

# **Testimony Before the U.S. Senate Committee on Small Business and Entrepreneurship**

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Russell Senate Office Building

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Thank you for inviting me to testify today.

My name is Ross Eisenbrey, and I am the vice president of the Economic Policy Institute, a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI believes every working person deserves a good job with fair pay, affordable health care, retirement security, and work-life balance.

Work-life balance is a fundamental goal of the Fair Labor Standards Act (FLSA). Because of its requirement that employers pay many employees a premium for time worked beyond 40 hours in a week, the FLSA is the single most important family-friendly law ever passed in the United States. Everyone claims to care about work-life or work-family balance, but for many employers, it's just talk, just as it was 75 years ago. If not for the law's overtime rules, tens of millions more workers would be working 50, 60, or 70 hours a week for no additional pay, just as millions of Americans did before the FLSA was enacted in 1938.

An uninformed person might think the 40-hour workweek most Americans have is part of the natural order, but of course it isn't. It exists in the United States because President Roosevelt persuaded Congress to pass the FLSA, which—by imposing the duty to pay time-and-a-half for overtime—makes it expensive for a business to work employees more than 40 hours a week. (Similarly, the weekend was not a given for most Americans before passage of the FLSA.) If the FLSA's regulations are not updated from time to time, as the law intends, the 40-hour workweek could become a thing of the past.

It's critical to remember that there's no inherent difference between an hourly worker and a salaried worker. How they are paid is entirely up to the boss. And **salaried employees need time with their families and time for themselves just as much as hourly workers do.** Congress recognized this in 1938 and made no distinction: Hourly workers and salaried workers alike were entitled to overtime pay, whether they were blue collar or white collar, whether they worked in a factory or an office. In fact, some of the most exploited workers at the time were women working 12-hour days, six days a week, as typists in giant office pools for \$6 or \$7 a week.

It's equally critical to remember that the **employees who work in small businesses are no different from those who work in medium-sized and large businesses; they too need time with their families and for themselves.** There is no good reason for small businesses to exploit their employees, work them excessive hours, or deny them time with their families.

For all of these reasons, the Department of Labor (DOL) should promptly issue its final rule to raise the threshold salary, below which all workers are automatically eligible for overtime, to \$50,440. This would be the most important improvement in the labor standards of America's working families in many years.

# Work–life balance, family responsibilities, and personal health

Having a decent work–life balance, which means having enough time outside of work for family and friends, for oneself, and for civic participation, is one of the two key goals of the FLSA's overtime requirements. But large percentages of managers and other white-collar employees say that increasingly, the law is failing to protect them, that they don't have enough time for their families. Alarming, parents' hours are increasing more than those of non-parents:

- An Ernst & Young survey found that too little pay and excessive overtime are among the three most common reasons employees quit.
- Approximately half (46 percent) of managers work more than 40 hours per week, and four in 10 say their hours have increased over the past five years.
- Younger generations have seen their hours increase the most in the last five years, at a time when many are moving into management and starting families (47 percent of millennial managers reported an increase in hours, versus 38 percent for Gen X managers and 28 percent for boomer managers).
- Of managers, a larger share of full-time working parents (41 percent) have seen their hours increase in the last five years than non-parents (37 percent).<sup>1</sup>

The implications of this overwork are obvious in terms of work–life conflict. Who will take care of the kids? Who will go to their ballgames, school plays, or counseling meetings? The conflict is especially intense because children increasingly have two parents working at least 35 hours per week. Ernst & Young finds that “over half (57%) of full-time employees in the US indicate that their spouse/partner works 35 hours or more a week, but for millennials and Gen X, the likelihood that their partner works full-time is much higher than for Boomers. Also, parents (70%) are much more likely than non-parents (57%) to have a partner that works at least full-time.”<sup>2</sup>

Specifically:

- “Millennials (78%) are almost twice as likely to have a spouse/partner working at least full-time than Boomers (47%).
- Millennials (64%) and Gen X (68%) were also much more likely to have a spouse/partner working 35 hours or more a week than Boomers (44%).
- Over a quarter of Boomers (27%) said their spouse/partner does not work outside the home or works part-time flexible hours (10%).
- Millennials (13%) and Gen X (14%) were much less likely to have a spouse/partner who did not work outside the home or who worked part-time but flexible hours (5% and 4% for millennials and Gen X, respectively).

- ‘Finding time for me’ is the most prevalent challenge faced by millennial parents who are managers in the US (76%) followed by ‘getting enough sleep’ and ‘managing personal and professional life’ (67%).”<sup>3</sup>

It’s not just work–family conflict, stress, or lack of sleep that’s at stake; it’s also the physical health of the workers. Overwork kills. People who work 55 hours or more per week have a 33 percent greater risk of stroke and a 13 percent greater risk of coronary heart disease than those working standard hours.<sup>4</sup> When employers don’t have to pay for overtime, they schedule much more of it, leading to the many stories among the rulemaking comments of managers working 60-hour weeks and longer until their health was destroyed, leaving them disabled.

## As currently enforced, the FLSA is failing salaried workers

Properly enforced, the Fair Labor Standards Act would prevent a great deal of this overwork and stress on families, but the law has been allowed to become almost a dead letter with respect to salaried employees. The single biggest reason for this failure is the low level of the salary threshold that determines whether workers are automatically eligible for overtime pay. As shown in the graph, in 1979 more than 12 million salaried workers earned less than the salary threshold and were therefore automatically guaranteed the right to overtime pay, regardless of their duties. Today, with a 50 percent bigger workforce, only 3.5 million salaried employees are automatically protected.<sup>5</sup>

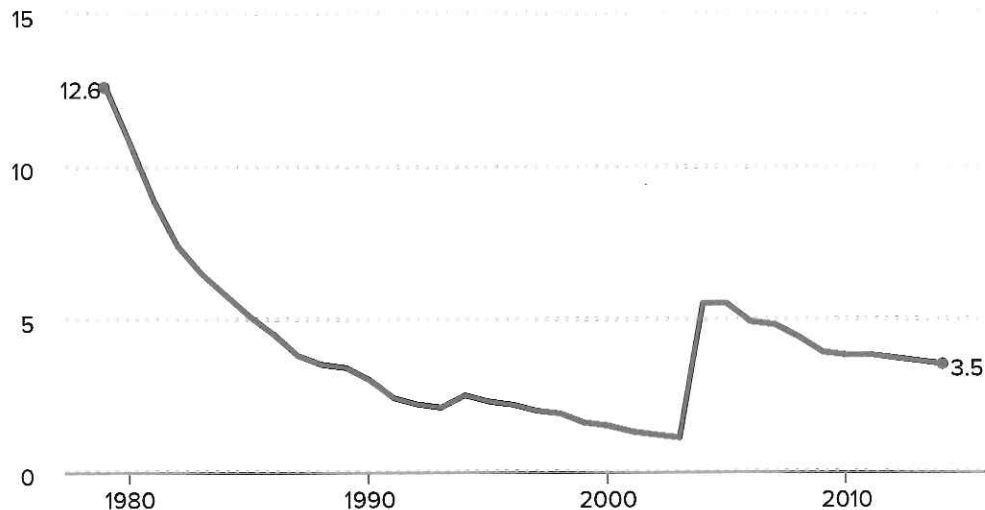
**In an excellent comment submitted to the rulemaking record, 57 legal scholars remind us that the basic rule is that all employees are entitled to time-and-a-half overtime pay, while the exemptions were meant to be very limited and narrow. For the most part, only relatively highly paid employees may be denied overtime pay:**

“Congress’ intent was to allow exemptions from the Fair Labor Standards Act’s overtime and minimum wage protections for a relatively small group of high-paid employees who were effectively already being compensated for the extra hours that they worked by their high level of compensation. Congress understood that these workers had sufficient individual bargaining power in the labor market and workplace to protect themselves, and so did not need the government to intervene to protect them from employers who might impose low wages and excessive overwork. One very strong indication of a worker’s individual bargaining power is the salary that he or she can negotiate with an employer. More individual bargaining power generally produces a higher salary. Bona fide executive, administrative, and professional employees are able to negotiate high salaries because of their skills, knowledge, close association with powerful corporate leaders and, in many cases, limited availability in the labor market. For this reason, we agree with the Wage & Hour Division that an employee’s salary level should be the most important factor in determining whether he or she is an exempt bona fide executive, administrative, or professional employee.”<sup>6</sup>

Figure A

## The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979

Number of salaried workers\* covered by overtime salary threshold, 1979–2014 (in millions)



\* The sample included salaried (nonhourly), full-time workers who are 18 years or older. It excluded teachers (pre-K through college) and religious workers who are automatically exempt from overtime protections.

**Note:** The nominal threshold was set at \$250 per week from 1975 until 2004 when it was increased to \$455 per week.

**Source:** EPI analysis of Current Population Survey Outgoing Rotation Group microdata

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The other purpose of the overtime rules was to reduce unemployment by reducing the average number of hours worked in certain jobs, thereby freeing up positions for additional workers. To maximize employment, it's obviously better to have three employees working 40 hours per week than just two working 60 hours each while the third is unemployed. U.S. underemployment is still almost 10 percent seven years after the end of the Great Recession—that's over 15 million Americans who want a job or more hours but have not been able to find them. The black unemployment rate is a recession-like 8.8 percent.

## The arguments against raising the overtime salary threshold don't hold water

Many businesses are unhappy that the Labor Department is proposing to restore overtime coverage almost to where it stood in the Nixon and Ford administrations. Businesses have become accustomed to working low-level salaried employees long hours for no extra

compensation, but the pendulum has swung too far, and it's time to restore some balance. The arguments they make against the rule are uniformly without merit.

Let's examine the four most prevalent of these arguments.

1. "Regulatory compliance costs will be excessive."

a. DOL probably overestimated these costs. Every firm that has an obligation to comply with the FLSA has already made a determination about the duties of its current employees and whether they can be exempted under the law's provisions for executive, administrative, and professional employees (known as "EAP exemptions"). The proposed rule makes this process much simpler for employees earning below the threshold. Here's the new test: "Does the employee make less than \$970 per week?" If yes, pay overtime.

b. DOL said becoming familiar with the new rules would take an hour, but in reality, it takes a few seconds, and anyone with ADP payroll processing software can make the necessary change in payroll in a few minutes. Even the National Restaurant Association's witness at last October's House Small Business Committee hearing on the rule admitted that "this would be an easy transition to make from a management and bookkeeping standpoint."

c. Going forward, it is beyond argument that millions of the decisions employers make about applying the exemption to employees earning above the current threshold but below the new threshold level (\$23,660 to \$50,440) will be made simpler: The complex duties tests that apply above the threshold will be irrelevant for those employees, and the only question will be, "Does the employee earn a salary less than \$970 per week?"

d. Converting employees to hourly status is entirely a decision of the employer. Overtime can be easily tracked for salaried employees. Many employers, including small businesses, track the time of salaried employees. At the House Small Business Committee hearing on the overtime rule last October, Terry Shea, representing the National Retail Federation, revealed that she routinely and closely tracks the time of her salaried employees:

"Furthermore, our store managers and assistant managers averaged a 40 hour work week last year. Management closes the stores two days a week, and on those days they come in at 10am and leave between 6:15pm and 6:30pm. They also work one Saturday a month, for which they are given a day off during the week. During 'crunch time' weeks, a manager will work more than 40 hours.

"However, when any salaried associate works in excess of 46 hours in a week, they are compensated with a day off of their choosing.

"This day off may be used the following week or 'banked' and taken later in the year."

2. "The regulation will harm relationships between owners and affected employees."

a. The National Federation of Independent Business (NFIB), for example, claims that employee morale will be hurt because employers will not just reclassify some managers as hourly but will also demote them, take away the manager title, take away their paid time off and their health benefits, and stop letting them leave early to pick up their kids from school. All of that is pure nonsense. Nothing in the rule makes an employer change a manager's title or take away benefits, and it would be poor management to do so if it were going to harm morale.

b. NFIB assumes that businesses will insist that employees continue to work long hours and will refuse to pay anything additional for overtime. NFIB says employers will cut wages by as much as \$5 per hour in order to keep their total wage bill unchanged. That has not been the history of the FLSA. We know that hourly workers are less likely to work long hours than salaried employees, and we have found no evidence that employees' wages were ever cut this way in the past.

3. "The rule will take flexibility and opportunities from employees who are converted to hourly status."

a. Research by Lonnie Golden at Penn State shows that employees paid a salary less than \$50,000 a year generally have no more flexibility than hourly workers.<sup>7</sup>

b. The opportunity argument is indefensible. If my business promotes employees paid a salary of \$25,000 to \$50,000 into management but the rule leads me to reclassify them all as hourly, they're still the same employees I would look to for promotion. Where else would I look? If not them, then to whom?

4. "The salary level is set too high for rural areas."

a. The salary level is meant to do one thing: prevent employers from denying a 40-hour workweek and overtime pay to people who aren't really executives and professionals. It doesn't set salaries; it reflects what bona fide executives, administrators, and professionals are paid.

b. The \$921 weekly level in the DOL's notice of proposed rulemaking (NPRM) is not high; it is so low that it isn't sufficient to provide a two-parent, two-child family with an income level necessary to live adequately yet

modestly.<sup>8</sup> This is not truly an executive-level salary if an employee in 2014 could not support a family in a modest way on that salary.

c. The salary levels since 1938 have been set nationally, without exception.

d. In inflation-adjusted terms, the equivalent salary level in 1975 would be \$57,462, according to the U.S. Chamber of Commerce. That level took account of regional and urban/rural differences because it was an inflation adjustment of earlier levels that took them into account. Regional pay differences are much smaller today than in 1975, so the salary level in the NPRM actually overcorrects for regional differences. Moreover, the fact that the NPRM level is well below the 1975 level despite decades of productivity growth and accelerating income growth for executives means the salary level is more likely too low than too high.

e. The HR Policy Association (HRPA) says that one in seven rural and small city CEOs earns less than \$940 per week. It's a very misleading portrait of their income, if not totally meaningless, because it's based on the Current Population Survey report of weekly wage data, which leaves out a lot of income—perhaps most of it for CEOs. Here's what's left out: non-production bonuses, perquisites, profit-sharing payments, stock bonuses, and year-end bonuses. Taking into account their various bonuses and perks, it might be that none of them earns less than \$75,000 a year—but we don't know.

CEOs are either the business owner, in which case they set their own salary and their own schedule, or they are employees of someone else. If the business owner isn't willing to pay its CEO more than \$50,000, it will have to pay overtime. This will affect very few businesses.

f. The HRPA figure of one-seventh of rural and small city CEOs totals less than 18,000 CEOs, of whom 3,000 are public employees. In a nation with more than 7 million businesses, that represents 0.2 percent of firms.

g. Managers paid less than the level necessary for a two-parent, two-child family to make ends meet anywhere in the country, whether they live in rural or urban areas, should not be treated as exempt executives; they should be paid for their overtime.

The Secretary of Labor has done precisely what the law requires in resetting the salary test to a level that truly reflects the compensation of bona fide executives, administrators, and professionals. In doing so, he is making the most important improvement in the labor standards of America's working families—particularly middle-class families—in many years. The proposed rule should be applauded and supported, and the Secretary should make it final.

# Biography

**Ross Eisenbrey** has been vice president of EPI since 2003. He is a lawyer and former commissioner of the U.S. Occupational Safety and Health Review Commission. Prior to joining EPI, Eisenbrey worked for many years as a staff attorney and legislative director in the U.S. House of Representatives, and as a committee counsel in the U.S. Senate. He served as policy director of the Occupational Safety and Health Administration from 1999 to 2001. Eisenbrey has testified numerous times in the House of Representatives and the Senate, and has written scores of articles, issue briefs, and policy memos on a wide range of labor issues. He holds a J.D. from the University of Michigan.

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3. Ibid.
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5. Ross Eisenbrey, "The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979," Economic Policy Institute Economic Snapshot, June 11, 2015.
6. L. Camille Hébert, et al., "Law Professor Comments Regarding 'Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,'" submitted to U.S. Department of Labor September 4, 2015.
7. Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers: When You Have Little Flexibility, You Have Little To Lose*, Economic Policy Institute Briefing Paper #385, September 30, 2014.
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Regulations.gov will undergo scheduled maintenance and will be unavailable Saturday, May 14, from 3:00 am through 8:00 pm (ET).



Hamermesh, Daniel

This is a Comment on the **Wage and Hour Division (WHD)**  
Proposed Rule: **Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees**

For related information, [Open Docket Folder](#)

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Comment

I am pleased to comment on Regulation RIN 1235-AA11. My bona fides for doing so is that I have worked in the area of research on labor markets for my entire professional career, the last 46 years. During that period I authored Labor Demand (Princeton University Press, 1993), widely recognized as the authority on issues of labor demand, and I have since written a number of studies on the topic of labor demand. In the book and among my subsequent studies are analyses of the impact of overtime laws on the labor market, including changes in the level of pay at which workers are no longer exempt from the FLSA's overtime provisions.

One can think of raising the pay level above which workers are exempt from overtime provisions as an increase in the cost to employers of an extra hour of work per week (beyond 40) among those workers whose level of annual earnings had previously made them exempt. The proposed regulation thus raises the price to employers of an extra hour of some workers' labor. There is substantial evidence on how employers respond to such an increase:

1. Employers cut weekly hours of those workers who become non-exempt and who had been working more than 40 hours per week.
2. That cut in hours is likely to be small enough that, with time-and-a-half pay for the remaining hours worked beyond 40 per week, those workers who become non-exempt will see an increase in their weekly earnings.
3. Perhaps most important, because of the increased cost of an additional hour of work among these low- to middle-wage workers, employers will substitute additional workers for the hours that they cut back on. In other words, this is a job-creation program it will increase employment in total, in particular among



this category of workers.

4. Because the cost of the average hour of work is raised by the regulation, the total amount of work performed hours per worker times number of workers will drop. The regulation raises the price of labor taken as a whole and reduces the quantity of labor demanded.

In sum, the regulation imposes a trade-off. It produces the benefits of:

1. More jobs a highly desirable outcome at a time when the fraction of the adult population that is working has dropped substantially since 2007.
2. Shorter workweeks for some workers also a highly desirable outcome at a time when the U.S. has become the most workaholic rich country, the champion in the average length of the work year (see Hamermesh and Stancaelli, Industrial and Labor Relations Review, 2015).
3. Higher weekly earnings for a group of low- to middle-income workers.

The regulation produces the cost of:

1. Slightly fewer total hours worked, and thus slightly less produced economy-wide.

To me the correct choice on this trade-off is easy the benefits far exceed the cost, so that I strongly support the proposed regulation.

The proposed regulation has one additional admirable feature, its inclusion of indexation of the presumptively non-exempt level of earnings. Too much political energy has been and is being wasted in Washington on repeated arguments over regulatory limits on the non-exempt level of earnings (and on many other wage issues under the FLSA). As we did with benefits and the taxable base in the 1983 Social Security amendments (PL 98-21), in this case too these wasteful discussions can and should be obviated by indexing the dollar amount.

In sum, from a politically neutral position I view the proposed regulation as being on net highly desirable, and I hope it will be issued as it stands.

