

THE NEW ERA OF EXECUTIVE ACTION

# MAKING MORE WORKERS ELIGIBLE FOR OVERTIME PAY

May 5, 2015

## Background

Under the Fair Labor Standards Act (FLSA), employees who work more than forty hours per week are entitled to pay at 1.5 times their usual rate. However, the law has numerous exceptions, the most prominent of which is the white-collar exemption that excludes “bona fide executive, administrative, and professional employees” from the overtime guarantee (the exclusion also applies to computer and outside sales workers). While exempting well-compensated managers from overtime rules is consistent with the law’s intent—protecting workers at risk for exploitative work schedules—the regulations have not kept pace with the accelerating white-collarization of the American workforce, leaving increasing numbers of workers vulnerable to abuse.

Traditionally, the “duties-based” standard for overtime protections has been supplemented with an earnings standard, so as to avoid misclassifying low-wage and hourly workers with job descriptions that do not reflect the degree of discretion they exert over their work schedules. However, the earnings threshold, which is set administratively by the secretary of labor, is not indexed to inflation and has been updated only eight times since the FLSA was passed in 1938, and most recently set at \$455 per week in 2004. This salary is equivalent to \$23,660 annually, which is less than the poverty guideline for a family of four (\$24,250). It is also well below the \$250 per week standard set in 1975 (the last update prior to 2004), which is worth \$56,500 in today’s dollars. As a result, the share of salaried workers with guaranteed overtime protections has declined, from two-thirds of the workforce in 1975 to less than one-tenth today. Together, with the shift toward white-collar work, the erosion of the earnings standard means a substantial share of the U.S. labor force is at risk for being forced to work unreasonable hours.

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This brief is part of The Century Foundation initiative, The New Era of Executive Action, which is available online at <https://tcf.org/atavist.com/executive-action>.

## Action

On March 13, 2014, President Barack Obama issued a presidential memorandum, Updating and Modernizing Overtime Regulations.

## What It Does

President Obama's memorandum instructs the secretary of labor to modernize and streamline the FLSA overtime regulations, subject to three primary criteria:

- remain consistent with the FLSA's intent;
- reflect the evolution of the American workplace; and
- simplify the regulations to make them easier for employees and employers to understand.

## Status

A full year after the president's memorandum, the Department of Labor has not yet issued a proposed rule. In the Department of Labor's May 2014 Semi-Annual Regulatory Agenda, it projected November 2014 as the release date for a proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees." However, its November 2014 Regulatory Plan delayed the projected publication date of the proposed rule to February 2015. The proposed rule is expected to be published in May.

Upon publication of the proposed rule, there will be a thirty-day public comment period. The Department of Labor will then respond to comments and draft a final rule. The Office of Management and Budget's Office of Information and Regulatory Affairs has ninety days (with a possible thirty-day extension) to review the draft final rule and publish the approved regulation in the *Federal Register*.

## Impact

Because approximately 90 percent of America's 65 million salaried workers earn more than the overtime threshold—and a substantial share of these work in white-collar occupations—the revised regulations have the potential to benefit millions of workers. While it is unclear how many workers' overtime rights are currently being violated (partly because the complexities of existing regulations are confusing to employees and employers alike), it is likely that a higher earnings standard coupled with clearer exceptions will improve compliance rates. In fiscal year 2014, the Department of Labor took enforcement action against 11,238 overtime violation cases and collected \$136 million in back pay.

## Response

As would be expected, workers and labor groups are strongly in support of the Obama administration's overtime actions, while business interests are opposed, given potential cost implications. Among the progressive policy organizations that have supported the president's proposal are the Economic Policy Institute and the Center for American Progress. Opponents include the Cato Institute and the National Retail Federation.