

September 25, 2017

Melissa Smith  
Director of the Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue N.W., Room S-3502  
Washington, DC 20210

Re: RIN 1235-AA20, Comments in Response to Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

The National Center for Lesbian Rights writes to urge the Department of Labor (the Department) to defend the final overtime regulations issued by the Department in 2016 (the Final Rule) and maintain the salary threshold established therein. As an organization dedicated to advancing the civil and human rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families, we are committed to promoting dignity and fairness in the workplace and supporting economic security for all people. By raising the salary threshold under which employees may not be considered exempt from overtime pay to \$47,476, the Final Rule provides or strengthens overtime protections under the Fair Labor Standards Act (FLSA) for as many as 12.5 million people,<sup>1</sup> including hundreds of thousands of LGBT people,<sup>2</sup> boosting economic security for working families across the country. While enforcement of this critically needed rule has been stalled by litigation, we strongly urge the Department to focus its energies on defending the Final Rule in its current form in the court proceedings rather than revisiting its provisions through this Request for Information or any future rulemaking.

The Department released the Final Rule following years of research, analysis, and deliberation, with ample opportunity for all stakeholders to participate in the process. Over 270,000 public comments—the vast majority supportive—were submitted. The Final Rule updates outdated regulations, lowers the risk and costs of litigation by providing a bright line rule for businesses to follow and rely upon in shaping their overtime policies, and provides millions

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<sup>1</sup> Economic Policy Institute. (2016, May). *The new overtime rule will directly benefit 12.5 million working people*. Retrieved 12 September 2017, from <http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/>

<sup>2</sup> According to the Williams Institute's study of LGBT demographics, between 3.4 and 5.6% of American adults identify as LGBT. Extrapolating these percentages to the 12.5 million salaried workers who would be affected by the overtime rule, we can estimate that somewhere between 425,000 and 700,000 of those workers are LGBT. It is likely that the number is even higher because many LGBT people do not self-report their sexual orientation or gender identity due to discrimination and social stigma. This conclusion is borne out in the Williams Institute's study, where younger people were far more likely to self-identify as LGBT than their older peers. See Gary J. Gates, *LGBT Demographics: Comparisons among population-based surveys*, The Williams Inst., 1 (Sept. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf>.

of modestly-paid workers with needed economic stability—and more dollars in their paychecks, which is in turn likely to stimulate consumer spending. Revisiting the salary threshold is a waste of time and resources that prioritizes the desires of corporate America above the needs of millions of working people who have already waited too long for the overtime pay they deserve.

**The \$47,476 salary level in the Final Rule restores the effectiveness of the salary threshold in the overtime exemption determination.** The salary threshold is key to determining whether an individual is an executive, administrative, or professional (EAP) employee who is exempt from overtime protections under the FLSA. The Department has long recognized that what an employer pays an employee is “the best single test” of whether that employee’s duties rise to the level of executive, administrative, or professional;<sup>3</sup> the higher an employee’s salary, the greater the likelihood that she holds an EAP position—and the lighter an inquiry into her duties need be to verify that this is the case.

By the time the Department released its proposed update to the overtime salary threshold in 2015, the applicable \$23,660 threshold, set in 2004 without any mechanism for automatic increase, was below the poverty line for a family of four and covered just 8 percent of salaried workers; by comparison, the 1975 salary threshold covered 62 percent of salaried workers.<sup>4</sup> This inadequate salary threshold provides no meaningful guide to identify whether an employee is likely to perform non-exempt tasks, but it does invite abuse from employers: a promotion to “shift supervisor” for a salary of just \$24,000 a year might cost a woman her overtime pay even if she is required to work 50 hours a week and performs many of the same tasks as the employees she “supervises.”

The salary threshold established by the Final Rule restores a more appropriate line between clearly overtime-eligible employees and potentially exempt EAP employees, securing long overdue protections for millions of workers. Setting the salary threshold at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), as the Final Rule does, re-establishes a reasonable standard to ensure that those whose positions are not highly compensated enough to fall within the EAP exemption under the FLSA are not deprived of the overtime pay that the law guarantees them when they work more than 40 hours in a week. And by establishing a mechanism to update the threshold every three years, the Department ensured the value of the threshold will not erode as it has in the past, creating stability and predictability for both employees and employers.

Lowering the salary threshold established by the Final Rule in any way—including through a mechanism to establish thresholds that vary by region, by industry, or on another basis—would require a strengthened and updated duties test that more closely examines whether an individual’s primary duties are properly considered executive, administrative, or professional.

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<sup>3</sup> U.S. Department of Labor (1940, October). “Executive, Administrative, Professional...” *Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition*. Washington, U.S. Govt. Print. Off..

<sup>4</sup> Eisenbrey, R. & Kimball, W. (2015, June). *An Updated Analysis of Who Would Benefit from an Increased Overtime Salary Threshold*. Economic Policy Institute. Retrieved 12 September 2017, from <http://www.epi.org/blog/an-updated-analysis-of-who-would-benefit-from-an-increased-overtime-salary-threshold/>

And altering or eliminating the automatic updates to the salary threshold established by the Final Rule would undermine the effectiveness of the threshold in providing a reasonable and consistent guide to distinguish between overtime-eligible and potentially exempt employees.

**LGBT workers will be negatively affected if the salary threshold is lowered.** Despite the significant political, social, and legal gains made by the LGBT community in the United States, many LGBT workers still struggle to make ends meet. LGBT individuals – particularly women, transgender people, and people of color – experience higher rates of poverty than do the general U.S. population.<sup>5</sup> LGBT people are struggling to attain higher education, find a fulfilling job, make enough money to afford quality housing and healthcare, save for the future, and spend time with and support a family.

While the Final Rule does not address all barriers to economic security or employment discrimination encountered by low- and middle-income workers, the new salary threshold—which could mean hundreds of dollars in additional pay each week for affected workers—is necessary for the economic security of LGBT people and their families. Until living wages become a reality in this country, the new rule will help millions of workers earn additional pay that they rightfully deserve and their families desperately need. This will mean more money for essentials like utility bills, groceries, and education.

**The 2016 Final Rule—and the salary threshold it established—was exhaustively researched, analyzed and commented on by thousands of experts, businesses and private citizens.** It was crafted with the primary purpose of protecting working people and their families and is consistent with the Department’s traditional methodology, which reflects an inverse relationship between a demanding inquiry into work duties and a higher salary threshold. Lowering the threshold would result in stripping hard working men and women of the overtime protections they need to support themselves and their families. We urge the Department to uphold its mission “to foster, promote, and develop the welfare of the wage earners” of the United States by defending the Final Rule and maintaining the salary threshold established therein.

Sincerely,

National Center for Lesbian Rights

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<sup>5</sup> Twenty-one percent of LGBT people living alone have annual incomes of less than \$12,000 compared to sixteen percent of non-LGBT people living alone. M.V. Lee Badgett, Laura E. Durso, & Alyssa Schneebaum, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, The Williams Inst., 2 (June 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>. Transgender people are three times more likely than the general population to have a household income of less than \$10,000 per year. Sandy E. James et. al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), <http://www.ustranssurvey.org/report>