023 proposal are likely similar to but slightly lower than CBO's estimate of the prior proposal.

NOTE: Estimated costs and benefits are discrete and should not be added together. For example, higher compliance costs and higher wages contribute to and are a part of the resulting higher prices and lower family incomes.

SOURCE: Congressional Budget Office, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations," November 2016, https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51925-overtimeregulations.pdf (accessed October 29, 2023).

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Worker Desires and the Pandemic Increased Workplace Flexibility—the Overtime Rule Threatens to Take That Away

Even before the COVID-19 pandemic, employers were increasing workplace flexibility and family friendly policies as a way to attract and retain the workers they needed in a tight labor market. The physical realities of the COVID-19 pandemic and the even tighter labor market that ensued contributed to a surge in workplace flexibility, such as remote-work options, flexible hours, and new and expanded paid family leave benefits. A key to employers being able to offer flexible work policies is employees offering flexibility in return, ensuring that the job gets done.

The overtime threshold ties employers' hands by requiring them to pay many workers by the hour instead of paying them to do a job. To avoid massive increases in labor costs and legal liabilities, employers will be forced to tie employees' hands. Likely consequences for workers will include:

Lost Flexibility and Few Remote-Work Options for Hourly Employees. The only way for employers to know how much time an employee spends working is if they control the time and location of the employee's work. Thus, the guidance to employers who want to avoid costly lawsuits for overtime violation is to prohibit or significantly restrict remote work for hourly employees. Such restrictions can include cutting off access to company e-mail and computer systems outside the typical Monday-to-Friday, nine-to-five work hours and limiting employees' access to company property.

In addition to the obvious lost benefit of some workers having fully remote jobs or being able to spend a few days a week working remotely, remote-work restrictions will also hurt workers who typically do most of their work in the office, for example:

- A father or mother who leaves work an hour early to take a child to an appointment and then finishes up work from home would no longer have that ability;

- A worker who wants to take a last-minute vacation and is willing to answer pertinent e-mails and phone calls while away in exchange for the approved time off might be denied the vacation request because the company's policy—per legal advice—prohibits communication with hourly employees when they are off-site and off-the-clock;

- A young, entry-level worker who wants to come in early and stay a little late to learn the ropes and make a good impression would be prevented from putting in the extra effort; or

- Two salaried shift managers who want to trade their Sunday shifts for Monday shifts would likely be prevented from doing so because the switch would result in each working 48 hours one week and 32 another. Despite no changes in total hours worked, the managers' employer would have to pay them each 10 percent more.

Two-Tiered, Less-Satisfied Workforces. A major purpose of salaried employees is to create a flexible, trust-based team environment, where people do what is needed to accomplish company goals. Hourly employees are treated differently, with more rights to minimum wage and overtime pay, but at the cost of greater oversight and more limitations. Consequently, salaried employees will typically have more opportunities to advance, will be more engaged, and will have greater job security.

A Gallup survey found that while hourly employees were slightly more satisfied than salaried employees with the amount of work that is required of them and the amount of on-the-job stress, hourly employees were significantly less satisfied with most other job aspects, including vacation time, retirement plan, total earnings, safety conditions, job security, opportunities for promotion, health insurance benefits, and recognition for work accomplishments.[33]

Lower and Less Predictable Pay. Salaried employees receive the same pay regardless of whether they work 35 hours or 45 hours in a given week. Small business owner Clement Troutman explained at a recent Heritage Foundation discussion on "21st Century Labor Policies to Promote Worker Freedom, Opportunity, and Entrepreneurship" how the new overtime rule would hurt one of his managers, a single mom, because currently, if she has to leave work early because her child is sick at school, she still receives a full paycheck. Under the proposed overtime rule, she would receive a smaller paycheck any time that she worked fewer than 40 hours, or else would have to use her paid time off to receive a full paycheck.[34]

In addition to workers losing out on pay when they are not able to log a full 40 hours, employers could also intentionally restrict workers' hours, especially when business is slower or when they are trying to save costs. This has been a consequence of minimum-wage laws that require employers to increase worker pay. In California, a 9.1 percent increase in the minimum wage resulted in minimum-wage workers losing five hours of work per week and ending up with 13.6 percent smaller paychecks.[35] In addition to fewer hours, workers also experienced more irregular schedules, including a 10 percent increase in the deviation of start times and a 33 percent increase in the deviation of weekly hours.[36]

12.3 Million Salaried Workers Have Earnings Under Proposed Overtime Threshold

The Department of Labor estimated that the increase in the salary threshold would affect 3.4 million workers in the first year.[37] New data released by the Bureau of Labor Statistics (BLS) in September 2023 reveals that 12.3 million salaried, or "non-hourly," workers have earnings below the proposed overtime threshold and above the current threshold.[38] While there are exemptions to the overtime rules (such as for lawyers and teachers), the proposed rule could affect more than the 3.4 million workers estimated by the department.

According to the BLS data, a total of 60.2 million workers across the U.S. are "non-hourly full-time workers," meaning that they receive a regular salary, and that they usually work 35 hours or more per week at their sole or primary job. Analysis of the BLS data reveals that 5.7 million, or 9.4 percent, of all full-time salaried workers currently earn below the $35,568 salary threshold and thus are already subject to overtime laws.[39] At the proposed salary threshold, 18.0 million, or 30.0 percent, of full-time salaried workers would have earnings below the threshold and be subject to the overtime laws unless they have a special exemption.[40] The difference between the number of salaried workers under the current salary threshold and those under the proposed threshold—those who could be newly subject to overtime laws—equals 12.3 million.[41]

Table 1 provides a demographic breakdown of the number and percent of workers with salaries below the newly proposed overtime threshold and above the current threshold who could be newly impacted by the proposed rule. The increased overtime threshold would disproportionately affect women, black, and Hispanic workers, while Asian workers would be the least affected.

The rule would also have greater impacts in low-cost areas of the country, with more workers potentially affected in the South and fewer in the Northeast and West. Table 2 shows the percentage of workers in each state who are paid less, on an hourly basis, than the proposed overtime threshold.

Workers performing the same jobs—perhaps even at the same companies—could be treated differently under the new overtime rule because of differences in their costs of living and thus their pay. For example, the median salary of a meeting, convention, and events planner in Louisiana is $866 per week whereas the median salary of a meeting, convention, and events planner in Massachusetts is $1,185 per week.[42] Thus, the worker in Louisiana would almost certainly be converted to an hourly employee and become subject to overtime laws while the worker in Massachusetts would not. And yet, their salaries say very little about their relative financial well-being due to significant differences in the cost of living. While the worker in Louisiana earns 27 percent less than her counterpart in Massachusetts, the median mortgage on a home in Baton Rouge, Louisiana, is 65 percent less than the median mortgage in Boston, Massachusetts.[43]

The department estimated that 3.4 million workers could be affected by the increased overtime threshold, but the actual figure could be significantly higher considering the BLS data that show 12.3 million salaried workers have earnings between the current and proposed thresholds.[44] In particular, while some workers who currently earn above the threshold may not qualify for an EAP exemption and thus are already subject to overtime rules, the

TABLE 1

Proposed Overtime Salary Threshold Will Impact Millions of Salaried Workers

FIGURES ARE AVERAGES FOR Q2 2023

	Number of workers below current $684/week (thousands)	Number of workers below proposed $1,115*/week (thousands)	Difference (thousands)	Percentage of workers below current $684/week	Percentage of workers below proposed $1,115*/week	Difference (percentage points)
Total Workers Ages 16+	5,680	17,954	12,274	9.4%	29.8%	20.4%
Men	2,693	8,820	6,128	8.0%	26.1%	18.1%
Women	3,206	9,463	6,257	12.1%	35.8%	23.7%
White	4,125	13,676	9,551	8.9%	29.4%	20.6%
Black	1,017	2,709	1,692	15.3%	40.8%	25.5%
Asian	352	1,059	707	6.4%	19.3%	12.9%
Hispanic	1,408	3,542	2,134	17.8%	44.7%	26.9%
Northeast	960	3,000	2,039	8.4%	26.3%	17.9%
Midwest	922	3,425	2,503	7.9%	29.4%	21.5%
South	2,839	8,426	5,587	11.8%	35.1%	23.3%
West	1,159	3,225	2,066	8.8%	24.6%	15.7%

* The Department of Labor notes that the proposed threshold of $1,059 is based on 2022 earnings and the actual threshold will be determined at the time the rule is finalized. The presumed $1,115 threshold follows the Department of Labor's methodology to arrive at a level that aligns with the 2nd quarter 2023 data used in this analysis.

SOURCE: Author's calculations based on data from the Bureau of Labor Statistics, "Research Series on Percentiles of Usual Weekly Earnings of Nonhourly Full-time Workers," https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm (accessed October 5, 2023).

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department's assumption that roughly 30 percent of workers over the current threshold do not qualify for an EAP exemption is based on a set of 25-year-old probability codes that were used to determine whether an occupation meets an EAP. Those probabilities were based on job functions at a time when the Internet was only just gaining common use. Those codes do not include probabilities for entirely new industries and jobs that exist today, and they do not take into account changes within job classifications and job duties tests over the past 25 years. Moreover, those probability codes are based on occupation and earnings, but do not appear to take into account differences in earnings across low-cost and high-cost areas of the country.

TABLE 2

Percentage of Workers with Earnings Below Proposed Overtime Threshold, by State

	THRESHOLD	
	Current: $684/Week ($17.10/Hour)	Proposed: $1,059/Week ($26.48/Hour)
Alabama	43.0%	69.1%
Alaska	22.4%	52.7%
Arizona	28.9%	62.1%
Arkansas	45.2%	75.0%
California	23.1%	53.9%
Colorado	22.2%	54.0%
Connecticut	24.0%	52.7%
Delaware	30.9%	56.8%
D.C.	9.9%	28.5%
Florida	37.5%	65.9%
Georgia	35.9%	63.0%
Hawaii	26.3%	56.4%
Idaho	38.6%	68.3%
Illinois	27.3%	56.4%
Indiana	35.1%	66.3%
Iowa	32.8%	64.9%
Kansas	36.5%	66.2%
Kentucky	39.0%	68.5%
Louisiana	42.7%	68.4%
Maine	26.3%	63.6%
Maryland	24.5%	52.8%
Massachusetts	17.6%	45.9%
Michigan	31.1%	60.9%
Minnesota	24.1%	55.7%
Mississippi	48.7%	77.0%
Missouri	36.1%	65.6%

	THRESHOLD	
	Current: $684/Week ($17.10/Hour)	Proposed: $1,059/Week ($26.48/Hour)
Montana	35.2%	66.3%
Nebraska	33.3%	64.2%
Nevada	38.1%	66.1%
New Hampshire	25.4%	56.9%
New Jersey	24.3%	53.1%
New Mexico	40.0%	66.4%
New York	21.9%	51.9%
North Carolina	36.8%	65.0%
North Dakota	25.5%	61.2%
Ohio	33.1%	62.2%
Oklahoma	41.7%	68.7%
Oregon	24.3%	56.6%
Pennsylvania	31.4%	59.9%
Rhode Island	25.2%	54.9%
South Carolina	41.6%	69.2%
South Dakota	38.7%	72.8%
Tennessee	39.0%	68.1%
Texas	35.6%	63.2%
Utah	32.2%	62.7%
Vermont	23.7%	59.8%
Virginia	29.1%	55.5%
Washington	14.3%	48.2%
West Virginia	44.5%	70.9%
Wisconsin	29.4%	62.9%
Wyoming	32.2%	62.5%

NOTE: The data for these estimates includes the hourly earnings of all workers, including those already subject to overtime laws. The current $684 and proposed $1,059 thresholds have been converted to hourly rates. This data does not equal the exact percentages who are currently and would be subject to overtime laws under the proposal because they do not take into account exemptions.
SOURCE: Author's calculations using data from Bureau of Labor Statistics, "May 2022 State Occupational Employment and Wage Statistics," https://www.bls.gov/oes/current/oes_pr.htm#00-0000 (accessed October 29, 2023).

How to Increase Worker Incomes and Enable Worker Flexibility

Ultimately, no employer can consistently pay workers more than the value of what they produce because doing so would cause the employer to go out of business. And no government mandate on employers can cause workers to become more valuable—only education, experience, initiative, and capital, such as machines and technology, can increase workers' productivity. Thus, policies that seek to increase worker compensation should seek to make workers more productive and seek to reduce regulations that disincentivize employers from investing in employees.

Moreover, workplace flexibility is extremely valuable to workers, and policymakers must not presume that higher wages are workers' only desire. A silver lining of the COVID-19 pandemic has been an increase in workplace flexibility, but that has mostly been for salaried workers. It is difficult and risky for employers to give hourly workers the options of remote work and flexible schedules because doing so adds significant legal liabilities for employers. Law firms and human resources consultants caution employers of the difficulty of monitoring remote employees' work (including legally required work breaks) and warn them that even while most overtime violations are unintentional (such as an hourly employee checking work e-mail for a few minutes at home while off the clock) can result in massive legal costs.[45]

Flexibility is difficult for employers to offer to hourly employees because the law requires employers to pay workers for any work they "suffer or permit," even if they did not approve of overtime. Thus, if employers do not want to incur overtime costs, they must restrict hourly workers' flexibility, such as prohibiting them from working more than 40 hours a week and cutting off their access to work systems. Since the proposed overtime law acts as a legal-liability tax on employers who offer remote work and flexible schedules, it will result in fewer workers having access to those benefits.

To support rising incomes and flexible work options, Congress should:

Expand Flexibility for Lower-Wage Workers by Enacting the Working Families Flexibility Act. This proposed law would allow lower-wage workers (all those who are subject to overtime laws) to choose between overtime pay and paid time off when they work overtime.[46] For example, an individual who works one extra day per month could accrue 18 days of paid time off per year.

Enable Benefit Expansions by Basing "Regular Rate of Pay" on Wages Only. When employers calculate workers "regular rate of pay" to determine workers' overtime wages, they currently must include the value of benefits like parking, childcare, or tuition assistance. Congress should amend the FLSA to specify that the "regular rate of pay" includes wages only, so that employers who currently do not offer childcare or other benefits out of concern that they will dramatically increase overtime costs can offer such benefits without any overtime consequences.

Allow Flexibility Within Overtime Laws. Congress should provide flexibility to employers and employees to calculate the overtime period over a period of more than one week, such as two weeks or four weeks. This would allow employers to better accommodate workers' desired schedules. Currently, if a worker wants to take four hours off one afternoon to attend a school field trip with his child and is willing to make those hours up the following week, the employer may not approve such a shift because it would entail paying four hours of overtime despite no change in the worker's total hours. Expanded overtime periods would give workers greater flexibility to request changes to their weekly schedules while continuing to work for the same total number of hours.

Enable Higher Pay Through the Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act. Union contract wages serve as both a floor and a ceiling, meaning that employers cannot pay employees more than the contracted wage, either as a performance-based bonus or by moving them up the pay scale faster than the contract specifies. The proposed RAISE Act would effectively remove the cap on workers' pay by allowing employers to give merit-based pay raises, even if such raises or bonuses were not specified in the collective bargaining agreement.[47]

Protect Independent Workers' Incomes with the 21st Century Worker Act. In an attempt to subject more workers to overtime rules and other labor laws, the Biden Administration redefined independent contractors so that more workers will have to be treated like employees. Once finalized, that proposal will take away income opportunities, and in some cases entire livelihoods, from the 60 million Americans who perform independent work.[48] The overwhelming majority of these workers prefer being independent contractors over employees, and more than half of them say they cannot work a traditional job because of their caregiving needs or health conditions. Congress should protect independent work by passing the 21st Century Worker Act, which would create a bright-line test for independent contractor status under the Fair Labor Standards Act, the National Labor Relations Act, and the tax code based primarily on how much control an employer exerts over a worker, and with deference to workers' preferred classification in cases of ambiguity.[49]

Replace Failed Federal Job-Training Programs with More Effective Private, and State or Local, Programs. The federal government spends billions of dollars each year on job-training programs that fail to provide workers with education and experience that helps them to find and retain jobs. The Workforce Investment Act[50] and Job Corps[51] program, for example, have had few positive employment effects. Instead of wasting taxpayer dollars and workers' time on failed federal job-training programs, policymakers should allow workers to benefit from more effective employer-provided programs.[52]

Expand Apprenticeship Programs by Ending the Government Monopoly. Having too few education options can restrict opportunities for successful careers. A 2017 study by Harvard Business School and Burning Glass Technologies estimated that the number of occupations commonly filled through apprenticeships could nearly triple, that the number of job openings filled through apprenticeships could expand eightfold, and that the occupations ripe for apprenticeship expansion could offer 20 percent higher wages than traditional apprenticeship occupations.[53] The Apprenticeship Freedom Act[54] and Training America's Workforce Act[55] would enable apprenticeships to develop across more industries, resulting in more students being able to access on-the-job, paid education ending in a successful career.

Conclusion

The proposed 69 percent[56] increase in the overtime threshold would significantly affect millions of workers and employers. While intended to increase the pay of some workers, the proposed overtime rule would almost certainly impose significantly higher costs than benefits, including higher prices for consumers, lower family incomes, and reduced overall employment. Instead of higher pay, affected workers could experience lost jobs, reduced hours, irregular schedules and paychecks, a loss of workplace benefits, and the end of flexible and remote-work opportunities. These consequences will disproportionately affect workers in lower-cost areas, as well as female, black, and Hispanic workers. Moreover, workers in U.S. territories could be pushed into underground employment and lose existing workplace protections. Instead of imposing costly new regulations, policymakers should enact policies that open doors to rising incomes and flexible work opportunities.

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Endnotes

1. 29 U.S. Code § 213(a)(1).
2. The executive exemption applies to employees who primarily manage the work of others, have hiring and firing authority, and who exercise independent judgment and discretion in their roles. The administrative exemption applies to employees who perform office or non-manual work related to the business operations or management of the employer, and whose work requires them to exercise independent judgment and discretion. The professional exemption is for work that requires advanced knowledge in a specialized field, and which is predominantly intellectual and requires regular discretion and judgment. The outside sales exemption is for employees who regularly and customarily engage in sales activities outside their employer's place of business.
3. 29 U.S. Code § 213(a)(1).
4. The final court's 2017 ruling is: *United States District Court, Eastern District of Texas, Sherman Division, State of Nevada et al. v. United States Department of Labor et al.*, August 31, 2017, https://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf (accessed October 31, 2023).
5. Rachel Greszler, "How a Federal Judge's Last-Minute Injunction Against the Overtime Rule Will Help Workers and Businesses," The Daily Signal, November 23, 2016, https://www.dailysignal.com/2016/11/23/how-a-federal-judges-last-minute-injunction-against-the-overtime-rule-will-help-workers-and-businesses/.
6. The proposed threshold is set at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, which is the South. U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," Notice of Proposed Rulemaking, *Federal Register*, Vol. 88, No. 173 (September 8, 2023), pp. 62152–6253, footnote 3, https://www.govinfo.gov/content/pkg/FR-2023-09-08/pdf/2023-19032.pdf (accessed October 31, 2023).
7. Ibid.
8. The rule's inclusion of automatic updates will almost certainly be litigated in court on the basis that Congress specified that the Labor Department's authority includes "periodically" but not "automatically" updating the overtime threshold.
9. The rule provides an estimate of $1,158 per week for the overtime threshold in the first quarter of 2024. This is a 69 percent, or $24,648 increase compared to the current threshold of $684 per week. U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," Notice of Proposed Rulemaking, footnote 3.
10. Bureau of Labor Statistics, "Employee Benefits in the United States: Table 6. Selected paid leave benefits: Access, March 2023," https://www.bls.gov/news.release/ebs2.t06.htm (accessed October 25, 2023).
11. Daren Bakst and Peter St. Onge, eds., "Inflation: Policymakers Should Stop Driving It and Start Fighting It," Heritage Foundation *Special Report* No. 252, January 20, 2022, https://www.heritage.org/sites/default/files/2022-02/SR252.pdf.
12. James Sherk, "Obama's Overtime Rule Tried at IBM, and It Didn't Work," The Daily Signal, May 19, 2016, https://www.dailysignal.com/2016/05/19/obamas-overtime-rule-tried-at-ibm-and-it-didnt-work/.
13. Donald J. Boudreaux and Liya Palagashvili, "An Economic Analysis of Overtime Pay Regulations," The Mercatus Center, George Mason University, April 4, 2016, https://www.mercatus.org/hayekprogram/research/working-papers/economic-analysis-overtime-pay-regulations (accessed November 20, 2023).
14. News release, "Employer Costs for Employee Compensation–June 2023," Bureau of Labor Statistics, September 12, 2023, https://www.bls.gov/news.release/pdf/ecec.pdf (accessed October 31, 2023).
15. Author's calculations based on ibid.
16. Qiuping Yu and Shawn Mankad, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage," *Manufacturing & Service Operations Management*, forthcoming, last revised June 2, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863757 (accessed October 25, 2023).
17. Michael S. Dworsky et al., "The Effect of the Minimum Wage on Employer-Sponsored Insurance for Low-Income Workers and Dependents," *American Journal of Health Economics*, Vol. 8, No. 1 (Winter 2022), https://www.journals.uchicago.edu/doi/abs/10.1086/716198?casa_token=jj022Ekeb1wAAAAA%3AXtuyqEhqJfQeqaO-Iss4cmamlaEOrnzq8RCcPgHDIOKqU9-9zochTEOfnVVPq_d1EZibrkCr8w&journalCode=ajhe (accessed November 29, 2023).
18. For example, redistributing the wages of one worker to nine others would allow each to receive an 11.1 percent pay increase, but adding in the benefits would allow a 15.7 percent increase in pay. Source: News release, "Employer Costs for Employee Compensation–June 2023."
19. Simon Quach, "The Labor Market Effects of Expanding Overtime Coverage," University of Southern California, October 5, 2021, https://economics.ucr.edu/wp-content/uploads/2021/10/10-22-2021-Quach.pdf (accessed November 20, 2023).
20. Ibid.
21. Ibid.

22. The department notes that the overtime threshold will be set at the time the rule is finalized and estimates that for the first quarter of 2024, the overtime threshold will equal $1,158. U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," Notice of Proposed Rulemaking, footnote 3.
23. Author's calculations using data from: Bureau of Labor Statistics, May 2022 State Occupational Employment and Wage Statistics, https://www.bls.gov/oes/current/oes_pr.htm#00-0000 (accessed October 29, 2023).
24. U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," Notice of Proposed Rulemaking, p. 62193.
25. Ibid.
26. Government Accountability Office, "Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them," Report to Congressional Committees, May 2018, https://www.gao.gov/assets/700/691944.pdf (accessed November 6, 2023).
27. Congressional Budget Office, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations," November 2016, https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51925-overtimeregulations.pdf (accessed October 29, 2023).
28. The CBO report noted that businesses had already incurred some compliance costs in anticipation of the scheduled changes taking effect. Thus, the compliance costs of the rule would be higher than the costs of cancelling it.
29. Ibid.
30. Ibid.
31. Ibid.
32. When the 2016 threshold was finalized in May 2023, the $913 weekly level equaled 103.8 percent of the $880 average weekly earnings of all private-sector workers. The proposed overtime threshold is specified to equal $1,059 per week, but the rule notes in footnote 3 of the Notice of Proposed Rulemaking that the actual overtime threshold will be determined at the time that the rule is finalized. The proposal notes that if the threshold is set equal to the 35th percentile of non-hourly earnings in the lowest wage census region (currently the south), the threshold would be $1,140 per week in the fourth quarter of 2023, and $1,158 in the first quarter of 2024. This is based on an assumed annual wage and salary increase of 4.5 percent. Applying that assumed 4.5 percent increase to the fourth quarter 2022 average weekly earnings results in average weekly earnings of $1,182 for the fourth quarter of 2023. The department's estimate of the threshold equaling $1,140 per week in the fourth quarter of 2023 is equivalent to 96.4 percent of the estimated average weekly earnings of $1,182. Source: Bureau of Labor Statistics, "Employment, Hours, and Earnings from the Current Employment Statistics Survey," Average weekly earnings of all employees, total private, seasonally adjusted, https://www.bls.gov/data/home.htm (accessed October 30, 2023).
33. Megan Brenan, "Hourly Workers Unhappier Than Salaried on Many Job Aspects," Gallup, August 23, 2017, https://news.gallup.com/poll/216746/hourly-workers-unhappier-salaried-job-aspects.aspx (accessed October 10, 2023).
34. The Heritage Foundation, "21st Century Labor Policies to Promote Worker Freedom, Opportunity, and Entrepreneurship," September 22, 2023, video, https://www.heritage.org/jobs-and-labor/event/21st-century-labor-policies-promote-worker-freedom-opportunity-and.
35. Yu and Mankad, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage."
36. Ibid.
37. The department also estimated that the increase in the highly compensated executives threshold (from $107,432 to $143,988) would affect an additional 248,900 workers.
38. Bureau of Labor Statistics, "Percentiles of usual weekly earnings of nonhourly full-time workers by selected characteristics, 2nd quarter 2023 averages," Current Population Survey, September 2023, https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm (accessed October 10, 2023).
39. The BLS data on earnings of non-hourly full-time workers divides the workers into 20 groups of approximately equal size to represent 5 percent increments. The author's estimates include all persons earning below a specified salary threshold of $1,115 (see footnote 40 below for an explanation of the $1,115 threshold used in this analysis) and assume an equal distribution of workers' earnings within income groups. For example, the 25th percentile of weekly earnings for all non-hourly full-time workers equals $1,007, and the 30th percentile equals $1,119. The newly proposed threshold equals $1,115 for the applicable second quarter of 2023. Thus, fully 25 percent of all non-hourly, full-time workers (15.051 million) earn below $1,007 and another estimated 2,903 workers earn between $1,007 and the newly proposed $1,115 weekly threshold. The estimated 2,903 workers are based on a calculation that 96 percent of workers between the 25th and 30th percentiles of workers will earn between $1,007 and $1,115 because the difference between $1,115 and $1,007 ($108) equals 96 percent of the difference between the 25th and 30th percentile earnings markers of $1,119 and $1,007 ($112).
40. The data on non-hourly workers earnings is from the second quarter of 2023. To align the department's proposed overtime threshold with that second quarter 2023 data, this analysis estimated that the proposed overtime threshold for the second quarter of 2023 would equal $1,115 per week. This is based on the department's stated assumption of percentage wage growth from 2022 to 2023 and its estimate that the applicable overtime threshold would equal $1,140 in the fourth quarter of 2023. See U.S. Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," Notice of Proposed Rulemaking, footnote 3.

41. This does not account for salaried workers who usually work fewer than 35 hours per week and could be converted to hourly employees.
42. Bureau of Labor Statistics, "Occupational Employment and Wage Statistics," May 2022, https://www.bls.gov/oes/current/oes_la.htm (accessed October 25, 2023).
43. The monthly mortgage payment on a median-value home in East Baton Rouge Parish, Louisiana, is $1,297 and the monthly mortgage payment on a median-value home in Suffolk County, Massachusetts, is $3,718. Source: National Association of Realtors, "County Median Home Prices and Monthly Mortgage Payments," 1st Quarter, 2023, https://www.nar.realtor/research-and-statistics/housing-statistics/county-median-home-prices-and-monthly-mortgage-payment (accessed October 25, 2023).
44. The department's analysis started with all wage and salary workers (166.2 million). It then excluded those not subject to the FLSA or the department's regulations, such as active-duty military, the self-employed, religious workers, and most federal employees (26.8 million). It then excluded all workers who are already hourly and subject to overtime rules and those who qualify for other non-executive, administrative, or professional (non-EAP) exemptions (87.5 million). Of the remaining 51.8 million potentially affected workers, the department estimated that 15.4 million are not EAP exempt, meaning they do not pass the duties test and are already subject to overtime rules. Of the remaining 36.4 million, the department estimated that 8.1 million are in named occupations (such as teachers and academic administrators, outside sales workers, physicians, and lawyers) that are exempt from the overtime rule. And finally, of the 28.4 million remaining workers potentially affected by the proposed rule, the department estimated that only 3.4 million would be affected by the proposed $1,059 standard overtime threshold and 0.2 million would be affected by the highly compensated executives level. (This analysis focuses on those affected by the standard threshold.)
45. The Biden Administration made it more difficult for employers to avoid costly litigation for unintended overtime violations when it terminated the Department of Labor's Payroll Audit Independent Determination (PAID) program that allowed businesses to self-report federal minimum wage and overtime violations and to properly compensate workers for their errors without costly litigation.
46. Rachel Greszler, "Mike Lee's Bill Would Boost Paid Family Leave Without Growing Government," The Daily Signal, April 11, 2019, https://www.heritage.org/jobs-and-labor/commentary/mike-lees-bill-would-boost-paid-family-leave-without-growing-government.
47. H.R. 2992 and S. 1633, Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act, 116th Congress, https://www.congress.gov/116/bills/hr2992/BILLS-116hr2992ih.pdf (accessed October 29, 2023).
48. Upwork, "Freelance Forward 2022," https://www.upwork.com/research/freelance-forward-2022 (accessed October 26, 2023).
49. The 21st Century Worker Act, S. 2159 (118th Congress, 1st session).
50. Sheena McConnell et al., "Providing Public Workforce Services to Job Seekers: 15-Month Impact Findings on the WIA Adult and Dislocated Worker Programs," Mathematica, May 30, 2016, https://www.mathematica.org/publications/providing-public-workforce-services-to-job-seekers-15-month-impact-findings-on-the-wia-adult (accessed October 29, 2023).
51. David B. Muhlhausen, "Job Corps: An Unfailing Record of Failure," Heritage Foundation *WebMemo* No. 2423, May 5, 2009, https://www.heritage.org/jobs-and-labor/report/job-corps-unfailing-record-failure.
52. In the case of federal job-training programs used as part of work requirements in means-tested aid programs, such as Temporary Assistance for Needy Families (TANF), food stamps, and housing, Congress should apply a pay-for-outcomes model. See Leslie Ford and Robert Rector, "Pay-for-Outcomes: Transforming Federal Social Programs to Expand Individual Well-Being," Heritage Foundation *Backgrounder* No. 3550, November 5, 2020, https://www.heritage.org/sites/default/files/2020-11/BG3550.pdf.
53. Joseph B. Fuller and Matthew Sigelman, "Room to Grow: Identifying New Frontiers for Apprenticeships," Harvard Business School and Burning Glass Technologies, November 2017, https://www.hbs.edu/managing-the-future-of-work/Documents/room-to-grow.pdf (accessed October 29, 2023).
54. H.R. 9509, Apprenticeship Freedom Act, 117th Congress, https://www.congress.gov/bill/117th-congress/house-bill/9509/text/ih?overview=closed&format=txt (accessed November 29, 2023).
55. S. 1213, Training America's Workforce Act, 118th Congress, https://www.congress.gov/118/bills/s1213/BILLS-118s1213is.pdf (accessed October 28, 2023)
56. Percentage increase based on department's estimate of the overtime threshold being set at $1,158 in the first quarter of 2024 (see Notice of Proposed Rulemaking, footnote 3). This is 69 percent above the current threshold of $684. The actual threshold will likely be higher as it will be finalized sometime after the first quarter of 2024.